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What Is Extraterritorial Jurisdiction

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ESSAY

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INTRODUCTION

Assertions of legal power beyond territorial borders present lawyers, courts, and scholars with analytical onions comprising layers of national and international legal issues; as each layer peels away, more issues are revealed. The U.S. Supreme Court has recently been wrestling this conceptual and doctrinal hydra. Whether it is the geographic scope of U.S. regulatory laws,[1] the power of U.S. courts over foreign defendants,[2] the rights of foreigners detained outside U.S. territory,[3] or the ability of U.S. courts to entertain causes of action arising

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1 *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2881 (2010).

2 *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011); J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780, 2785 (2011).

3 *See* Boumediene v. Bush, 553 U.S. 723, 732 (2008).

out of activity abroad,[4] all of these questions have one basic feature in common: they all relate to the phenomenon of what is generally referred to as "extraterritorial jurisdiction."[5] As the term indicates, it connotes the exercise of jurisdiction, or legal power, outside territorial borders.[6] And, as the examples just listed suggest, this phenomenon can manifest in myriad ways.

Any legal analysis of extraterritorial jurisdiction leans heavily on the answers to two key definitional questions: What do we mean by "extraterritorial"? And, what do we mean by "jurisdiction"? Because, as we will see, the answer to the first question is often conditional on the answer to the second, the questions are probably better addressed in reverse order, that is: What type of "jurisdiction" is at issue? And, is its exercise "extraterritorial"?

This Essay aims to supply legal thinkers, practitioners, and decisionmakers with tools to go about answering these increasingly prevalent and multilayered questions of U.S. law—the answers to which hold potentially massive consequences for a rapidly and diversely growing number of cases and fields, from corporate and securities law, to human rights, to anti–drug trafficking and terrorism. The Essay begins by explaining that both terms are legal constructs whose meanings and uses vary depending on the context in which they are employed. Thus at the outset, much depends upon what type of jurisdiction we are talking about. U.S. jurisdiction to prescribe rules regulating foreign conduct, or "prescriptive jurisdiction," may differ significantly from U.S. jurisdiction to subject foreign parties to judicial process, or "adjudicative jurisdiction," and both of these types of juris-

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4 *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1662 (2013).

5 *See generally* Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 126–36 (2007) (describing the concept of extraterritorial jurisdiction and its modern growth).

6 While most of the examples listed above deal with the exercise of U.S. power over foreigners abroad, the question of foreigners' rights under U.S. law presents second-order issues of (assuming U.S. power applies to parties outside U.S. territory) what corresponding rights, if any, those parties enjoy under U.S. law. It is fairly well settled, for instance, that the Due Process Clause protects foreign parties from being haled into U.S. courts unconstitutionally, and those protections have in turn tended to shape the extraterritorial jurisdiction of U.S. courts' authority. *See Nicastro*, 131 S. Ct. at 2798 (Ginsburg, J., dissenting); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113–14 (1987). But many questions remain about the extent to which foreigners abroad enjoy constitutional rights against other exercises of U.S. power. *See Boumediene*, 553 U.S. at 798 (Souter, J., concurring) (stating that there may be a "genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism"). For reasons of space and streamlining the discussion, I want to bracket broader discussion of whether and when the Constitution supplies foreigners outside of U.S. territory with rights or privileges. For my thoughts on the Supreme Court's handling of this issue with respect to noncitizens detained at Guantanamo Bay, Cuba, see generally Anthony J. Colangelo, *"De Facto Sovereignty":* Boumediene *and Beyond*, 77 GEO. WASH. L. REV. 623, 669–76 (2009).

diction differ drastically from U.S. jurisdiction to enforce law abroad, or "enforcement jurisdiction."[7]

Accompanying this jurisdictional question is another preliminary definitional question that can compound complexities: What do we mean by "extraterritorial"? And the answer largely depends on the type of jurisdiction at issue. For instance, extraterritorial may relate to one thing when the issue is prescriptive jurisdiction to regulate conduct—namely, the location of the conduct—and to something very different when the issue is adjudicative jurisdiction over a party—namely, the location of the party. And these may be only the beginnings of the respective inquiries. Must every aspect of a claim be foreign for the exercise of prescriptive jurisdiction to qualify as extraterritorial, or is it enough that some aspect of a claim takes place abroad? If it is the latter, which aspect of the claim? Or when it comes to adjudicative jurisdiction to subject parties to judicial process, what if the party is physically located abroad but is a citizen of the forum, or a foreign party's contacts with the forum are so strong that the law deems the party "at home" there?[8] In short, in addition to determining what type of jurisdiction is at issue, courts and litigants must also discern whether the assertion of jurisdiction meets some definition of "extraterritorial." And though fact-dependent, this is a fundamentally legal determination that turns deeply on the particular type of jurisdiction at issue.

After briefly sketching different constructs of jurisdiction and extraterritorial in the law, I focus on one area of particularly stubborn confusion and escalating importance in the cases: the extraterritorial exercise of U.S. prescriptive jurisdiction. I show that U.S. extraterritorial prescriptive jurisdiction can present constitutional, statutory construction, and common-law analysis issues. Along the way, I emphasize and try to elucidate and refine what has become an often blurry but important line between prescriptive and adjudicative jurisdiction. In the past few years, the Supreme Court has alternatively tried to clarify and muddle this line, and lower courts routinely struggle, and often fail, to properly conceptualize and draw it doctrinally. Yet it is critical both to the overall coherence of the law and to the outcomes of a mounting number of cases raising extraterritorial jurisdiction issues.

Following the hierarchy of sources in U.S. law, I begin with the Constitution.[9] I then move to statutory construction[10] and finally to

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7 *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987).

8 *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

9 *See infra* Part III.A.

10 *See infra* Part III.B.

common law choice-of-law analysis.[11] As to the Constitution, I make an initial distinction between prescriptive jurisdiction issues of power and issues of rights. As to power, I argue that for extraterritorial prescriptive jurisdiction to be constitutional, the activity sought to be regulated must fall within both (*i*) the subject matter of Congress's regulatory authority and (*ii*) the geography of Congress's regulatory authority. While the first criterion should be familiar from wholly domestic cases, the second presents novel and increasingly litigated issues of first-order constitutional power. In this connection, I demonstrate how the concept of territoriality can be, and has been, finessed to embrace foreign activity. Similarly, the ambit of extraterritorial sources of legislative authority can depend upon malleable conceptualizations of where a claim occurs. In brief, with regard to both territorial and extraterritorial jurisdiction, courts have been willing to hang U.S. jurisdiction on the hook that some aspect of transnational activity comprising a claim falls within the geographic scope of U.S. authority, even if that aspect is fleeting and minor relative to the rest of the conduct comprising the claim. In turn, even seemingly straightforward jurisdictional questions of geographic power often hinge on some predicate legal determination about where, exactly, one locates the relevant aspect or aspects of a claim.

As to rights, I dive below the surface of a superficially fractured due process jurisprudence among lower courts to make it cohere according to the principle of fair notice of the law applicable to primary conduct when and where the conduct occurs. I argue that this area's doctrinal discord can be harmonized by recognizing that the various tests courts have developed are simply proxies for this underlying fair notice objective. Bringing coherence to this area of the law is especially urgent because a jurisprudence that fails to provide fair notice of the law contradicts a main tenet of the Due Process Clause that that very jurisprudence purports to uphold.

The rights discussion identifies two salient sources of confusion in the lower courts: (*i*) the role of international legal principles in due process analyses and *(ii*) mix-ups between prescriptive and adjudicative jurisdiction tests under the Constitution.

As to the role of international law, I argue that international law does not determine of its own force whether exercises of U.S. jurisdiction comport with the Constitution. Instead, it acts as a proxy for whether the exercise of jurisdiction is "arbitrary or fundamentally unfair" by imputing to defendants knowledge of its substantive and jurisdictional rules.[12] Most prominently (but not exclusively) the international law of universal jurisdiction puts everyone everywhere

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11 *See infra* Part III.C.

12 *See infra* Part III.A.2.

on notice that they can be held to account anywhere for certain serious offenses against international law—such as piracy, torture, genocide, and terrorist acts like hostage taking and plane bombing. But for the exercise of this form of jurisdiction to comport with due process's fair notice objective, U.S. law and the application thereof must hew closely to the international legal definitions of the offenses at issue. In this way, the concept of universal jurisdiction can transform exercises of extraterritorial jurisdiction into exercises of territorial jurisdiction because U.S. courts are applying the substance of an international law that covers the globe. Although courts have been receptive to this type of argument, some have stretched it to reach situations where, instead of implementing international law, U.S. law purports to reflect or match up with the law of the place where foreign activity occurred. I caution that if courts employ this rationale, they must at the very least be mindful of the fair notice aim of due process and, accordingly, ensure that U.S. law does in fact accurately reflect foreign law.

As to the relationship between prescriptive and adjudicative jurisdiction, I identify a conceptual and doctrinal mix-up that has led courts to borrow personal jurisdiction tests about "minimum contacts" to gauge prescriptive jurisdiction. Substituting a personal jurisdiction inquiry for a prescriptive jurisdiction inquiry is both under- and overinclusive. It is underinclusive because it improperly cuts off U.S. jurisdiction over universal jurisdiction violations—thereby creating separation of powers problems because, in many cases, the political branches have undertaken international commitments to exercise jurisdiction over such violations. And it is overinclusive because it improperly allows jurisdiction based on a defendant's postconduct presence—thereby creating due process problems because defendants may not have had adequate notice that U.S. law might apply to their acts when and where they acted. One way to reconcile existing decisions that have messed up this distinction, at least in criminal cases, is for courts to rationalize the decisions under the principle that states apply only their own penal laws. Because states apply only their own penal laws, questions of prescriptive and adjudicative jurisdiction can merge into one inquiry: Can the United States exercise jurisdiction? Importantly, this merged jurisdiction must satisfy both prescriptive and adjudicative tests under the Constitution. That is, defendants must both have had fair notice that U.S. law might apply to them when they acted and fairly be before the court.

After the Constitution, I turn to the area in which the Supreme Court has been most active: U.S. prescriptive jurisdiction and statutory

construction.[13] While I anticipate the constitutional issues getting before the Court in the future, readers interested only in what the Court has done so far might want to skip to Part III.B. Here I focus mainly on the Court's two most recent decisions on extraterritoriality and statutory construction, *Morrison v. National Australia Bank Ltd.*[14] and *Kiobel v. Royal Dutch Petroleum Co.*[15] I argue that after trying to clarify that the extraterritorial scope of statutes is a matter of prescriptive jurisdiction in *Morrison*, the Court in *Kiobel* contradicted and basically tied itself in knots trying to elide whether the scope of the statute at issue in that case—the Alien Tort Statute (ATS)[16]—posed issues of prescriptive or adjudicative jurisdiction. The Court's contortions were chiefly a result of the ATS's acknowledged nature as "strictly jurisdictional"[17] and *Morrison*'s explicit finding that the statutory presumption against extraterritoriality did not apply to the jurisdictional statute in that case but only to conduct-regulating rules[18]—which, as *Kiobel* recognized, the ATS does not contain since conduct-regulating rules under the statute come from international law.[19] In trying to finagle the presumption's application in *Kiobel*, the Court ended up inventing a brand new presumption and attached it to common law claims allowed under the ATS.[20] Yet even this weird move ultimately could not save the Court from contradicting itself in *Morrison* because the Court eventually found itself construing the ATS. The practical point of exposing the Court's contradictions is to advise lawyers and lower courts of the incoherence in this area so that lawyers can present arguments, probably in the alternative, which hopefully will prompt courts to recognize, reconcile, and resolve the incoherence going forward.

Other major statutory issues looming large for lower courts are whether a presumption against extraterritoriality is triggered on the facts to begin with, and, if it is, whether it can be "displaced" by claims that sufficiently "touch and concern" the United States.[21] These questions arise from the reality that anytime some aspect of a claim contains a domestic element, arguments are available that the exercise of U.S. jurisdiction is not extraterritorial but domestic because all U.S. law does is regulate that element of the claim that takes place in U.S.

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13 *See infra* Part III.B.

14 130 S. Ct. 2869 (2010).

15 133 S. Ct. 1659 (2013).

16 28 U.S.C. § 1350 (2012).

17 *Kiobel*, 133 S. Ct. at 1664 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 713 (2004)).

18 *See Morrison*, 130 S. Ct. at 2877 (finding the question of extraterritoriality to go to the merits, not to jurisdiction).

19 *Kiobel*, 133 S. Ct. at 1664–66.

20 *See id.* at 1668–69 (concluding that "the presumption against extraterritoriality applies to [federal common law] claims under the ATS").

21 *Id.* at 1669.

territory. *Morrison* answered these arguments by looking to the "focus" of the statute at issue.[22] According to *Morrison*, if the statutory focus—that is, the element of the claim the statute primarily addresses—takes place abroad, jurisdiction is extraterritorial; if, on the other hand, the focus takes place at home, jurisdiction is territorial.[23] *Kiobel* arguably added to this analysis by asking whether extraterritorial claims can nonetheless displace the presumption if they sufficiently "touch and concern" the United States.[24] I explore what this potential exception means and outline different conceptions of it in the courts so far. I contend that the best reading of the exception on the current state of the law is that if claims authorize jurisdiction under longstanding and widely held principles of international law—a law the ATS explicitly invokes—that a state has jurisdiction over its own nationals, the presumption ought to be displaced.

Finally, I explain that common law choice-of-law analysis functionally can produce extraterritorial applications of U.S. law, specifically U.S. state law.[25] Although choice-of-law cases are not traditionally understood as involving extraterritorial jurisdiction, that is in fact exactly what happens when U.S. courts choose local law to govern multijurisdictional claims with foreign elements. I suggest two developments are presently pushing against traditional conceptions of choice-of-law analysis and urging acknowledgement of its actual extraterritorial dimensions: globalization of activity and convergence of public and private law. Cliché as it may be to say, the more multijurisdictional activity becomes, the more frequent extraterritoriality becomes. And this extraterritoriality has crept from traditionally private law matters like torts and contracts to more public law matters like securities fraud under domestic law and human rights abuses under public international law (via the ATS). Here I proffer the public/private distinction not as a normatively desirable way of advancing the law, but as a descriptively helpful way of understanding a current counterintuitive disparity between the comparatively broad extraterritorial reach of state law under flexible choice-of-law methodologies and the comparatively narrow reach of federal law under progressively stringent canons of statutory construction.

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There is no grand revolutionary theory driving this Essay. My principal aim instead is to roll up my sleeves and dig into a messy area of law with analytical rigor. What is needed now more than anything

22 *Morrison*, 130 S. Ct. at 2884–85.
23 *See id.*
24 *Kiobel*, 133 S. Ct. at 1669.
25 *See infra* Part III.C.

is a clean conceptual and doctrinal understanding from which to evaluate the field—which captures another, broader point: For too long, the phenomenon of extraterritorial jurisdiction has been addressed piecemeal in the disparate substantive fields in which it happens to pop up. Yet it has migrated to virtually every area of law in some way, and courts are struggling not only to resolve extraterritoriality issues but also to comprehend how their resolutions fit within a larger jurisprudence on increasingly important questions of when and how the United States may exercise legal power beyond U.S. borders. To the extent there is a guiding principle to the analysis that follows, it is the goal of coherence. And here I perhaps betray my normative commitments. To try to be as transparent as possible, I believe the rule of law strives, and should strive, toward coherence. My hope is that this Essay assists that endeavor in the burgeoning field of extraterritorial jurisdiction.

I
JURISDICTION

The word "jurisdiction" is basically a legal term for power, literally the power to "speak[ ] the law."[26] It derives from the Latin *jus* or *juris* (law) plus *dicere* (to speak).[27] Jurisdiction is not a monolithic concept. Rather, as the Introduction noted, it comprises at least three different aspects, ordinarily referred to as prescriptive jurisdiction, adjudicative jurisdiction, and enforcement jurisdiction.[28] Roughly speaking, prescriptive jurisdiction is the power to make and apply law to persons or things.[29] This type of jurisdiction is typically (though not always) associated with legislatures as opposed to courts,[30] and for this reason is sometimes referred to, somewhat imprecisely, as "legislative jurisdic-

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26 Costas Douzinas, *The Metaphysics of Jurisdiction*, *in* JURISPRUDENCE OF JURISDICTION 21, 22 (Shaun McVeigh ed., 2007).

27 1 SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 1472 (5th ed. 2002).

28 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987).

29 *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a).

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

tion."[31] Adjudicative jurisdiction, on the other hand, is the power to subject persons or things to judicial process and, accordingly, is generally associated with courts.[32] An example is personal jurisdiction or a court's power over the persons before it.[33] Another example is a court's subject-matter jurisdiction, which is self-evidently a court's power over the subject matter of a lawsuit.[34] Special rules govern the exercise of each type of adjudicative jurisdiction, but they are all concerned with the same basic question of when and how the court may assert power. A final category is enforcement jurisdiction, or the power "to induce or compel compliance or to punish noncompliance" with the law.[35] Although analytically helpful, these jurisdictional categories are only heuristics. They are neither freestanding legal doctrines nor tidy compartments into which assertions of legal power always neatly fit.[36] Thus an often contested but crucial question at the outset of any jurisdictional analysis is what type of jurisdiction is at issue.

Each of these forms of jurisdiction can crop up in cases involving assertions of U.S. legal power outside U.S. territory. At present, the most litigated jurisdictional categories are prescriptive and adjudicative.[37] For various reasons, enforcement jurisdiction has tended to evade regular review by domestic courts, including in the United States. As a domestic legal matter, it is treated chiefly as a political question.[38] As an international legal matter, it remains closely tied to territory in that a state is generally considered to have a monopoly of force within its borders.[39] The flipside of this rule is that any extraterritorial exercise of force inside another state infringes that state's jurisdictional monopoly of force within its borders, often popularly described as "sovereignty."[40] International law allows some exceptions

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31 *See Hartford Fire*, 509 U.S. at 813 (Scalia, J., dissenting); Reese, *supra* note 30, at 1587.

32 *See Hartford Fire*, 509 U.S. at 813 (Scalia, J., dissenting); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(b).

33 *See* Burnham v. Superior Court, 495 U.S. 604, 610–11 (1990).

34 *See* Wachovia Bank v. Schmidt, 546 U.S. 303, 316 (2006).

35 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(c).

36 For example, a court's power to entertain a suit may naturally encompass some authority to make and apply law, particularly in common-law suits.

37 Again, I put aside issues of foreigners' rights abroad under the Constitution, an area that has seen significant growth since the Supreme Court's 2008 decision in *Boumediene*.

38 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(b).

39 *See* John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 782, 786 (2003).

40 *See id.*; *see also* Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 1 (1999) ("The meaning of 'sovereignty' is

to this rule, but even the exceptions are contested.[41] All of this is to say that while both national and international law have grown to push, break, and remake rules of prescriptive and adjudicative jurisdiction so as to permit and sometimes even encourage the exercise of extraterritorial jurisdiction, the law of enforcement jurisdiction has remained fairly static. It both has resisted domestic judicial review and has stuck fastidiously to a rule of strict territoriality.

When it comes to extraterritorial exercises of prescriptive and adjudicative jurisdiction, however, the law has been active. The past half century has seen a boom in the reach both of U.S. laws over foreign conduct and of U.S. courts' subject-matter and personal jurisdiction over cases with foreign aspects and parties. This explosion of extraterritoriality has generated gnarly conceptual and doctrinal knots, tangling up strands of prescriptive and adjudicative jurisdiction jurisprudence. And the Supreme Court's recent interventions promise only further imbroglio.

Part III approaches this intricate but important area from a prescriptive jurisdiction perspective and seeks to systematically identify and elaborate different types of extraterritorial prescriptive jurisdiction issues in U.S. law. In so doing, it discusses adjudicative jurisdiction to the extent that form of jurisdiction interacts or is confused with prescriptive jurisdiction in the courts. The ultimate aim is a cleaner understanding of both forms of jurisdiction and their relationships to each other on the current state of the law. Before embarking on that project, however, a brief primer on the construct of "extraterritorial" in the law from a prescriptive jurisdiction standpoint supplies a helpful conceptual and doctrinal foundation from which the discussion can analytically draw and build.

II
EXTRATERRITORIAL

Like jurisdiction, the word "extraterritorial" requires elaboration. Also like jurisdiction, it is a legal construct whose use can vary depending on the point being made.[42] It obviously indicates something along the lines of "beyond . . . territorial limits."[43] But that in itself

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confused and its uses are various, some of them unworthy, some even destructive of human values.").

41 *See, e.g.*, Daphné Richemond, *Normativity in International Law: The Case of Unilateral Humanitarian Intervention*, 6 YALE HUM. RTS. & DEV. L.J. 45, 46–51 (2003) (discussing the difficulty of codifying principles for a norm of unilateral humanitarian intervention in the face of traditional notions of "sovereignty").

42 *See* Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631, 635 (2009).

43 BLACK'S LAW DICTIONARY 929 (9th ed. 2009).

may not be very helpful. Many activities or events we might think of as outside a territory can be recharacterized as inside a territory.

For a classic prescriptive jurisdiction example, if Jane fires a gun in State A across the border into State B, and the shot hits and kills Dick in State B, where did the act occur?[44] The answer depends on which part of the transaction we focus. If it is Jane's conduct—firing the gun—the act occurred in State A. If it is the effect of Jane's conduct—Dick being shot and killed—the act occurred in State B. The fields of conflict of laws (or private international law) and public international law have long dealt with these types of questions in multistate systems. These fields offer good analytical starting points both because of their robust intellectual history with extraterritorial jurisdiction questions and because they conceptually and doctrinally inform recent Supreme Court jurisprudence on extraterritoriality.

To return to our shooting hypothetical, traditional choice-of-law or private international law rules would resolve the conundrum by selecting one element of the multijurisdictional transaction and then localizing the entire transaction based on that element.[45] Accordingly, if the relevant choice-of-law rule says the key element is where the harm ultimately is felt, the act took place (or, using traditional choice-of-law terminology, the cause of action arose) in State B. State B therefore may apply its laws to the act as a matter of State B's territorial jurisdiction. In other words, State B would not be exercising extraterritorial jurisdiction if it applied its laws to Jane in the hypothetical. On the other hand, if the choice-of-law rule says that the key element is where Jane's conduct setting the harm in motion occurs, State A has territorial jurisdiction.

Further complicating matters is the possibility that State A and State B might have different choice-of-law rules, leading to either both states or neither state having territorial jurisdiction over the act. To illustrate, State A's rule might say that the conduct—Jane firing the gun—is the key jurisdictional element while State B's rule might say that the harm—Dick being shot—is the key jurisdictional element. Both states could claim territorial jurisdiction on the same facts. Or State A's rule may say it is the harm and State B's rule may say it is the conduct that establishes territorial jurisdiction—in which case neither

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44 *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 n.1, illus. 1 (1934).

45 *See id.* § 377 cmt. a ("If consequences of an act done in one state occur in another state, each state in which any event in the series of act and consequences occurs may exercise legislative jurisdiction to create rights or other interests as a result thereof . . . ."). At times, the criminal law also exhibited this formalist fiction, through which "some courts . . . sought to localize the whole crime in one state when only part of the constituent acts occurred there" in order to avoid acknowledging the reality of extraterritorial jurisdiction and the attendant problems it causes for traditional notions of sovereignty. Wendell Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238, 242 (1931).

state has territorial jurisdiction. Familiarizing ourselves with this type of localization approach now will be useful later because it features prominently in recent Supreme Court opinions addressing whether and when U.S. law applies to claims involving foreign elements.[46]

The line between territorial and extraterritorial is abstruse or at least elusive in public international law as well. And, like private international law, public international law rules tend to analytically and doctrinally inform judicial analysis of U.S. prescriptive jurisdiction.[47] In the shooting hypothetical, State A and State B both might claim territorial jurisdiction under public international law: State A on the basis of subjective territoriality, which authorizes jurisdiction over acts occurring in part in a state's territory[48] (thereby covering Jane's conduct in firing the gun), and State B on the basis of "objective territoriality," which authorizes jurisdiction over acts abroad that have, or are intended to have, effects within a state's territory[49] (thereby covering the impact of the shot on Dick). These varying conceptualizations of territoriality will be covered in more detail below; the point here is only to illustrate that, like other legal concepts, territorial and extraterritorial are variable and open to interpretation.

III
Extraterritorial Prescriptive Jurisdiction

The extraterritorial exercise of U.S. prescriptive jurisdiction can be litigated a number of ways. It may be the subject of constitutional, statutory, or common law analysis. What follows identifies and elaborates different types of prescriptive jurisdiction issues in U.S. law. For each type of issue, I describe why the issue relates to the exercise of prescriptive jurisdiction (as opposed to, say, adjudicative jurisdiction); ways to challenge the exercise of such jurisdiction; and what the law says and, in some cases, should say. I then explain how the law determines the geographic scope of U.S. regulatory authority and, in particular, how the law determines whether an exercise of jurisdiction is extraterritorial. Although these two issues—what type of jurisdiction is at issue and whether its exercise is extraterritorial—can be and often are analytically linked, I address them separately to promote what I hope is cleaner and more rigorous thinking about each of

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46 *See infra* Part III.C.

47 *See infra* Part III.A–B.

48 *See Jurisdiction with Respect to Crime*, 29 Am J. Int'l L. 435, 484–87 (Supp. 1935) (describing the development of a "subjective territorial principle which establishes the jurisdiction of the State to prosecute and punish for crime commenced within the State but completed or consummated abroad").

49 *See id.* at 487–94 (describing an "objective territorial principle which establishes the jurisdiction of the State to prosecute and punish for crime commenced without the State but consummated within its territory").

these related but distinct aspects of the law of extraterritorial jurisdiction.

A. Constitutional Prescriptive Jurisdiction

As a constitutional matter, prescriptive jurisdiction issues come in two main flavors: power and rights. Power issues relate to the power of the state or sovereign to make and apply law and, more precisely, to limitations on that power.[50] Rights issues, on the other hand, relate to the rights of persons or things not to be subjected to the law for some constitutionally cognizable reason—usually because application of the law fails some test of fundamental fairness.[51] Importantly, these are distinct issues and entail distinct analyses. For instance, a law may be constitutional in the power sense if there exists some basis in the Constitution to make and apply it generally and to the defendant specifically.[52] But application of that law nonetheless still may be unconstitutional if it violates individual rights because the application is fundamentally unfair.[53] I have elsewhere described power limitations as "structural, and go[ing] to Congress's power to legislate in the first instance," while rights limitations "are personal to the [defendant], shielding the individual against an unconstitutional application of an otherwise lawful enactment."[54] Yet both sorts of constitutional challenge to U.S. legal power challenge the exercise of U.S. prescriptive jurisdiction.

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50 *See, e.g.*, Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 951–58 (2010) (discussing the Foreign Commerce Clause as "a unilateral basis of extraterritorial legislative power" and various constraints on that power); Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1219–23 (2009) (discussing how the content of international law may limit Congress's power under the Define and Punish Clause).

51 *See infra* note 107 (discussing the fairness required by the Fifth Amendment).

52 *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1230–42 (2010) (distinguishing between facial and as-applied challenges on the basis of whether it is a law itself or its enforcement that violates the Constitution).

53 *See, e.g.*, United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1258 (11th Cir. 2012) (holding enforcement of an anti–drug trafficking law unconstitutional as applied to conduct in the territorial waters of another country); United States v. Clark, 435 F.3d 1100, 1108 (9th Cir. 2006) (explaining that extraterritorial application of criminal law to a U.S. citizen is not fundamentally unfair); United States v. Yousef, 327 F.3d 56, 111–12 (2d Cir. 2003) (finding extraterritorial application of U.S. law to be fairly applied to defendants who conspired to attack U.S. aircraft); United States v. Perez-Oviedo, 281 F.3d 400, 402–03 (3d Cir. 2002) (finding no due process violation, even without nexus with the U.S., since "drug trafficking is condemned universally by law-abiding nations"); United States v. Suerte, 291 F.3d 366, 370–77 (5th Cir. 2002) (same).

54 Colangelo, *supra* note 5, at 123.

1. *Power*

a. *As Prescriptive Jurisdiction*

As noted, one type of constitutional challenge to U.S. prescriptive jurisdiction tests the lawmaking power of the United States to make and apply the law at issue. As a descriptive matter, courts presently accept that the notion of a government of limited and enumerated powers extends to legislation with extraterritorial reach[55] and accordingly, I will too for purposes of this Essay.[56] Constitutional challenges to the extraterritorial exercise of prescriptive jurisdiction essentially challenge either the law or its application (or both) as *ultra vires* on the theory that no basis in the Constitution exists to authorize the law's enactment or application in a particular case.

The Constitution contains a number of lawmaking powers that may authorize the enactment of legislation with extraterritorial reach. Prominent among these are the powers "[t]o regulate Commerce with foreign Nations,"[57] "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,"[58] and to effectuate treaties via the Necessary and Proper Clause.[59] A constitutional challenge to the United States' authority to enact and apply law under these powers is a constitutional challenge to U.S. prescriptive jurisdiction. In this respect, the jurisdictional challenge may target either, or both, (*i*) the scope of the power to regulate the sub-

55 *See, e.g.*, *Bellaizac-Hurtado*, 700 F.3d at 1250–51 (interpreting the Offences Clause "as consistent with the structure of our government of enumerated powers").

56 For present purposes I therefore also bracket discussion of extraconstitutional sources like the so-called "foreign affairs" power. *See, e.g.*, United States v. Bin Laden, 92 F. Supp. 2d 189, 220–21 (S.D.N.Y. 2000) (suggesting in dicta that Congress may have an extraconstitutional power to enact "foreign affairs legislation" over conduct abroad). For critiques of this power, see Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175, 1176–77 (2003) (raising the objection that "an unenumerated foreign-affairs power makes entirely redundant not only the foreign commerce clause, but also all the other foreign-affairs powers as well"); *see also* Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 334–35 (2001) (noting that the Supreme Court "has given no indication that foreign affairs activities are exempt" from the principle that Congress has limited and enumerated powers); Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 409 (2000) (noting that the Constitutional Convention "sought to remedy [the Articles of Confederation's omission] by including express grants of power over foreign commerce to the national government"). In this connection, the Supreme Court has made clear that "[t]he restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations." Perez v. Brownell, 356 U.S. 44, 58 (1958); *see also* United States *ex rel.* Quirin v. Cox, 317 U.S. 1, 25 (1942) ("Congress and the President, like the courts, possess no power not derived from the Constitution.").

57 U.S. CONST. art. I, § 8, cl. 3.

58 *Id.* art. I, § 8, cl. 10.

59 *Id.* art. I, § 8, cl. 18.

ject matter of the activity, and (*ii*) the geographic scope of the regulation's application.

Subject matter scope. A subject-matter jurisdiction challenge basically means what it says and argues that the subject matter of the activity Congress seeks to regulate falls outside Congress's prescriptive jurisdiction. This type of challenge should be familiar to U.S. readers from the domestic jurisdiction context. That is, domestic cases challenging the constitutionality of federal legislation typically argue that the nature of the activity Congress seeks to regulate is beyond Congress's prescriptive purview under the Constitution.[60]

A recent case out of the Eleventh Circuit illustrates this type of challenge in the extraterritorial jurisdiction context. *United States v. Bellaizac-Hurtado* asked whether Congress may employ the power "[t]o define and punish . . . Offences against the Law of Nations" to regulate drug trafficking abroad.[61] The defendants had challenged their convictions under the Maritime Drug Law Enforcement Act (MDLEA)[62] for trafficking drugs in Panamanian waters.[63] The court held that the subject matter of the regulation—drug trafficking—did not fall within Congress's Offences Clause power under either a historical or a contemporary view of the law of nations, because "[d]rug trafficking was not a violation of customary international law at the time of the Founding, and drug trafficking is not a violation of customary international law today."[64] Consequently, the convictions were vacated.[65]

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60 *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2587 (2012) ("Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority."); United States v. Morrison, 529 U.S. 598, 617–19 (2000) (finding that Congress exceeded its authority both under the Commerce Clause and under Section 5 of the Fourteenth Amendment in creating a civil remedy for victims of gender-motivated violence); United States v. Lopez, 514 U.S. 549, 567–68 (1995) (refusing "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States").

61 United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1248–49 (11th Cir. 2012) (citing U.S. CONST. art. I, § 8, cl. 10).

62 46 U.S.C. §§ 70503(a), 70506 (2012).

63 *Bellaizac-Hurtado*, 700 F.3d at 1247–48.

64 *Id.* at 1253–54. The court found the power "[t]o define and punish . . . Felonies committed on the high Seas," or the Felonies Clause power, was inapposite, since there was nothing to suggest that the offense occurred not on the high seas; rather, all relevant elements occurred in a foreign sovereign's territorial waters. *Id.* at 1248 (quoting U.S. CONST. art. I, § 8, cl. 10) (internal quotation marks omitted). For a compelling and comprehensive recent examination of the Offences Clause, see generally Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 NW. U. L. REV. 1675 (2012). For my thoughts on the Clause, see Colangelo, *supra* note 5, at 137–42; Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1050–52 (2011) [hereinafter Colangelo, *A Unified Approach*].

65 *Bellaizac-Hurtado*, 700 F.3d at 1258.

Geographic scope. Yet *Bellaizac-Hurtado*'s holding raises another species of constitutional challenge unique to extraterritorial jurisdiction cases. It is well established, for instance, that Congress *can* regulate drug trafficking domestically, so why not abroad? Indeed the court in *Bellaizac-Hurtado* also strongly intimated that, had the conduct taken place on the high seas, it would have been subject to U.S. regulation.[66] Thus there is both a subject-matter scope component and a geographic scope component to extraterritorial exercises of U.S. prescriptive jurisdiction under the Constitution. That is, the Constitution may authorize Congress to regulate the subject matter of the activity in question, but that authorization may be geographically limited. To figure out whether geographic limitations exist and what those limitations are, one must examine the relevant power or powers underlying the exercise of prescriptive jurisdiction.

To return to the drug trafficking example then, the question is not just what authorizes Congress to regulate drug trafficking but also what authorizes Congress to regulate drug trafficking in a particular geographic location outside U.S. territory—here, in Panamanian waters. We can start by examining Congress's established legislative powers to regulate the subject matter in question. The Eleventh Circuit in *Bellaizac-Hurtado* expressly considered and rejected one such power—the power "[t]o define and punish . . . Felonies committed on the high Seas,"[67] often referred to as the Felonies Clause power.[68] The court found that because the drug trafficking at issue did not occur on the high seas but rather in a foreign sovereign's territorial waters, Congress could not regulate it under the Clause.[69] To be sure, the Clause's language contains a textually explicit geographic limit: the felonies sought to be regulated must occur "on the high Seas"[70] to come within the scope of the Clause.[71]

What about Congress's power to regulate drug trafficking domestically? The relevant constitutional power here is the power "[t]o regulate Commerce . . . among the several States,"[72] or the Interstate Commerce Clause. According to the Supreme Court, this broad domestic power enables Congress to regulate not only drug trafficking in channels and instrumentalities of interstate commerce but also entirely intrastate activity that substantially affects interstate commerce

66 *See id.* at 1257.

67 *Id.* at 1248 (citing U.S. CONST. art 1, § 8, cl. 10).

68 *See, e.g.*, *id.*

69 *Id.* at 1257–58.

70 U.S. CONST. art 1, § 8, cl. 10.

71 *See Bellaizac-Hurtado*, 700 F.3d at 1248 (noting that "piracy is, by definition, robbery on the high seas, and the Felonies Clause is textually limited to conduct on the high seas") (citations omitted).

72 U.S. CONST. art. I, § 8, cl. 3.

by undermining comprehensive regulatory schemes among the states.[73] Moreover, the Court has recognized that this power is not limited to domestic activity,[74] as a multitude of federal drug prosecutions for extraterritorial conduct can attest.[75] In fact, lower courts have uniformly held that the specific provision of the federal Controlled Substances Act (CSA) that the Supreme Court found reached purely intrastate conduct, also applies to conduct by non-U.S. nationals outside the United States.[76] Why then does this power not reach drug traffickers in Panamanian waters?

The answer, once again, goes to the relevant constitutional power and the geographic limitations on that power. The relevant commerce power in this context would not derive from the Interstate Commerce Clause because the Panamanian drug trafficking is not "among the several States."[77] Rather, the relevant commerce power comes from the Foreign Commerce Clause, which grants Congress power "[t]o regulate Commerce with foreign Nations."[78] Congress cannot reach entirely foreign drug trafficking pursuant to this power because the Foreign Commerce Clause, while covering the subject matter of the activity at issue (drug trafficking), does not geographically encompass that activity if it has no demonstrable U.S. nexus (drug trafficking unconnected with the United States).

Unlike the Interstate Commerce Clause, which gives Congress broad power to regulate commerce "among" the several U.S. states, the Foreign Commerce Clause does not give Congress an equivalently large power to regulate commerce "among foreign Nations." Rather, it grants only the power to regulate commerce "with" them.[79] Consequently, "[f]oreign commerce that is the subject of federal regulation therefore must be not only 'with' foreign nations, but also 'with' the United States."[80] It follows that "Congress cannot independently cre-

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73 *See* Gonzales v. Raich, 545 U.S. 1, 22 (2005).

74 *Id.* at 12–13 (characterizing the Controlled Substances Act as an effort to fight international as well as interstate drug traffic).

75 Some federal code provisions explicitly authorize extraterritorial jurisdiction, such as the prohibition on unlawful importation. *See, e.g.*, 21 U.S.C. § 959(c) (2012) ("This section is intended to reach acts . . . committed outside the territorial jurisdiction of the United States."); *see also* Morales v. United States, 933 F. Supp. 2d 82, 84 (D.D.C. 2013) (rejecting a challenge to § 959 as outside of Congress's "legislative jurisdiction" because of its extraterritorial scope). Courts have also consistently construed the Controlled Substances Act's general domestic prohibitions to apply extraterritorially. *See* United States v. Larsen, 952 F.2d 1099, 1099–1101 (9th Cir. 1991); United States v. Wright-Barker, 784 F.2d 161, 165–70 (3d Cir. 1986); United States v. Orozco-Prada, 732 F.2d 1076, 1087–88 (2d Cir. 1984); United States v. Baker, 609 F.2d 134, 138–39 (5th Cir. 1980).

76 *See Wright-Barker*, 784 F.2d at 165–70; *Orozco-Prada*, 732 F.2d at 1087–88; *Baker*, 609 F.2d at 138–39.

77 U.S. CONST. art. I, § 8, cl. 3.

78 *Id.*

79 *Id.*

80 Colangelo, *supra* note 50, at 954.

ate comprehensive global regulatory schemes over international markets or prevent races to the bottom among the world's nations the same way it can create comprehensive national regulatory schemes over domestic markets and prevent races to the bottom among the states."[81] As a result, Congress also "cannot claim a derivative authority . . . to reach local foreign conduct that threatens to undercut those schemes."[82] Long ago, Chief Justice John Marshall famously announced that the "enumeration [of the power to regulate commerce 'among' the several states] presupposes something not enumerated": namely, the internal commerce of a state.[83] The Foreign Commerce Clause also presupposes something not enumerated: namely, commerce that is not "with" both foreign nations and the United States. That is, it presupposes the exclusion of commerce internal to foreign nations and "among foreign Nations" unconnected with the United States. If Congress's authority were deemed to reach all foreign commerce around the world, it would exclude nothing, gutting the limits inherent in the Clause. On this reasoning, wholly Panamanian drug trafficking looks out of reach under the Foreign Commerce Clause. Absent another basis for regulation, the conduct therefore also looks out of reach under the Constitution.[84]

Another interesting question involves Congress's foreign commerce power to reach activities of U.S. citizens abroad. For instance, Professor Gerald Neuman views the Foreign Commerce Clause as empowering Congress to regulate noncommercial sexual abuse of minors by U.S. citizens abroad, and criticizes using the Court's *Lopez* framework to evaluate the foreign commerce power because "[t]he *Lopez* categories cannot be equated with the meaning of the constitutional text."[85] My own view is that the word "commerce" does not mean noncommercial sexual abuse—activity the Court itself has said does not qualify as commerce.[86] I agree that the *Lopez* categories do not spring straight from the text; but I also think the meaning of

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81 *Id.* at 974.

82 *Id.*

83 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194–95 (1824).

84 Again, this discussion does not address the notion of extraconstitutional bases of regulatory authority.

85 Gerald L. Neuman, *Extraterritoriality and the Interest of the United States in Regulating its Own*, 99 CORNELL L. REV. 1441, 1450 (2014). Under *United States v. Lopez*, Congress may, pursuant to its commerce power, (1) "regulate the use of the channels of interstate commerce," (2) "regulate and protect the instrumentalities of interstate commerce, or person or things in interstate commerce," and (3) "regulate those activities having a substantial relation to interstate commerce." 514 U.S. 549, 558–59 (1995).

86 *See* United States v. Morrison, 529 U.S. 598, 609–13 (2000) (finding that "[g]endermotivated crimes of violence are not, in any sense of the phrase, economic activity" and therefore not subject to regulation under the commerce power); *Lopez*, 514 U.S. at 561 (finding that "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise" exceeded Congress's commerce power).

"commerce" should not change substantially within the same sentence. Again, where I do see major changes are in the different powers to regulate "among" the several U.S. states as opposed to "with" foreign nations, and I view those grants as giving Congress no more power to regulate inside foreign nations than it has inside the United States. Professor Neuman, by contrast, feels the absence of federalism concerns in the foreign commerce context gives Congress greater power to regulate inside foreign territory than inside U.S. territory, at least with respect to U.S. citizens.[87] For the reasons given in my article *The Foreign Commerce Clause*, I disagree.[88] Finally, I agree with Professor Neuman that "the interplay among powers of Congress, and their relations with other features of the Constitution, deserve consideration in deciding what dealings between a citizen and another person abroad the commerce power reaches."[89] But I disagree that this means we should endorse "an *implied* power of Congress in the field of foreign affairs, arising within the Constitution,"[90] because such a power could render redundant—indeed could entirely swallow—the many *express* powers the Constitution gives Congress in the field of foreign affairs. To be sure, other bases of express constitutional authority more easily provide Congress power to regulate noncommercial sexual abuse of minors by U.S. citizens abroad without needing to stretch the meaning of commerce in novel ways to embrace that activity.[91]

So far, this subpart has shown that extraterritorial jurisdiction cases raise novel and unique challenges to U.S. exercises of prescriptive jurisdiction under the Constitution. More specifically, legal analysis cannot stop at the subject-matter jurisdiction stage, so familiar from wholly domestic challenges that test only whether the subject matter of activity falls within Congress's regulatory scope. Rather, there is an additional, geographic component that also must be satisfied. That is, the constitutional power not only must cover the subject matter of the activity but also must reach the activity when and where it takes place. Whether the exercise of extraterritorial jurisdiction exceeds the Constitution thus turns on two distinct questions: (*i*) Is the activity within the subject matter of Congress's regulatory authority? And (*ii*) is the activity within the geography of Congress's regulatory authority?

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87 *See* Neuman, *supra* note 85, at 1452, 1455.

88 Colangelo, *supra* note 50 at 970–83.

89 Neuman, *supra* note 85, at 1455.

90 *Id.* at 1455 (emphasis in original).

91 Take for example the power to effectuate treaties. U.S. CONST. art. I, § 8, cl. 18. Here is where I submit that whatever federalism concerns may exist to constrain congressional power in the domestic context vanish when it comes to regulation of U.S. citizens abroad pursuant to an international treaty.

b. *As Extraterritorial Jurisdiction*

Crucial to the second criterion is whether the jurisdictional assertion qualifies as extraterritorial. If it does not—that is, if the jurisdictional assertion is deemed territorial—the geographic scope issue basically drops out because the United States uncontroversially enjoys jurisdiction inside U.S. territory.[92] As some of the drug trafficking prosecutions demonstrate, the United States may assert jurisdiction on the basis of territoriality even though the conduct being regulated actually occurred abroad. For instance, regulating activity abroad that produces effects in the United States (such as drugs entering the U.S. market) may be conceptualized as an assertion of territorial jurisdiction because the effect or harm occurs inside the United States.[93] In other words, by localizing the cross-border crime to the aspect that touches U.S. territory, the United States purports to exercise territorial jurisdiction.[94]

Similarly, even if the jurisdictional assertion is deemed extraterritorial, whether activity falls within U.S. prescriptive jurisdiction still may be subject to differing conceptualizations of the geographic coverage of U.S. law. For instance, depending on the constitutional power at issue, the geographic scope of U.S. regulatory authority may or may not be governed by generalizable, context-neutral lines on a map. Certainly some lawmaking powers lend themselves to such lines, like the Felonies Clause's explicit limitation to "the high Seas."[95] Though even here, there is flexibility—especially in cases with multijurisdictional elements.[96]

To take an actual case,[97] suppose land-based parties inside a foreign nation conspire to ship drugs on the high seas. The coconspirators never leave the foreign land and, although the drug-laden ship is interdicted in foreign territorial waters, evidence suggests that it invariably traveled on the high seas at some point in its journey. Are the land-based coconspirators within the scope of the Felonies Clause

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92 *See* The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (1987).

93 *See supra* Part II.

94 *See supra* Part II.

95 U.S. CONST. art. I, § 8, cl. 10.

96 *See* United States v. Moreno-Morillo, 334 F.3d 819, 831 (9th Cir. 2003) (affirming convictions under MDLEA when foreign defendants were found on the high seas in a stateless vessel); United States v. Davis, 905 F.2d 245, 251 (9th Cir. 1990) (affirming convictions under MDLEA when foreign defendants were found on the high seas in a foreign state vessel). *But see* United States v. Carvajal, 924 F. Supp. 2d 219, 224–25 (D.D.C. 2013) (affirming convictions under MDLEA when foreign defendants' stateless vessel was seized by Colombian authorities in Colombian territorial waters not on the high seas).

97 *Carvajal*, 924 F. Supp. 2d at 219.

power? At least one court so far has said yes, on the theory that if at some point a felony occurred on the high seas the United States may regulate it, even if the defendants remained on land.[98] Thus, even seemingly straightforward jurisdictional questions of geography often hinge on some predicate legal determination about where, exactly, one locates the relevant aspect or aspects of a claim or suit.[99]

Of course, other legislative powers in the Constitution do not purport to draw sharp, context-neutral geographic lines. The scope of the foreign commerce power for example does not depend on objective demarcations on a map but instead, as we saw, on the relationship between the activity Congress seeks to regulate *with* the United States. Thus while an entirely *intra*national drug transaction between Canadians in Montreal would not be subject to U.S. prescriptive jurisdiction under the Clause, a transaction in Jakarta between two Indonesians to ship drugs to the United States would, because the latter could constitute foreign commerce with the United States. The presence of a U.S. nexus expands U.S. extraterritorial regulatory power while the absence of a U.S. nexus contracts it. In sum, "territorial" and "extraterritorial" are fluid constructs subject to conceptual manipulation. How lawmakers, litigants, and judges manipulate those constructs directly influences the geographic scope of U.S. regulatory power under the Constitution.

2. *Rights*

a. *As Prescriptive Jurisdiction*

Individual rights challenges to extraterritorial exercises of U.S. prescriptive jurisdiction operate through the Due Process Clauses of the Constitution.[100] I address the extraterritorial exercise of state authority in its own subpart below.[101] When it comes to the exercise of federal authority, the relevant Due Process Clause is that of the Fifth Amendment.[102] The key question for courts and litigants right now is: What is the correct Fifth Amendment due process test for gauging the exercise of U.S. extraterritorial jurisdiction? Courts have recently and variously described this analysis as "an incredibly difficult legal ques-

98 *See id.* at 237–39.
99 *See supra* Part II.
100 *See* U.S. CONST. amends. V, XIV.
101 *See infra* Part III.C.
102 The Fifth Amendment provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

tion,"[103] subject to "conflicting guidance"[104] leading to "admitted confusion."[105]

The Supreme Court has yet to weigh in.[106] Although many lower courts have, the law is all over the place with different courts adopting different tests,[107] and some courts carving out exceptions or atrophying reigning tests on a seemingly *ad hoc* basis.[108] As a result, the law is fractured and threatens to offer little in the way of predictive assurance to actors abroad about whether and when U.S. law applies to their activities. A jurisprudence that fails to provide fair notice of the law contradicts a main tenet of the Due Process Clause that very jurisprudence purports to uphold.

Probably the two most salient sources of doctrinal disarray are confusion about the underlying objective of due process in the prescriptive jurisdiction context (and how the various tests courts have developed can be understood to relate to that objective) and a misguided borrowing from the adjudicative, personal jurisdiction context to evaluate prescriptive jurisdiction. Subsumed within the first source of confusion are questions about the proper role of international legal principles in due process analyses and fitting factually distinguishable cases together according to those principles. Subsumed within the second source of confusion are questions about similarities and differ-

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103 United States v. Ali, 885 F. Supp. 2d 55 (D.D.C. 2012), *aff'd and rev'd in part*, 718 F.3d 929 (D.C. Cir. 2013).

104 United States v. Carvajal, 924 F. Supp. 2d 219, 262 (D.D.C. 2013).

105 United States v. Moreno-Morillo, 334 F.3d 819, 827 (9th Cir. 2003).

106 *See, e.g.*, United States v. Ali, 885 F. Supp. 2d 17, 43 (D.C.C. 2012), *vacated in part*, 885 F. Supp. 2d 55 (D.D.C. 2012), *aff'd and rev'd in part*, 718 F.3d 929 (D.C. Cir. 2013) ("Neither the Supreme Court nor the D.C. Circuit has addressed whether or how the Due Process Clause limits the extraterritorial application of U.S. criminal statutes.").

107 Most courts agree that to satisfy the Fifth Amendment, application of U.S. law must not be "arbitrary or fundamentally unfair." United States v. Shi, 525 F.3d 709, 722 (9th Cir. 2008); United States v. Perlaza, 439 F.3d 1149, 1160–61 (9th Cir. 2006); United States v. Suerte, 291 F.3d 366, 377 (5th Cir. 2002); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999); United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990). Yet the test for whether application of U.S. law is "arbitrary or fundamentally unfair" is a point of disagreement. *See Shi*, 525 F.3d at 722 (requiring a nexus when international law also requires one); United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998) (finding the minimum contacts requirement comparable to personal jurisdiction requirements, such that U.S. law is only asserted over defendants who "should reasonably anticipate being haled into" a U.S. court (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980))); *Davis*, 905 F.2d at 248–49 (requiring a sufficient nexus to the U.S.).

108 *See, e.g.*, United States v. Al Kassar, 660 F.3d 108, 119 (2d Cir. 2011) (finding an exception to the nexus requirement where conduct is "self-evidently" criminal); United States v. Caicedo, 47 F.3d 370, 372–73 (9th Cir. 1995) (finding an exception to the nexus requirement when defendants are aboard "stateless vessels"); *Ali*, 718 F.3d at 944 (D.C. Cir. 2013) (finding an exception to the nexus requirement when a treaty exists on the substance of cause of action); United States v. Hasan, 747 F. Supp. 2d 599, 608 (E.D. Va. 2010) (finding an exception to the nexus requirement when a cause of action is subject to universal jurisdiction), *aff'd sub nom.* United States v. Dire, 680 F.3d 446 (4th Cir. 2012).

ences between prescriptive and adjudicative jurisdiction tests under the Constitution.

To try to help clear up some of the confusion, I argue: (*i*) The underlying objective of due process in the extraterritorial prescriptive jurisdiction context is essentially fair notice of the law applicable to primary conduct when and where the conduct occurs, and the seemingly fractured jurisprudence in this area can be harmonized by recognizing that the various tests courts have developed are simply proxies for this underlying fair notice objective. And (*ii*) because of differences in the constitutional criteria for gauging adjudicative and prescriptive jurisdiction, unreflective borrowing from the personal jurisdiction context to analyze the exercise of prescriptive jurisdiction can generate serious legal errors that may, perversely, produce due process violations.

Fair notice. Over the past thirty years or so lower courts have spawned multiple tests for evaluating whether exercises of U.S. extraterritorial prescriptive jurisdiction satisfy due process under the Fifth Amendment. To take a main cleft in the law as a starting point, some courts require a "nexus" between the defendant and the United States for the application of U.S. law to satisfy due process;[109] others do not.[110] To further complicate matters, even courts that traditionally have required a nexus as a general rule have more recently abandoned that requirement in specific types of cases.[111] Hence, there is real confusion about not only when due process is satisfied but also what the correct due process test even is, or should be.[112]

Yet despite the varying tests, there is basic agreement on two features of the law: due process regulates the exercise of extraterritorial prescriptive jurisdiction and, at the very least, demands that the extraterritorial application of U.S. law not be "arbitrary or fundamentally unfair."[113] Here the agreement stops, and what qualifies as arbitrary or fundamentally unfair has invited subjective and differing judicial opinions.[114] Nonetheless, as the D.C. Circuit recently recognized,[115]

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109 *See Davis*, 905 F.2d at 248–49; United States v. Yousef, 327 F.3d 56, 111 (2d Cir. 2003) (quoting *Davis*, 905 F.2d at 248–49). For an example of a civil suit that employs this test, see Goldberg v. UBS AG, 690 F. Supp. 2d 92, 105–06 (E.D.N.Y. 2010).

110 *Suerte*, 291 F.3d at 375–77 (finding that no nexus is required where the flag nation consented or waived objection to enforcement); *Cardales*, 168 F.3d at 553 (same); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993) (finding that Congress may override a nexus requirement found in international law).

111 *See Al Kassar*, 660 F.3d at 119; *Shi*, 525 F.3d at 722–24; *Caicedo*, 47 F.3d at 372–73.

112 For a recent survey of the differences among circuits, see generally Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 HASTINGS INT'L & COMP. L. REV. 323, 347–72 (2012).

113 *See Ali*, 718 F.3d at 944; *see also* United States v. Carvajal, 924 F. Supp. 2d 219, 262 (D.D.C. 2013) (describing this test as a "common denominator" in the case law).

114 *See supra* notes 106–08 and accompanying text.

115 *See Ali*, 718 F.3d at 944.

and as I have argued since 2007,[116] the varying due process tests can be made to cohere under a single, unifying principle: fair notice of the applicable law.

Take, for example, the "nexus" test:

> This test did not materialize out of nowhere. It basically replicates in the international context under the Fifth Amendment the governing test in the interstate context under the Fourteenth Amendment . . . which holds "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[117]

At bottom, the interstate test is "designed to protect parties from 'unfair surprise or frustration of legitimate expectations' resulting from the choice of a law they could not have expected would govern their conduct when they engaged in it."[118] Replicating this test in the international context by requiring a U.S. nexus ensures that parties have fair notice that U.S. law might apply to their conduct. That is to say, nexus is a proxy for fair notice.

Yet, and as courts have begun to recognize,[119] the international context differs from the interstate context because international law itself may supply adequate notice even absent a domestic nexus. And, in my view, this use of international law to provide notice can largely harmonize the various Fifth Amendment due process tests. For instance, courts that have refused to adopt the nexus requirement, or that have carved out exceptions to it, have done so on the grounds that "whatever the Due Process Clause requires, it is satisfied where the United States applies its laws extraterritorially pursuant to the universality principle [of international law]."[120]

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116 Colangelo, *supra* note 5, at 165–66.

117 Anthony J. Colangelo, *Spatial Legality*, 107 NW. U. L. REV. 69, 86 (2012) (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985)).

118 *Id.* (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 318 n.24 (1981) (plurality opinion)).

119 *See, e.g.*, United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993) ("Inasmuch as the trafficking of narcotics is condemned universally by law-abiding nations, we see no reason to conclude that it is 'fundamentally unfair' for Congress to provide for the punishment of persons apprehended with narcotics on the high seas.").

120 United States v. Carvajal, 924 F. Supp. 2d 219, 262 (D.D.C. 2013) (quoting United States v. Ali, 885 F. Supp. 2d 17, 44 (D.D.C. 2012)); *see also* United States v. Brehm, 691 F.3d 547, 554 (4th Cir. 2012) (finding that the defendant should have reasonably understood that his conduct would be subject to prosecution somewhere, even if not necessarily in the U.S.); United States v. Al Kassar, 660 F.3d 108, 119 (2d Cir. 2011) ("Fair warning does not require that the defendants understand that they could be subject to criminal prosecution *in the United States* so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere."); United States v. Shi, 525 F.3d 709, 724 (9th Cir. 2008) ("Because piracy is a universally-condemned crime, a jurisdictional nexus is not required to satisfy due process."); United States v.

The universality principle, also referred to as "universal jurisdiction," holds that certain international law violations are prohibited everywhere and that every state has jurisdiction to hold accountable perpetrators of such violations.[121] In this connection, courts have explained, "[d]ue process does not require a nexus between such an offender and the United States because the universal condemnation of the offender's conduct puts him on notice that his acts will be prosecuted by any state where he is found."[122]

Conceptually,

> because the legal prohibition on universal crimes is fundamentally international—that is, it is not a matter of just U.S. national law alone, but also of a pre-existing and universally applicable international law—defendants cannot claim lack of notice of the law as applied to them. By prosecuting perpetrators of universal crimes, U.S. courts simply adjudicate the substance of an international law to which the defendant is already and always subject.[123]

Indeed, and as I elaborate below, the exercise of universal jurisdiction is not really extraterritorial; rather, it is the decentralized enforcement by domestic courts of an international law that covers the globe.[124]

Similarly, courts that traditionally have required a nexus have made exceptions for stateless vessels on the international legal theory that "[b]y attempting to shrug the yoke of any nation's authority, [defendants on stateless vessels] subject themselves to the jurisdiction of all nations '*solely* as a consequence of the vessel's status as stateless.'"[125] And other courts have relied on other international jurisdictional principles like objective territoriality[126] and the protective

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Hasan, 747 F. Supp. 2d 599, 608 (E.D. Va. 2010) (calling piracy the "paradigmatic universal jurisdiction offense"), *aff'd sub nom.* United States v. Dire, 680 F.3d 446 (4th Cir. 2012).

121 *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

122 *Shi*, 525 F.3d at 723.

123 Colangelo, *supra* note 5, at 167–68.

124 *See infra* Part III.A.2.b.

125 United States v. Caicedo, 47 F.3d 370, 372 (9th Cir. 1995) (quoting United States v. Marino-Garcia, 679 F.2d 1373, 1383 (11th Cir. 1982) (emphasis in original)); *see also* United States v. Juda, 46 F.3d 961, 966–67 (9th Cir. 1995) ("[I]f no nation exercises jurisdiction, [stateless] vessels would represent floating sanctuaries from authority and constitute a potential threat to the order and stability of navigation on the high seas." (quoting *Marino-Garcia*, 679 F.2d at 1382) (internal quotation marks omitted)).

126 *See, e.g.*, United States v. Medjuck, 156 F.3d 916, 918–19 (9th Cir. 1998) (finding the nexus requirement satisfied where drugs were destined for the U.S.); United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257–59 (9th Cir. 1998) (same); United States v. Davis, 905 F.2d 245, 249 (9th Cir. 1990) (same). For a definition of objective territoriality, see *supra* note 49 and accompanying text.

principle[127] to support the exercise of U.S. jurisdiction under the Fifth Amendment.

In all of these cases, international law does not determine of its own force whether exercises of U.S. jurisdiction comport with the Constitution. Instead, it acts as a proxy for whether the exercise of jurisdiction is "arbitrary or fundamentally unfair" by imputing to defendants knowledge of its substantive and jurisdictional rules. More specifically, if international substantive and jurisdictional principles put defendants on notice that U.S. law may apply to their extraterritorial activities—whether because those activities are subject to universal jurisdiction, occur on a stateless vessel, or come within some other jurisdictional basis of international law—the application of U.S. law is not arbitrary or unfair.

An important corollary of this argument is that if international law functions as the notice proxy for due process purposes, courts must apply that international law accurately and stringently; otherwise, defendants may not have had adequate notice that U.S. law applied to their conduct when and where they engaged in it. To illustrate, in *United States v. Ali* the D.C. Circuit recently held that a defendant could be prosecuted for hostage taking unconnected to the United States under U.S. law implementing the United Nations Convention Against the Taking of Hostages, even though the defendant's home state, Somalia, was not party to the Convention.[128] In reaching this conclusion the court made the unfortunate statement that "Ali mistakes the due process inquiry for the customary international law of jurisdiction. . . . Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law."[129]

But if it is precisely those norms of customary international law that put the defendant on notice that U.S. law might apply to him, then those norms become incorporated into the Constitution via the Due Process Clause and the exercise of U.S. jurisdiction must indeed conform to them or risk violating the Constitution. Rather than pooh-poohing the status of customary international law in U.S. courts, the court in *Ali* would have been better advised not to rely solely on

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127 *See, e.g.*, United States v. Yousef, 327 F.3d 56, 97 (2d Cir. 2003) (finding jurisdiction under the protective principle where "planned attacks were intended to affect the United States and to alter its foreign policy"); United States v. Peterson, 812 F.2d 486, 493–94 (9th Cir. 1987) ("Protective jurisdiction is proper if the activity threatens the security or governmental functions of the United States."); United States v. Brehm, No. 1:11-CR-11, 2011 WL 1226088, at *6 n.9. (E.D. Va. Mar. 30, 2011) (noting that jurisdiction over a noncitizen contractor supporting a U.S. military operation abroad is consistent with the protective principle).

128 *See* 718 F.3d 929, 945 (D.C. Cir. 2013).

129 *Id.* (quoting United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991)) (internal quotation marks omitted).

the positive law of the treaty—to which the defendant's home state was not subject and which therefore would not have put him on adequate notice—but to use the treaty as evidence of state practice and *opinio juris* to show that hostage taking is a universal jurisdiction violation of a customary international law applicable everywhere, including in the defendant's home state.[130]

Mixing up adjudicative and prescriptive jurisdiction. Another unfortunate doctrinal wrinkle that has tripped up lower courts and that ought to be ironed out is the use of adjudicative jurisdiction tests to evaluate the exercise of prescriptive jurisdiction under the Constitution. In particular, a number of courts have identified due process limits on the exercise of extraterritorial prescriptive jurisdiction with due process limits on the exercise of personal jurisdiction.

For example, according to the Ninth Circuit, the Fifth Amendment's "nexus requirement serves the same purpose as the 'minimum contacts' test in personal jurisdiction. It ensures that a United States court will assert jurisdiction only over a defendant who 'should reasonably anticipate being haled into court' in this country."[131] The internally quoted language comes from a famous personal jurisdiction case, *World-Wide Volkswagen Corp. v. Woodson*.[132] And, as the language affirms, the case concerns only whether a defendant "should reasonably anticipate *being haled into court*" in the forum, not whether the forum's law applies. These are different constitutional questions. Nonetheless, numerous other courts have latched onto this description in both criminal and civil suits, blurring the line between adjudicative and prescriptive jurisdiction.[133]

The problem with using a minimum contacts analysis to evaluate exercises of prescriptive jurisdiction is that such an analysis is at the

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130 I have spelled out how this analysis works in a number of places. *See* Colangelo, *A Unified Approach*, *supra* note 64, at 1092–96; Colangelo, *supra* note 5, at 176–88.

131 *Klimavicius-Viloria*, 144 F.3d at 1257 (9th Cir. 1998) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

132 444 U.S. 286 (1980).

133 *See* United States v. Angulo-Hernández, 576 F.3d 59, 62 (1st Cir. 2009); United States v. Mohammad-Omar, 323 F. App'x 259, 261 (4th Cir. 2009); United States v. Shi, 525 F.3d 709, 722 (9th Cir. 2008); United States v. Ali, 885 F. Supp. 2d 17, 43 (D.D.C. 2012), *vacated in part*, 885 F. Supp. 2d 55 (D.D.C. 2012), *rev'd in part*, 718 F.3d 929 (D.C. Cir. 2013); United States v. Campbell, 798 F. Supp. 2d 293, 306–07 (D.D.C. 2011); United States v. Bout, No. 08 Cr. 365, 2011 WL 2693720, at *2 (S.D.N.Y. July 11, 2011), *aff'd* 731 F.3d 233 (2d Cir. 2013); United States v. Brehm, No. 1:11-CR-11, 2011 WL 1226088, at *4 (E.D. Va. Mar. 30, 2011); United States v. Ayesh, 762 F. Supp. 2d 832, 842 (E.D. Va. 2011), *aff'd* 702 F.3d 162 (4th Cir. 2012); United States v. Yousef, No. S3 08 Cr. 1213, 2010 WL 3377499, at *3 (S.D.N.Y. Aug. 23, 2010); Goldberg v. UBS AG, 690 F. Supp. 2d 92, 106–07 (E.D.N.Y. 2010); Goldberg v. UBS AG, 660 F. Supp. 2d 410, 431 (E.D.N.Y. 2009); United States v. Al Kassar, 582 F. Supp. 2d 488, 494 (S.D.N.Y. 2008); United States v. Clark, 315 F. Supp. 2d 1127, 1132 (W.D. Wash. 2004), *aff'd* 435 F.3d 1100 (9th Cir. 2006); United States v. Shahani-Jahromi, 286 F. Supp. 2d 723, 728–29 (E.D. Va. 2003); United States v. Juda, 797 F. Supp. 774, 779 (N.D. Cal. 1992), *aff'd* 46 F.3d 961 (9th Cir. 1995).

same time both under- and overinclusive. And this under- and overinclusiveness can lead to legal errors that may generate separation of powers problems and, perversely, even due process violations.

A minimum contacts test is underinclusive because, as already explained, the United States may exercise prescriptive jurisdiction over entirely foreign activity that has no contact or "nexus" with the United States if that activity is subject to universal jurisdiction under international law. Imposing a minimum contacts requirement on the exercise of prescriptive jurisdiction therefore not only would threaten failure to uphold U.S. international legal obligations to exercise jurisdiction over perpetrators of universal jurisdiction offenses like piracy,[134] torture,[135] hostage taking,[136] and plane bombing,[137] it also would directly contradict the foreign policy commitments of the political branches to undertake those obligations. Of course, fulfilling such commitments must comply with the Constitution, including the Due Process Clause. But once again, no due process problem exists where the United States accurately applies the substance of an international law that covers the globe and of which defendants are necessarily on notice.

On the other hand, a minimum contacts test is overinclusive because it counts the presence of a defendant in a forum as a constitutionally sufficient contact to establish jurisdiction. In civil suits, personal jurisdiction exists if a defendant is served process while temporarily, physically present in the forum, even if the defendant has no other connection to the forum.[138] And physical presence, or custody of a defendant, establishes personal jurisdiction in criminal suits as well.[139] In fact, it typically does not matter how a criminal defendant gets before the court for personal jurisdiction purposes: the defendant's presence may be obtained by, among other means, traveling to the forum, extradition, or abduction.[140] Short of severely violating

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134 *See* Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 186–87 (2006).

135 *See id.* at 195–98.

136 *See* 18 U.S.C. § 1203 (2012).

137 *See* 18 U.S.C. § 32 (2012).

138 *See* Burnham v. Superior Court, 495 U.S. 604, 610–11 (1990).

139 *See* United States v. Alvarez-Machain, 504 U.S. 655, 661 (1992) (stating that "forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence" (quoting Ker v. Illinois, 119 U.S. 436, 444 (1886)) (internal quotation marks omitted)). A later Supreme Court case, *Frisbie v. Collins*, extended the rule in *Ker* to abductions in other U.S. states. *See* 342 U.S. 519, 522 (1952) (holding that the forcible abduction of a defendant in Illinois by Michigan police officers to bring the defendant back to Michigan to stand trial did not violate due process). For this reason, the doctrine is often referred to as the "*Ker-Frisbie* doctrine." *See, e.g.*, United States v. Oscar-Torres, 507 F.3d 224, 228 (4th Cir. 2007).

140 *See Oscar-Torres*, 507 F.3d at 228; United States v. Yousef, 327 F.3d 56, 82, 88–90 (2d Cir. 2003).

the defendant's rights—say by torture en route to the forum—physical presence, however obtained, establishes personal jurisdiction.[141]

But because such presence may occur after the activity that is the subject of the suit, and because the activity may have had no connection whatsoever to the forum when and where it took place, defendants may not have had adequate notice that forum law might apply to their activity when they engaged in it (excepting the application of forum law to universal jurisdiction violations and perhaps to conduct on stateless vessels on the high seas). If defendants' only contact with the forum is their postconduct presence, the defendants may not have had a reasonable expectation that forum law might apply to their conduct when they acted.

This is, in a sense, a species of retroactivity or legality problem: the only reason forum law purports to apply to the conduct is because of a postconduct event; consequently, the defendant may not have had notice of the applicable law at the time of the conduct. Because this type of retroactivity operates not only in time but also in space—forum law existed in time when the activity occurred but did not reach the activity in geographic space—I have termed it a "spatial legality" problem, as opposed to the more commonly discussed "temporal legality" problem in which a law comes into existence after the activity in question occurred.[142]

Going forward, one way courts can try to correct mix-ups of adjudicative and prescriptive jurisdiction tests, while not openly repudiating language in prior cases mistakenly blurring the tests, is to acknowledge that, in criminal cases at least,[143] the exercise of adjudicative jurisdiction can be viewed as tantamount to the exercise of prescriptive jurisdiction. Because one sovereign will not enforce the penal laws of another,[144] the propriety of an exercise of prescriptive jurisdiction in criminal cases effectively collapses into the propriety of an exercise of adjudicative jurisdiction. Put another way, if (1) the forum claims adjudicative jurisdiction, and (2) the forum will apply only its own law, then (3) the propriety of the exercise of both adjudicative and prescriptive jurisdiction reduces to one inquiry: can the forum exercise (both adjudicative and prescriptive) jurisdiction?[145]

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141 *See generally* Malvina Halberstam, *In Defense of the Supreme Court Decision in* Alvarez-Machain, 86 AM. J. INT'L L. 736 (1992) (taking the position that jurisdiction over defendants seized abroad may be justified in some cases even when that seizure violates international law).

142 *See* Colangelo, *supra* note 117, at 69.

143 This is untrue in civil cases because one state will apply another state's law.

144 *See, e.g.*, The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825) ("The Courts of no country execute the penal laws of another . . . .").

145 This proxy analysis would hold only to the extent that the United States is seeking to apply its own law; if it is not, the two types of jurisdiction can be disaggregated and treated on their own terms, leading to physical presence establishing adjudicative jurisdic-

Acknowledging this feature of the law of jurisdiction would make some sense of the language that, to borrow again the Ninth Circuit's description, the "nexus requirement serves the same purpose as the 'minimum contacts' test in personal jurisdiction. It ensures that a United States court will assert jurisdiction only over a defendant who 'should reasonably anticipate being haled into court' in this country."[146] Here, a criminal defendant's reasonable anticipation of being haled into U.S. court would serve as a proxy for that defendant's reasonable anticipation of being subjected to U.S. law since U.S. courts apply only U.S. criminal law.

Yet importantly, the exercise of this merged adjudicative and prescriptive jurisdiction must satisfy both sets of constitutional criteria governing the exercise of both types of jurisdiction. That is, if courts use a personal jurisdiction test as a proxy for gauging the propriety of prescriptive jurisdiction, the exercise of jurisdiction must still satisfy the test for prescriptive jurisdiction—namely, defendants must have had fair notice that U.S. law might apply to their activity when and where they acted. Accordingly, although postconduct presence in the forum may satisfy personal jurisdiction criteria, it could fail prescriptive jurisdiction criteria if the defendants did not have a reasonable expectation that forum law might apply to their activities when they engaged in them, notwithstanding their presence in the forum at some later point.[147]

b. *As Extraterritorial Jurisdiction*

As we have seen, case law so far indicates that a central analytical maneuver undergirding the United States' ability to aggressively apply its laws to activity far removed from U.S. territory without violating due process involves the concept of universal jurisdiction.[148] If U.S.

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tion but perhaps not prescriptive jurisdiction. As noted, physical presence may establish adjudicative jurisdiction in civil cases where U.S. courts apply foreign law. Also, in criminal cases physical presence may establish adjudicative jurisdiction for extradition purposes where the defendant is extradited to another state that has prescriptive jurisdiction over the conduct in question.

146 United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

147 All of this is not to say that adjudicative jurisdiction due process analysis has nothing to teach prescriptive jurisdiction due process analysis. For example, although the court confused personal and prescriptive jurisdiction, the Ninth Circuit profitably drew from personal jurisdiction analysis of preliminary jurisdictional questions involving mixed issues of fact and law to evaluate prescriptive jurisdiction questions that raised similar preliminary issues of fact and law. *See* United States v. Moreno-Morillo, 334 F.3d 819, 830 (9th Cir. 2003) (explaining that "any conclusion regarding statelessness is not a final determination of the issue but rather a necessary precursor to the district court's determination regarding personal jurisdiction").

148 *See* United States v. Ali, 885 F. Supp. 2d 17, 44 (D.D.C. 2012), *vacated in part*, 885 F. Supp. 2d 55 (D.D.C. 2012), *aff'd in part, rev'd in part*, 718 F.3d 929 (D.C. Cir. 2013); United

law accurately implements extant international law, the exercise of U.S. prescriptive jurisdiction anywhere in the world can be reconceptualized from an exercise of extraterritorial jurisdiction to an exercise of territorial jurisdiction. The reason is that the United States is not applying just national law but also an international law that covers the globe. Because the prescriptive jurisdiction of international law over universal jurisdiction violations governs everywhere, universal jurisdiction is an all-encompassing territorial jurisdiction. And if all the United States does is use domestic law apparatuses as conduits for the application of that universal prescriptive jurisdiction, there is no exercise of extraterritorial jurisdiction. In turn, there is no due process objection because the United States would be applying a law that already applied to the defendant when and where the activity in question occurred. Courts have been receptive to this type of argument.[149] A necessary corollary to this maneuver, however, is that the U.S. law being applied must hew closely to the international legal definitions of the violations at issue; otherwise, defendants may not have had adequate notice of idiosyncratic U.S. modifications to or interpretations of those definitions.

The upshot is that accurate implementation and application of international law can transform exercises of extraterritorial jurisdiction into exercises of territorial jurisdiction and, in turn, change the entire nature of due process analyses regarding the United States' ability to assert jurisdiction over serious violations of international law like torture, hostage taking, and airplane bombing anywhere in the world. Some U.S. courts that have used universal jurisdiction in this way have been mindful of the attendant limits the concept places on domestic implementation and application of its international legal proscriptions.[150]

But other courts have taken this type of rationale and stretched it—perhaps past its breaking point—by extending it beyond the class of universal jurisdiction violations presently extant in international law. For instance, the Second Circuit in *United States v. Al Kassar*

States v. Hasan, 747 F. Supp. 2d 599, 608 (E.D. Va. 2010), *aff'd sub nom.* United States v. Dire, 680 F.3d 446 (4th Cir. 2012).

149 This argument was originally spelled out in Colangelo, *supra* note 134 and Colangelo, *supra* note 5, and has been explicitly adopted by courts in recent cases addressing universal jurisdiction. *See* United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1260 (11th Cir. 2012); *Hasan*, 747 F. Supp. 2d at 608, 629; *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 256 & n.139 (S.D.N.Y. 2009).

150 *See, e.g.*, *Bellaizac-Hurtado*, 700 F.3d at 1258 ("Because drug trafficking is not a violation of customary international law, we hold that Congress exceeded its power, under the Offences Clause, when it proscribed the defendants' conduct in the territorial waters of Panama."); *Hasan*, 747 F. Supp. 2d at 608 (noting that "a state's ability to invoke universal jurisdiction is inextricably intertwined with, and thus limited by, the substantive elements of the crime as defined by the consensus of the international community").

found that for due process purposes, "[f]air warning does not require that the defendants understand that they could be subject to criminal prosecution *in the United States* so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere."[151] The D.C. Circuit recently relied on *Al Kassar* for this due process proposition,[152] as have other lower courts, to find that "the Due Process challenge fail[ed]," although no U.S. nexus with foreign activity existed, where, in the court's opinion, the "acts [were] 'self-evidently criminal.'"[153]

Viewing this reasoning charitably, it holds that the applicable law may be distinctly national and, as long as the activity was prohibited where it occurred, the defendant was on sufficient notice. The difference from universal jurisdiction is that the U.S. proceedings do not apply an international law that governs everywhere but rather a national law that to some degree matches up with the law of the place of the activity. Thus, although the exercise of prescriptive jurisdiction is extraterritorial, the defendant is deemed on notice because the U.S. law mirrors or replicates the law of the place of the activity.

This reasoning is not unknown to international law, which contemplates jurisdiction on the "vicarious administration of justice" principle whereby the forum acts as a surrogate for the state where the acts occurred.[154] However, the vicarious administration of justice principle and related principles of dual criminality in the extradition context demand a tight fit between the law of the forum and the law of the state where the acts occurred—including identical norms and elements of offense and use of the locus state's justifications and excuses, especially because "the perpetrator could not have known of the applicability of foreign law."[155] Unhappily, U.S. courts that have used this type of reasoning have betrayed no awareness of the fit required between forum law and the law of the place of the acts, and, as noted, some have even dismissed due process concerns by concluding, without analysis, that the act in question is simply "self-evidently criminal."[156] In this author's view, should U.S. courts continue to employ a vicarious administration of justice–type rationale to expand U.S. extraterritorial jurisdiction, they must also be mindful of the ultimate objective of due process and the requirements that objective imposes. As this subpart has argued, the ultimate objective is fair notice, and

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151 660 F.3d 108, 119 (2d Cir. 2011) (emphasis in original).

152 United States v. Ali, 718 F.3d 929, 945–46 (D.C. Cir. 2013).

153 United States v. Ahmed, No. 10 CR 131, 2011 WL 5041456, at *3 (S.D.N.Y. Oct. 21, 2011) (quoting *Al Kassar*, 660 F.3d at 119).

154 Jürgen Meyer, *The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction*, 31 HARV. INT'L L.J. 108, 115–16 (1990).

155 *Id.* at 116.

156 *See supra* note 120 and accompanying text.

that requires defendants reasonably know what substantive laws may apply to their activity when they act.

B. Statutory Prescriptive Jurisdiction

The Supreme Court has been most prolific in the area of extraterritoriality and statutory construction. Beginning with piracy cases in the early nineteenth century,[157] the Court has had a long, storied, and incredibly messy legacy construing statutes to gauge extraterritorial application—a legacy that saunters circuitously up to the present day. And the Court's most recent decisions, despite their lip service to cleaning up the mess and supplying stability and predictability to the law, promise only to generate more confusion.

A quick qualification before jumping into the mess: the cases in this area deal principally with statutes silent on geographic scope. Congress may, if it wants,[158] enact a statute that reaches beyond U.S. borders. What exactly that statute must look like for courts to construe it extraterritorially, however, is a bit of a moving target. A clear statement of extraterritorial application to a particular set of facts certainly would seem to suffice,[159] but the absence of either a clear statement or a set of facts falling squarely within the statutory language regarding extraterritoriality will pose a nice test case for litigants and lower courts.

1. *As Prescriptive Jurisdiction*

Given this Essay's discussion so far, whether a federal statute applies to conduct abroad seems to raise a fairly straightforward question of prescriptive jurisdiction. Yet there has been confusion on this point. In *Hartford Fire Insurance Co. v. California*, the Supreme Court mistakenly evaluated whether the Sherman Antitrust Act reached foreign conduct as a question of the district court's subject-matter jurisdiction,[160] despite Justice Antonin Scalia's cogent reasoning in dissent that "the extraterritorial reach of the Sherman Act . . . has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct."[161] Justice Scalia went on to explain that "[t]here is, however, a type of 'jurisdic-

157 *See* United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1820); United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820); United States v. Klintock, 18 U.S. (5 Wheat.) 144 (1820); United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818).

158 Of course, Congress must act within constitutional bounds. *See supra* Part III.A.

159 *Morrison* did not adopt a clear statement rule, but something less that considers context, so a clear statement should automatically suffice. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2883 (2010).

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

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

tion' relevant to determining the extraterritorial reach of a statute; it is known as 'legislative jurisdiction,' or 'jurisdiction to prescribe.'"[162] This prescriptive jurisdiction, Justice Scalia clarified, "refers to 'the authority of a state to make its law applicable to persons or activities,' and is quite a separate matter from 'jurisdiction to adjudicate.'"[163] On this view, the proper inquiry in *Hartford Fire* was not whether courts should decide to exercise subject-matter jurisdiction over claims arising out of foreign conduct but rather whether Congress intended the Sherman Act's substantive conduct-regulating rules to reach that conduct.[164] To resolve this question, Justice Scalia employed longstanding canons of statutory construction[165] to conclude that Congress did not so intend.

Justice Scalia got his revenge, so to speak, in *Morrison v. National Australia Bank Ltd.*, a case involving claims by foreign plaintiffs against foreign defendants for fraud in connection with stock purchased on a foreign exchange.[166] At issue was if, and how, a statutory presumption against extraterritorial application attached to the U.S. Securities Exchange Act.[167] Writing for the majority this time, Justice Scalia began the opinion's legal discussion with a section devoted entirely to "correct[ing] a threshold error in the Second Circuit's analysis."[168] Namely, the lower court had mistakenly "considered the extraterritorial reach of § 10(b) [of the Exchange Act] to raise a question of subject-matter jurisdiction."[169] Justice Scalia then corrected this error: "But to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, 'refers to a tribunal's power to hear a case.'"[170] After distinguishing the extraterritorial reach of § 10(b)'s prescriptive conduct-regulating rule prohibiting fraud as "an issue quite separate" from the adjudicative subject-matter jurisdiction of U.S. courts, Justice Scalia observed that as to the latter, under the Exchange Act "[t]he District Court here had jurisdiction under 15 U.S.C. § 78aa to adjudicate the question whether § 10(b) applies to [the defendant's] conduct,"[171] and quoted the relevant language of § 78aa, which provides:

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162 *Id.* (citations omitted).

163 *Id.* (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. IV, intro. note (1987)).

164 *See id.* at 813–21.

165 *See id.* at 814–15.

166 130 S. Ct. 2869, 2875–76 (2010).

167 *See id.* at 2877–78.

168 *Id.* at 2876–77.

169 *Id.* at 2877.

170 *Id.* (quoting Union Pac. R.R. Co. v. Brotherhood of Locomotive Engineers & Trainmen General Committee of Adjustment, 558 U.S. 67, 81 (2009)).

171 *Id.* (footnote omitted).

> The district courts of the United States . . . shall have exclusive jurisdiction of violations of [the Exchange Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act] or the rules and regulations thereunder.[172]

Hence, *Morrison* made clear that the extraterritorial reach of a statute is a question of prescriptive, not judicial subject-matter, jurisdiction. It followed that whether and how a presumption against extraterritoriality applied concerned a statute's conduct-regulating rules, not its jurisdictional provisions for courts. To be sure, even where the plaintiff, the defendant, and the transaction were foreign (a "foreign-cubed" case), the Court stressed that judicial subject-matter jurisdiction existed under the statute's jurisdictional provisions.

This clarity was short lived. Less than three years later, the Supreme Court decided *Kiobel v. Royal Dutch Petroleum Co.*[173] At issue was "whether and under what circumstances courts may recognize a cause of action under the Alien Tort Statute [ATS], for violations of the law of nations occurring within the territory of a sovereign other than the United States."[174] The ATS grants U.S. district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations."[175] As the statutory language indicates—and as the Court in *Kiobel* openly acknowledged—the ATS is "'strictly jurisdictional.' It does not directly regulate conduct or afford relief."[176]

Kiobel involved ATS claims by Nigerian plaintiffs against British, Dutch, and Nigerian corporate defendants alleging harmful conduct in Nigeria.[177] Like *Morrision*, *Kiobel* therefore presented a "foreign-cubed" case. And under *Morrison*, the result should have been clear: Because the ATS is "strictly jurisdictional" and "does not directly regulate conduct,"[178] a presumption against extraterritoriality is inapplicable. That is, like § 78aa of the Exchange Act, the ATS goes to the court's subject-matter jurisdiction; both § 78aa and the ATS simply authorize U.S. courts with "jurisdiction." Under the ATS, that "jurisdiction" encompasses "any civil action by an alien for a tort only, committed in violation of the law of nations."[179] If the ATS does not sufficiently indicate extraterritorial application, certainly neither does

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172 *Id.* at 2877 n.3 (alteration in original) (quoting 15 U.S.C. § 78aa (2012)).

173 133 S. Ct. 1659 (2013).

174 *Id.* at 1662.

175 28 U.S.C. § 1350 (2012).

176 133 S. Ct. at 1664 (citation omitted) (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 713 (2004)).

177 *Id.* at 1662–63.

178 *Id.* at 1664 (citation omitted).

179 28 U.S.C. § 1350.

§ 78aa. And if the district court in *Morrison* "had jurisdiction under 15 U.S.C. § 78aa"[180] over claims involving extraterritorial activity—as the Supreme Court explicitly said it did—then the district court in *Kiobel* also should have had jurisdiction under the ATS over claims involving extraterritorial activity.

Such a consistent application of precedent was not to be. Instead, it seemed the Court really wanted to apply a presumption against extraterritoriality in *Kiobel*, irrespective of what its prior decisions said. Of course, the traditional candidate for the presumption would have been the statute's conduct-regulating rules. But here the ATS posed a bit of a puzzle. The statute's conduct-regulating rules came not from U.S. law but from international law or "the law of nations."[181] Again, as the Court in *Kiobel* explained, the ATS "does not directly regulate conduct or afford relief. It instead allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law."[182] Accordingly, the relevant question is "whether the court has authority to recognize a cause of action under U.S. law *to enforce a norm of international law*."[183] In short, the cause of action comes from U.S. law and the conduct-regulating norm comes from international law.

This bifurcation presented a puzzle because applying a presumption against extraterritoriality to international conduct-regulating norms does not make sense. International norms against—to use some of the norms at issue in *Kiobel*—torture and crimes against humanity already apply everywhere in the world; that is the whole point of international law. Perhaps recognizing that it could not sensibly apply the presumption in its traditional role, the Court had to locate some other creature of U.S. law to which the presumption could attach. The Court seized upon the only thing left: the cause of action allowed by the ATS.[184] I have critiqued this move elsewhere on the basis that under longstanding principles of U.S. and international law, forum law traditionally provides the cause of action for suits arising abroad—even where the conduct-regulating rule derives from foreign law.[185] In other words, causes of action have never been deemed an importation of foreign law; rather, courts craft causes of action out of forum law to permit recovery under conduct-regulating rules of foreign law for harms abroad.[186] In this respect, *Kiobel*'s attempt to cir-

180 Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010).
181 28 U.S.C. § 1350.
182 133 S. Ct. at 1664.
183 *Id.* at 1666 (emphasis added).
184 *See id.* at 1664-65.
185 Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations in* Kiobel *and Beyond*, 44 GEO. J. INT'L L. 1329, 1342–44 (2013).
186 *See id.*

cumvent one area of established law (concerning the presumption against extraterritoriality) succeeded only in clashing with another area of established law (concerning which law provides causes of action).

But the doctrinal contortions do not end there. It is worth reiterating that the presumption against extraterritoriality is a canon of *statutory* construction.[187] We have already seen that applying it directly to the ATS itself would be awkward, because the ATS, like § 78aa of the Exchange Act, is a jurisdictional statute. And in fact, the Court did not quite do that. Instead, it tried to stretch the presumption around, or perhaps through, the ATS proper in order to reach the common law cause of action the statute implicitly authorized.[188] Needless to say, such a tortured (no pun intended) use of the presumption is odd. It is also not very convincing. For no matter what type of leapfrogging around the Court had in mind for the presumption, it was invariably mired in the text and context of the ATS. Thus although the Court strained to cabin the presumption's work "to claims under the ATS," it invariably had to ask about the statute itself, concluding that "nothing in the [ATS] rebuts that presumption."[189] And once that inevitable statutory inquiry is made, it becomes pellucid that no principled distinction exists between gauging the presumption's applicability to the ATS on the one hand, and its applicability to § 78aa on the other, and that *Kiobel* renders the law incoherent.

Where does all of this leave the current state of the law? In line with *Morrison*, a statute's geographic reach is probably still best analyzed as a question of prescriptive, as opposed to judicial subject-matter, jurisdiction. *Morrison* went out of its way to make this point explicitly. And, although the Court in *Kiobel* tied itself in knots trying to finagle the presumption's application to a nonstatutory, judicially crafted creature of traditionally forum law, it was careful not to repudiate the presumption's classification as a doctrine of prescriptive jurisdiction in *Morrison*. So when it comes to conduct-regulating rules, it is fairly safe to say that the extraterritorial application of U.S. statutes is an exercise of prescriptive jurisdiction.

The answer is less clear, however, when it comes to non-conduct-regulating aspects of the law like the viability of common law causes of action arising abroad. Here there are some glimmerings of judicial subject-matter jurisdiction. Apart from acknowledging the ATS's

187 *See Kiobel*, 133 S. Ct. at 1664.

188 *See id.* at 1663 ("The grant of jurisdiction is instead 'best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations.'" (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) (alteration in original))).

189 *Id.* at 1669.

"strictly jurisdictional" nature,[190] Justice Anthony Kennedy raised the extraterritoriality issue *sua sponte* at oral argument[191]—a clear sign of a subject-matter jurisdiction defect,[192] as opposed to a merits-based defect. *Kiobel* also elided classifying the presumption's application as going to either prescriptive or judicial subject-matter jurisdiction, ultimately leaving litigants and lower courts to contest the point. The lower court trend so far appears to be in favor of classifying the defect as going to subject-matter jurisdiction, and indeed courts have felt free to raise it *sua sponte* for this reason.[193] There are, however, exceptions, with at least one court viewing the presumption's operation on the ATS as a prescriptive, merits-based challenge that can be—and was—waived.[194] Given the Supreme Court's track record in this area, the careful lawyer would be well advised to argue in the alternative going forward.

2. *As Extraterritorial Jurisdiction*

The other statutory inquiry asks how to determine whether the exercise of jurisdiction is extraterritorial and, if it is, whether jurisdiction is permissible. The law in this area is also messy and comprises at least three distinct issues. One, does a presumption against extraterritoriality apply to the statute? Two, does the claim at issue involve the territorial or extraterritorial application of the statute? Three, even if the presumption applies and the claim involves the statute's extraterritorial application, is the presumption nonetheless displaced?

The law is so messy that the very existence of the third inquiry is debatable. Yet the first issue is fairly straightforward after *Morrison*, which explained that "[w]hen a statute gives no clear indication of

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190 *Id.* at 1664.

191 Transcript of Oral Argument at 4, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491).

192 *See* FED. R. CIV. P. 12(h)(3).

193 *See* Chen Gang v. Zhao Zhizhen, No. 3:04CV1146, 2013 WL 5313411, at *4 (D. Conn. Sept. 20, 2013); Kaplan v. Cent. Bank of the Islamic Republic of Iran, 961 F. Supp. 2d 185, 204–05 (D.D.C. 2013); Ahmed v. Comm'r for Educ. Lagos State, No. 1:13-cv-00050-MP-GRJ, 2013 WL 4001194, at *2 (N.D. Fla. Aug. 6, 2013); Ahmed-al-Khalifa v. Minister of Interior, No. 5:13-cv-172-RS-GRJ, 2013 WL 3991961, at *2 (N.D. Fla. Aug. 2, 2013); Chen Hua v. Shi Honghui, No. 09 Civ. 8920, 2013 WL 3963735, at *7 (S.D.N.Y. Aug. 1, 2013); Ahmed-al-Khalifa v. Obama, No. 1:13-cv-49-MW/GRJ, 2013 WL 3797287, at *1–2 (N.D. Fla. July 19, 2013); Al Shimari v. CACI Int'l, Inc., 951 F. Supp. 2d 857, 857 (E.D. Va. 2013), *vacated and remanded*, No. 131-937, 13-2162, 2014 WL 2922840 (4th Cir. June 30, 2014); Mwangi v. Bush, No. 5:12-373-KKC, 2013 WL 3155018, at *4 (E.D. Ky. June 18, 2013); Ahmed-al-Khalifa v. Salvation Army, No. 3:13cv289-WS, 2013 WL 2432947, at *2–3 (N.D. Fla. June 3, 2013); Mohammadi v. Islamic Republic of Iran, 947 F. Supp. 2d 48, 68–71 (D.D.C. 2013); Mwani v. Bin Laden, 947 F. Supp. 2d 1, 3–4 (D.D.C. 2013); Muntslag v. D'Ieteren, S.A., No. 12-cv-07038, 2013 WL 2150686, at *2 (S.D.N.Y. May 17, 2013).

194 *See* Ahmed v. Magan, No. 2:10-cv-00342, 2013 WL 4479077, at *1–2 (S.D. Ohio Aug. 20, 2013).

extraterritorial application, it has none."[195] There may be some wiggle room absent statutory language expressly providing for extraterritoriality. The Court backed off from a "clear statement rule" requiring that a statute say something to the effect of "this law applies abroad" and suggested both statutory text and context can be considered in gauging extraterritoriality.[196] But in the end, the "clear indication" threshold is a high one. It is also a legal one, based entirely on the text and context of the statute. That is to say, the statute itself must clearly indicate extraterritorial application.[197] I emphasize this now because it will be relevant later on when discussing *Kiobel*'s possible exception to the presumption.

The second issue asks whether a statute is being applied territorially or extraterritorially. This is a complicating factor in many multijurisdictional cases brought in U.S. courts under federal law, including "foreign-cubed" cases. Namely, some aspect of the suit in some way relates to the United States and an argument can therefore be made that the statute involves the domestic application of U.S. law to that aspect of the suit relating to U.S. territory. Thus in *Morrison*, although the ultimate stock transaction took place abroad, the plaintiffs argued that because some fraudulent conduct had occurred in the United States, application of the Exchange Act was not extraterritorial but domestic, and the presumption was not triggered as to their claims.[198] According to plaintiffs, *Morrison* simply involved the territorial application of U.S. law. The Court rejected this argument, observing: "[I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States."[199] Then the Court zoomorphized the presumption, and gave it fangs: "But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case."[200]

The Court then unleashed the presumption's watchdog by concluding that the "focus of the Exchange Act is . . . upon purchases and sales of securities in the United States."[201] And because that focus had occurred outside the United States, application of the statute would constitute an exercise of extraterritorial jurisdiction.[202] Thus, the only reason the plaintiffs' argument described above failed in *Morrison* was the Court decided the Act's statutory focus was not upon fraudu-

195 Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878 (2010).
196 *Id.* at 2883.
197 *See id.*
198 *Id.* at 2883–84.
199 *Id.* at 2884.
200 *Id.*
201 *Id.*
202 *See id.* at 2884–85.

lent conduct but on purchases or sales. Conversely, under *Morrison*'s logic, if the focus of a statute transpires in the United States, application of that statute is presumably an exercise of territorial, not extraterritorial, jurisdiction.[203]

How did this logic apply in *Kiobel*? It depends whom you ask. The Second Circuit's recent ATS opinion, *Balintulo v. Daimler AG*, stated that "the Supreme Court in *Kiobel* has made clear that federal courts may not, under the ATS, recognize common-law causes of action for conduct occurring in another country"[204] and that corporate citizenship cannot be enough of a contact with the United States to authorize claims under the ATS.[205] These holdings derive largely from Part IV of the *Kiobel* opinion, which reads in relevant part:

> On these facts, all the relevant conduct took place outside the United States. And 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. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.[206]

The Second Circuit read this language to mean: "[i]n *all* cases, therefore the ATS does not permit claims based on illegal conduct that occurred entirely in the territory of another sovereign."[207] This reading essentially interprets the second sentence of the paragraph, which addresses whether "claims touch and concern" the United States so as "to displace" the presumption, in light of the first sentence, which explains that "all the relevant conduct" took place abroad. In this way, the *Balintulo* court rewrote the suggested exception for *claims* that touch and concern the territory of the United States to instead require *conduct* that touches and concerns the territory of the United States. Finally, it is not entirely clear how *Kiobel*'s sentence about "mere corporate presence" fit into the Second Circuit's analysis, but my guess is that the court read it to indicate that corporate citizenship is never enough of a contact to displace the presumption.

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203 For critiques of this "focus" step, see 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, 657 (2011) (arguing that the "focus" analysis "makes no pretense at all of reflecting what Congress wanted"); Colangelo, *A Unified Approach*, *supra* note 64, at 1044–46 (explaining that *Morrison* raises concerns about foreign sovereignty and domestic separation of powers); Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 NOTRE DAME L. REV. 1673, 1699–1700 (2012) ("*Morrison*'s focus discussion . . . encourages courts to do an end-run around legislative jurisdiction analysis.").

204 727 F.3d 174, 194 (2d Cir. 2013).

205 *See id.* at 189–90.

206 133 S. Ct. 1659, 1669 (2013) (citation omitted).

207 *Balintulo*, 727 F.3d at 192 (emphasis in original).

I want to identify two difficulties with *Balintulo*'s reading of *Kiobel* and then propose an alternative reading that, in my view, makes more sense on the current state of Supreme Court case law. Even assuming the Second Circuit's reading is plausible, when two readings are plausible courts should adopt the reading that is consistent with existing law, not the reading that breaks from it.

The first difficulty with *Balintulo*'s reading is that it relies on *Morrison*'s "craven watchdog" language regarding the "focus" analysis to rewrite *Kiobel*'s suggested exception for *claims* that touch and concern the United States to instead read *conduct* that touches and concerns the United States. This is understandable; *Kiobel* did after all cite *Morrison*.[208] But upon inspection, that particular part of *Morrison* is a bad fit. It dealt with whether the statutory "focus" in the case was domestic or foreign—and thus whether the presumption was even triggered to begin with.[209] If the statutory focus had been a domestic element of the claim (say, the fraudulent conduct in *Morrison*), there would have been no extraterritorial application of the statute and thus no need for the presumption. This is at odds with *Kiobel*'s description of the presumption as already being in place, and then being displaced by claims that touch and concern the United States. Nor is this simply about the chronology of similar analytical steps. One step—the focus inquiry—asks whether the statute's application is territorial or extraterritorial; the other step—the displacement inquiry—asks whether the presumption, once in place, is displaced. Moreover, the nature of each inquiry is completely different. *Morrison*'s "focus" determination is a thoroughgoing legal, textual analysis of *the statute* in question.[210] *Kiobel*'s suggestion that the presumption might be displaced where claims sufficiently touch and concern the United States is, by contrast, a straight-up factual inquiry.

The other difficulty with *Balintulo* is that the Second Circuit read *Kiobel*'s statement[211] that "mere corporate presence" is not enough to allow claims under the ATS to categorically mean *no* corporate presence can ever be enough to authorize claims under the ATS.[212] But "corporate presence" is a legal term of art. And there is a robust and recent Supreme Court jurisprudence that distinguishes some types of corporate presence from others. Within that jurisprudence, "mere" corporate presence signifies exactly what the Court in *Kiobel* described: comparatively minor contacts with many forums.[213] On the other end of the spectrum, however, are comparatively major con-

208 *Kiobel*, 133 S. Ct. at 1669.
209 Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2883–88 (2010).
210 *See id.* at 2884.
211 *Kiobel*, 133 S. Ct. at 1669.
212 *Balintulo*, 727 F.3d at 189–90.
213 133 S. Ct. at 1669.

tacts, like a corporation's place of incorporation and headquarters—contacts that, according to the Supreme Court, render the corporation "at home" in a limited number of forums.[214] On the reading of *Kiobel* below, I want to argue that this type of relationship with the United States, and in particular corporate citizenship, can suffice to displace the presumption.

Another way to read *Kiobel* is that it did four things. First, it extended (awkwardly) a presumption against extraterritoriality to claims allowed by the ATS. Second, it applied that presumption to the specific claims at issue. Third, it suggested that there may be "claims" that sufficiently "touch and concern" the United States so as to "displace" the presumption after it is already in place. And fourth, it concluded that "mere corporate presence" is not enough to displace the presumption.[215]

Although the paragraph quoted earlier[216] from Part IV of the opinion is terse, it can be read to contain three distinct legal points in its three sentences. The first point is that *Kiobel*, like *Morrison*, is a case in which the "focus" of the statute was outside the United States and therefore the presumption against extraterritoriality was triggered. Presumably if the focus of the ATS—whatever that is—takes place in the United States, U.S. courts enjoy territorial jurisdiction over the claims. But because in *Kiobel* "all the relevant conduct took place outside the United States,"[217] the focus could not have been a domestic element of the claim. While the Court did not specify what the ATS's statutory focus is, it indicated that it did not need to because, on the facts, none of the relevant conduct occurred in the United States. This also implies that whatever the focus of the ATS is, it has to do with conduct.

The Court then moved on to a second point: whether the presumption, although triggered, can nonetheless be overcome. "And 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."[218] The words "claims" and "displace" are key. To start, unlike the focus step, this second inquiry does not ask only about conduct but instead asks whether the *claims* touch and concern the United States. Although one certainly could argue that the focus inquiry cares only about *conduct*, this second inquiry abandons that narrow emphasis and looks more broadly to

214 Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853–54 (2011).

215 *Kiobel*, 133 S. Ct. at 1669.

216 *See supra* note 206 and accompanying text.

217 133 S. Ct. at 1669.

218 *Id.* (emphasis added).

claims. This makes sense because, once again, the ATS is a *jurisdictional statute*; as such, it addresses claims, not conduct. And it would be consistent with the lower court trend reading *Kiobel*'s use of the presumption as a subject-matter jurisdiction inquiry, not as a gauge for measuring the reach of conduct-regulating rules.[219] In other words, because subject-matter jurisdiction deals with the viability of claims, it makes sense to talk about the relationship of claims, not just conduct, to the United States. The word "displace" then confirms that we are talking about a situation in which the presumption is already in effect, that is, in place, and some powerful U.S. connection *displaces* it—a connection that is not, by the opinion's terms, limited to *conduct* but that explicitly embraces *claims*.

Now, what U.S. connection is enough to displace the presumption once it has been triggered is a good question. But here too, there are some clues. And this is the third point in the third sentence of the paragraph. The Supreme Court made clear that "mere corporate presence" is not enough.[220] Yet as noted, "corporate presence" is a term of art that carries a ton of definitional baggage in the jurisdiction context. It can refer to a broad spectrum of contacts with a forum—ranging from doing some business there to maintaining corporate headquarters. Courts have been using different stops on this spectrum to measure contacts for personal jurisdiction purposes since the middle of the last century under *International Shoe Co. v. Washington*'s "minimum contacts" test.[221] Against this established jurisprudential backdrop, prefacing the term "corporate presence" with the word "mere" puts important distance between *Kiobel*'s formulation and the Supreme Court's recent pronouncements about what degree of corporate presence suffices to establish "general personal jurisdiction" under *International Shoe*: namely, a corporate presence so substantial that the defendant is "at home" in the forum.[222] If all degrees of corporate presence were insufficient to authorize claims arising abroad under the ATS, there would have been no need to include the word "mere"—a word that is not just empty rhetoric in the jurisdiction context but that instead carries significant analytical weight.

Next, while "mere" corporate presence is exactly what *Kiobel* described—minor contacts with many forums[223]—on the other end of the spectrum are major contacts like a corporation's headquarters or place of incorporation. These contacts render the corporation "at

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219 *See supra* note 193 and accompanying text.

220 *Kiobel*, 133 S. Ct. at 1669.

221 326 U.S. 310, 316–18 (1945).

222 Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011) (citing *Int'l Shoe*, 326 U.S. at 317).

223 *See Kiobel*, 133 S. Ct. at 1669.

home" in a limited number of forums.[224] Indeed, these contacts are so strong that jurisdictional analysis views them as equivalent to a human defendant's citizenship and domicile.[225] If nothing else, the ATS's history suggests a powerful desire to provide redress against U.S. nationals for violations of the law of nations.[226] If corporations are liable under the statute, this route for redress should extend against corporate as well as natural citizens. Such a reading would also comport nicely with the other, and to my mind more relevant, canon of statutory construction applicable to the ATS—the *Charming Betsy* canon, which instructs courts to interpret statutes in line with international law if possible.[227] Under international law, states possess jurisdiction over their nationals for offenses committed abroad.[228] To be sure, at the time of the ATS's enactment "every nation had a duty to redress certain violations of the law of nations committed by its citizens or subjects against other nations or their citizens."[229] Hence, at least one post-*Kiobel* lower court opinion upheld application of the ATS to claims alleging foreign harms in part because "unlike the British and Dutch corporations [in *Kiobel*], Defendant [was] an American citizen residing within the venue of [the] court" and "[u]nder the law of nations, states are obliged to make civil courts of justice accessible for claims of foreign subjects against individuals within the state's territory."[230]

In sum, despite—though one might also say because of—the Supreme Court's recent interventions in the area of statutory extraterritoriality, many important questions remain outstanding. While it is fairly clear that the extraterritorial scope of a statute's conduct-regulating rules is a question of prescriptive jurisdiction, it is unclear whether the scope of jurisdictional statutes and claims allowed thereunder present prescriptive or adjudicative jurisdiction issues. Moreo-

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224 *See Goodyear*, 131 S. Ct. at 2851.

225 *See id.* at 2853–54.

226 *See generally* Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62 (1988) (arguing that the ATS served important foreign policy interests by providing an alien plaintiff with recourse against U.S. defendants in federal courts).

227 *See* Murray v. Schooner Charming Betsy (The Charming Betsy), 6 U.S. (2 Cranch) 64, 118 (1804).

228 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987).

229 Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 448 (2011). Moreover, as Professor Louise Weinberg persuasively demonstrates in this symposium, the United States has strong interests in deciding ATS cases under longstanding principles of private international law. *See* Louise Weinberg, *What We Don't Talk About When We Talk About Extraterritoriality:* Kiobel *and the Conflict of Laws*, 99 CORNELL L. REV. 1471 (2014).

230 Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 321, 323 (D. Mass. 2013). The other basis for upholding application of the ATS was that some of the conduct causing the foreign harm occurred in the United States. *See id.* at 310–11.

ver, while it is fairly clear that a potent presumption against extraterritoriality applies to all statutes, it is unclear how to tell whether statutes apply territorially or extraterritorially. And if the latter, it is further unclear whether and how the presumption may be displaced when claims sufficiently touch and concern the territory of the United States.

C. Choice of Law

A third manifestation of U.S. extraterritorial prescriptive jurisdiction occurs via common law analysis, though it is not traditionally conceptualized and discussed as such. Choice-of-law analyses that select U.S. forum law to regulate foreign conduct effectively produce extraterritorial exercises of prescriptive jurisdiction. Unlike the areas of constitutional and statutory extraterritorial jurisdiction, there does not seem to be much confusion that choice-of-law analysis chooses which state's prescriptive jurisdiction governs a dispute. However, the question of whether that prescriptive jurisdiction is extraterritorial has begotten a fascinating field that for a long time was, and to some extent still is, dominated by legal fictions.

To spin somewhat Part II's cross-border shooting hypothetical, suppose that instead of a gun being fired from State A into State B, tortious conduct occurred in State A but its ultimate harm took hold inside State B. Say, for example, Jane negligently failed to properly couple train cars in State A and, as a result, Dick was injured across the border in State B when the cars separated.[231] Under a traditional choice-of-law rule, the law of the place of the harm, or the *lex loci delicti*, governs, leading to the application of State B law.[232] An analytical fiction effectively "localizes" the entire tort in one place, State B, as the place of the harm.[233] Yet in reality, State B law reaches across the border to regulate Jane's conduct in State A. Although more modern choice-of-law analyses tend to abandon the localization fiction[234] they do not abandon the broader conceptualization of this type of analysis as a choice of law among multiple pertinent jurisdictions' laws.[235]

Yet another way to view this scenario is that forum law extends to any element of the multijurisdictional claim occurring outside the forum, constituting an exercise of extraterritorial jurisdiction. Realistically speaking, this is in fact exactly what happens when a forum

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231 *See* Alabama G.S.R. Co. v. Carroll, 11 So. 803, 803–04 (Ala. 1892).

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

233 *See id.*

234 *See* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS §§ 6, 145, 187, 188 (1971).

235 *See id.* For a discussion of additional modern choice-of-law analyses, see Rhoda S. Barish, Comment, Renvoi *and the Modern Approaches to Choice-of-Law*, 30 AM. U. L. REV. 1049, 1051–61 (1981).

chooses its own law to govern conduct or activity outside its borders. This realization has recently gained salience in light of the Supreme Court's trimming back the reach of federal law through devices like the presumption against extraterritoriality discussed above—leading to the somewhat counterintuitive result that state law can boast greater potential extraterritorial reach via flexible choice-of-law methodologies than can federal law, because the latter is now constrained by rigid canons of statutory construction.[236] I will not pretend to resolve this "sharp disparity"[237] between the extraterritorial reach of federal and state law here, but I will highlight what I believe should, and will, serve as important guideposts in future analyses of these invariably increasing types of issues.

To begin with, it is important to appreciate that choice-of-law analysis has always contemplated choosing between U.S. state and foreign law, not simply choosing between the laws of multiple U.S. states (thereby resulting in the application of *some* U.S. law irrespective of what choice the court makes).[238] This is an important initial point because it immediately knocks out any argument that there was or is something qualitatively different about choice-of-law analysis extending U.S. law—i.e., U.S. state law—inside other nations as opposed to inside other U.S. states. Modern approaches may more explicitly invite weighing international considerations,[239] but the analytical enterprise is basically the same whether the involved jurisdictions are multiple U.S. states or U.S. states and foreign nations. The extraterritorial extension of state law into foreign nations is thus not a new phenomenon; it is, and has been, contemplated and fostered throughout the history of choice-of-law jurisprudence.

Two developments are, however, pushing against this phenomenon and urging reconsideration. The first is the increasing interconnectedness of the world: it is almost cliché at this point to talk of rapid globalization of virtually every aspect of life ranging from markets to crime to family relationships. The result is that an ever-increasing

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236 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, 536 (2012) ("Already, it is frequently the case—and as a result of the *Morrison* decision will likely be the case more often in [the] future—that state law applies to such disputes where federal law does not.").

237 *Id.*

238 *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 542 (5th ed. 1857); *see also* Milkovich v. Saari, 203 N.W.2d 408, 417 (Minn. 1973) (selecting Minnesota law over the Ontario guest statute); Babcock v. Jackson, 191 N.E.2d 279, 283–84 (N.Y. 1963) (applying the law of the state with the most significant relationship to the occurrence); Auten v. Auten, 124 N.E.2d 99, 103 (N.Y. 1954) (applying English law because the parties "could [not] have expected or believed that any law other than England's would govern").

239 *See, e.g.*, RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 6(2)(a) (listing "the needs of the . . . international systems" as one consideration in the choice-of-law analysis).

amount of human behavior touches multiple jurisdictions and, therefore, is potentially subject to multiple jurisdictions' laws given the notoriously flexible cadre of choice-of-law methodologies presently available to courts. The second development is what might be thought of as a collapse or merger of traditionally separate spheres of public and private law. Though the public/private distinction was never really as crisp as it sounded,[240] recent developments have arguably eroded it into analytical uselessness for many of the most explosive legal issues currently facing courts and litigants.

Take for example the two most recent extraterritorial jurisdiction cases decided by the Supreme Court: *Morrison*[241] and *Kiobel*.[242] Are these private or public law cases? The litigation postures and styling of the cases suggest they are private law cases: one private party is suing another private party for relief. Yet the laws at issue suggest something different is going on. Certainly in *Morrison* we are not talking about a garden-variety private law claim; rather, at issue was the principal antifraud provision of the federal Securities Exchange Act.[243] *Morrison* thus involved private enforcement of a public regulatory law. Indeed, it was precisely this private enforcement aspect that appeared to cause the problems in the first place. Congress swiftly overruled *Morrison*'s presumption against extraterritoriality when it came to government enforcement of the Act.[244] (As an aside, applying the presumption to government enforcement actions frankly makes no sense anyway; the presumption is designed to prevent only "unintended" discord with foreign nations.[245] If the main political actor in foreign affairs—the executive—wishes to risk foreign relations frictions by pursuing an enforcement action, who are the courts to say no?) The confounding aspect of *Morrison* and similar cases in areas like antitrust and antidiscrimination was not, and could not be, simply the prospect of U.S. law applying to foreign activity—that has been happening forever in choice-of-law cases. Instead it was the *type* of law,

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240 *See generally* William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161, 165–93 (2002) (sketching the development of a "public law taboo" from courts' reluctance to enforce foreign penal or revenue laws).

241 Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010).

242 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

243 *Morrison*, 130 S. Ct. at 2875.

244 After *Morrison*, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which authorizes the SEC to pursue conduct in the United States that harms investors outside the United States. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b)(1), 124 Stat. 1376, 1864 (2010) (codified at 15 U.S.C. § 77v(c)(1)); *see also Morrison*, 130 S. Ct. at 2886 (discussing why letting private plaintiffs take advantage of U.S. procedures creates a "Shangri-La of class action litigation" in U.S. courts).

245 *See* EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991).

specifically, a U.S. regulatory law that looks more public than private, reaching into foreign territory and regulating behavior there.

Kiobel presents these same sorts of issues but with an international law twist. In *Kiobel*, it was not U.S. public law that U.S. courts were purporting to apply but international public law. Hence the arguments in the briefs and lower court opinions that necessarily drew from, analogized to, and relied on international criminal law—a paradigmatically public law.[246] Again, there was and is nothing exceptional about U.S. courts applying U.S. law to foreign activity as a matter of private international law. It should also be said that there is nothing exceptional about U.S. courts applying foreign law to foreign activity—even activity that has no connection to the United States, such as in the "foreign cubed" situations presented by *Morrison* and *Kiobel*.[247] Rather, like *Morrison*, the confounding aspect of *Kiobel* was using public law as the conduct-regulating rule and enforcing that rule via private enforcement mechanism. Unlike *Morrison*, the public law in *Kiobel* came from public international law and the private enforcement mechanism came from the common law cause of action authorized by the ATS. Yet in both cases it was the combination of a public conduct-regulating rule paired with a private enforcement mechanism that caused conceptual conniptions.

So how do we resolve this counterintuitive disparity between the scopes of state versus federal extraterritoriality? Katherine Florey has perceptively explored the issue and concluded that choice-of-law analysis involving foreign jurisdictions should more directly incorporate international considerations like a domestic effects test and comity.[248] And Jeffrey Meyer has elegantly suggested that a presumption against extraterritoriality simply should not apply to the common law because of the common law's qualitative differences from legislatively enacted statutes.[249] Florey's sensible conclusions are to some degree already captured by modern choice-of-law tests[250] and may serve as an invitation to judges to seize upon those international considerations going forward in choice-of-law cases involving foreign elements. Meyer's suggestion relies largely on the fact that the presumption against ex-

246 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 132–37 (2d Cir. 2010) (discussing international criminal tribunals), *aff'd*, 133 S. Ct. 1659 (2013).

247 *See* Brief on Reargument of Amici Curiae: Law of Nations Scholars Supporting Neither Party at 33, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491).

248 *See* Florey, *supra* note 236, at 574–75; *see also* Katherine Florey, Bridging the Divide: The Case for Harmonizing State and Federal Extraterritoriality Principles After *Morrison* and *Kiobel* 106 (U.C. Davis Legal Stud. Research Paper Series, Research Paper No. 367, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2339300.

249 Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 GEO. L.J. 301, 304 (2013).

250 *See* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS §§ 6, 145, 187, 188 (1971).

traterritoriality is a canon of statutory construction and, as such, does not apply to the common law.[251]

Yet while it is surely true that the presumption against extraterritoriality is a canon of construction addressed to legislative intent, it is important to understand why there is a presumption in the first place. It did not originate in a vacuum. Rather, it developed because courts were worried about judicial interference with foreign affairs through courts extending U.S. laws extraterritorially in a way that legislatures did not intend.[252] If that is right, and it is, then courts are on even shakier ground extending the common law extraterritorially than they are extending statutes silent on geographic scope. At least in the latter scenario a court has some democratically enacted text from the political branches whose plain meaning encompasses the foreign activity in question; in the former scenario, we are just talking about a judge-made decision to extend a judge-made law in a way that may interfere with the political branches' preferences. In this light, extraterritoriality of the common law looks even more suspect than extraterritoriality of statutory law from a separation of powers standpoint.

In my view, one helpful way to understand the current divergent treatment of state and federal extraterritoriality is to identify the type of law at issue in the suit as either more private looking or more public looking within our jurisprudential traditions. This is not to say either that there is a clean analytical line between private and public or that that line is normatively desirable, but rather that, historically speaking, some types of suits were generally considered private law suits—say, suits involving common law torts and contracts,[253] while other types of suits were generally considered public law suits—say, suits involving penal laws or government regulatory enforcement actions.[254] Application of the former involves a degree of judicial discretion in that courts choose among multiple potentially applicable laws, while application of the latter is more mandatory in that if forum law is one of the potentially applicable laws, it must apply or the case is dismissed. This distinction can help reconcile the disparity between state and federal extraterritoriality in the following way: If a suit principally involves a rule traditionally associated with private law, the extraterritoriality issue is analyzed using choice-of-law principles. If, on

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251 *See* Meyer, *supra* note 249, at 304.

252 Colangelo, *A Unified Approach*, s*upra* note 64, at 1058–61.

253 Levy v. Daniels' U-Drive Auto Renting Co., 143 A. 163, 164 (Conn. 1928) (discussing choice of law for claims arising in contract and tort); Alabama G.S.R. Co. v. Carroll, 11 So. 803, 809 (Ala. 1892) (holding that the applicable law in tort is that of the place of the injury); Milliken v. Pratt, 125 Mass. 374, 375 (Mass. 1878) ("The general rule is that the validity of a contract is to be determined by the law of the state in which it is made . . . .").

254 *See* The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825) ("The Courts of no country execute the penal laws of another . . . .").

the other hand, the suit principally involves a rule traditionally associated with public law—even if the law currently supplies a private right of action—the extraterritoriality issue is analyzed using canons of construction like the presumption against extraterritoriality and the *Charming Betsy* canon geared directly toward reducing foreign relations frictions.

This view is not intended to resolve all disparities between state and federal extraterritoriality or even to endorse them. Personally I would prefer to see the two approaches converge so as to add broader coherence to the law. But that seems unlikely for the foreseeable future. For the time being, I therefore limit myself to trying to provide a rationale for why the law developed the way it did and what I hope is a manageable mechanism for courts and lawyers, consistent with that intellectual history, to evaluate extraterritorial common law jurisdiction without radically breaking from either entrenched choice-of-law or statutory construction traditions.

Conclusion

The proliferating phenomenon of extraterritorial jurisdiction across diverse fields has thus far resisted transsubstantive and systematic analysis. Yet the legal and practical stakes of resolving a mounting array of extraterritorial jurisdiction issues have never been higher. This Essay has sought to approach extraterritoriality as a fundamentally singular phenomenon with myriad doctrinal manifestations instead of a scattershot smattering of discrete legal issues in isolated areas. My principal aim in doing so is to help legal thinkers and decisionmakers not only to resolve extraterritoriality issues but also to comprehend how their resolutions fit within a larger jurisprudence on increasingly important questions of when and how the United States may exercise legal power beyond U.S. borders.