

EXTRATERRITORIALITY AND CONFLICT OF LAWS

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ABSTRACT

This Article views the modern federal presumption against the extraterritoriality of U.S. law through the lens of conflict of laws. It argues that the presumption makes many of the same mistakes that conflict methodologies have already made, and sometimes the mistakes are worse. It then proposes a way to harmonize federal extraterritoriality and state choice of law to identify a superior approach to both.

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I. INTRODUCTION

Extraterritorial jurisdiction and conflict of laws represent two distinct paradigms for dealing with the same fundamental phenomenon: how to decide which law governs a multijurisdictional event or transaction. While the law of extraterritorial jurisdiction governs the application of federal law, state conflict of laws rules govern the application of state law. These are two different methodologies. As to federal law, the Supreme Court has strongly reinvigorated the so-called “presumption against extraterritoriality,” which requires a clear indication from Congress for U.S. law to apply abroad so as to avoid judicial interference in foreign affairs.¹ As to conflict of laws analysis, courts are tasked with choosing among multiple laws to govern a multijurisdictional dispute, one of which may be U.S. law.² This may lead to seemingly bizarre and perhaps perverse results. State choice of law rules allow courts wide discretion to choose the applicable law to foreign events or transactions, and some of these rules permit courts to apply U.S. law despite minimal U.S. contacts – a methodology that appears far more flexible and expansive than the federal presumption against extraterritoriality, and with far more extravagant reach.³ This leads to the paradox that state law may have broader reach abroad than federal law;⁴ yet the federal government, not the states, is supposed

¹ See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013).

² See generally SYMEON C. SYMEONIDES & WENDY COLLINS PERDUE, *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL* 701-77 (4th ed. 2019) (discussing choice between U.S. federal law and foreign law and U.S. state law and foreign law).

³ See *Babcock v. Jackson*, 191 N.E.2d 279, 284-85 (N.Y. 1963) (applying New York law to a tort in Canada).

⁴ See 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 future – that state law applies to such disputes where federal law does not.”). Conversely, there is also the phenomenon of parochial state presumptions against extraterritorialities, further muddying the waters. As William Dodge has observed:

[S]tates do not need presumptions against extraterritoriality because every state has conflicts rules to determine questions of priority when a case falls within the laws of more than one jurisdiction. State presumptions can also create confusion about how they fit with other conflicts rules and create inconsistency among state statutes and with state common law. Finally, . . . state presumptions are not necessary to avoid conflict with foreign law in international cases.

to be in charge of foreign affairs.⁵ To put it mildly, the law of extraterritoriality is a mess.

I intend to clean it up. To begin, I want to take the Supreme Court's most recent jurisprudence on the presumption against extraterritoriality and view it through the lens of conflict of laws to show how the presumption actually mirrors features of conflicts doctrine in some respects, giving courts broader discretion than the presumption may first appear to endow. Indeed, it displays features of both the traditional Restatement (First) of Conflict of Laws and more modern approaches like Brainerd Currie's governmental interest analysis (an approach the Restatement (Third) of Conflict of Laws looks like it may adopt). My thesis is that when viewed through the lenses of these conflict methodologies, the Court gets the law of extraterritoriality wrong. It is wrong because it fails to take into account the interests of other nations and the international system. This is a key insight because the presumption grew precisely out of the perceived need to avoid international friction sparked by courts unilaterally projecting U.S. law abroad. Yet that's just what the presumption now surreptitiously authorizes. In the decade since it has been reinvigorated, it has shown itself to be a dangerous anachronism. Conflict of laws has a lot to teach federal extraterritoriality.

I want to propose that both state and federal extraterritoriality embrace the same test—one that actually appears in both the Restatement (Second) of Conflict of Laws and the Restatement (Third) of Foreign Relations Law. At the federal level, it is a test captured by another canon of statutory construction called the *Charming Betsy* canon, and it expressly takes into consideration the interests of other states and the international system. Finally, it adds predictability for multistate actors as to what law will apply to their conduct, making them more comfortable engaging in behavior deemed beneficent to overall social welfare and upholding the rule of law.

In *Morrison v. National Australia Bank Ltd.*,⁶ Justice Scalia laid out a two-step framework for gauging the extraterritorial reach of

William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1389 (2020).

⁵ See Florey, *supra* note 4, at 538 (arguing federal law "fosters greater uniformity and predictability" and that Congress seems better equipped to handle complaints from other countries).

⁶ *Morrison v. Nat'l Austl. Bank, Ltd.*, 561 U.S. 247 (2010).

statutes: (1) does the statute clearly indicate extraterritoriality; and (2) if not, is the “focus” of the statute domestic rather than foreign, rendering application of U.S. law domestic and thereby avoiding the presumption altogether.⁷ Whether inadvertently or not, *Morrison* returned the extraterritorial jurisdiction question back to the First Restatement of Conflict of Laws, which “localized” a multijurisdictional event or transaction to one element of that event or transaction, transforming through legal fiction the entire multijurisdictional event to the place of the localization.⁸ Thus imagine a tort spanning State A and State B. The negligence occurs in State A, but the ultimate injury occurs in State B. Under the First Restatement’s localization rule, or *lex loci delicti* (the law of the place of the injury), the place of the entire tort would be State B.⁹ In other words, the entire multijurisdictional tort is localized to one state and, fictionally, there is no extraterritorial application of State B law into State A where the negligence occurred—even though, in reality, of course State B law would be regulating the negligence that occurred in State A. This fictional framework was constructed to preserve the sovereignty of states by selecting one element, localizing, and stipulating that everything happened in that state’s sovereign territory. *Morrison*’s “focus” step makes many of the same moves. It selects the “focus” of the statute as its localization rule and, if the “focus” of the statute is the domestic element of the cause of action, applies U.S. law as the law governing the entire multijurisdictional event as if it were a purely domestic application of the law.¹⁰ But of course, like with the Restatement, it is not. Imagine securities fraud is perpetrated in Australia but the resultant sale occurs in the United States. *Morrison* would localize the multijurisdictional transaction to U.S. territory because the “focus” of the Exchange Act—the sale—is domestic.¹¹ Like the fiction of the First Restatement, it would pretend to be a purely domestic application of the law even though it clearly regulates the foreign fraud. Or to take a real-life example, in the Supreme Court’s recent case, *WesternGeco LLC v. ION*

⁷ *Id.* at 255.

⁸ *See, e.g.,* Ala. Great S. R.R. v. Carroll, 11 So. 803 (Ala. 1892) (explaining and describing *lex loci delicti*).

⁹ RESTATEMENT (FIRST) OF THE CONFLICT OF LAWS § 377 (AM. L. INST. 1934); *see, e.g.,* Carroll, 11 So. at 806 (agreeing with the position that the location of the injury is where a cause of action arises).

¹⁰ *Morrison*, 561 U.S. at 266.

¹¹ *See id.* at 266-67.

Geophysical Corp., the Court found that supplying materials from the United States constituted the “focus” of the Patent Act and applied the Act as a purely domestic application of U.S. law even though the ultimate injurious conduct and injury occurred abroad.¹² Completely absent from the Court’s analysis was the interest of the state or states where the harm actually occurred.

At this point an important distinction must be made. The First Restatement is a set of *a priori* rules agreed upon by states that adhered to it; that is, it created a *system* of conflict of laws. Thus other states could not complain about the real-life extraterritorial application of foreign law inside their borders because they had agreed *ex ante* to the fictionalization of the Restatement’s localization rules. Consequently, in our hypothetical above, State A could not complain that State B’s tort law was extending into State A territory to regulate conduct there because State A already would have agreed upon the *lex loci delicti* localization rule. Obviously, this was designed to cut down on interstate friction.

The same cannot be said of the Supreme Court’s “focus” test. Once the Court finds a U.S. “focus” is satisfied, it simply applies U.S. law irrespective of the views of the other states involved in the multijurisdictional dispute. Hence, even though it resembles the Restatement’s localization fiction, *Morrison’s* test leaves out the part that respects other states’ sovereignties and has the consequent potential to create more international friction by employing unilateral rules to fictionalize the location of multijurisdictional disputes and apply U.S. law to conduct abroad—without ever acknowledging it!

Things become even more interesting when *Morrison’s* test is compared with the more modern governmental interest analysis of conflict of laws. And here, an in-depth look at lower court jurisprudence reveals why. Courts are all over the place as to the foci of various statutes.¹³ Yet they all have one thing in common: if the “focus” is domestic, U.S. law applies irrespective of the interests of foreign nations. This looks very much like Brainerd Currie’s interest analysis whereby courts look at the law of the forum, or *lex fori*, and discern whether it has an interest in regulating the

¹² *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2137-38 (2018).

¹³ *See, e.g., Bascuñán v. Elsaca*, 927 F.3d 108, 121 (2d Cir. 2019) (“The courts in this circuit are not of one mind on the focus of [the mail and wire fraud] statutes.”).

multijurisdictional dispute.¹⁴ If the forum does have an interest, forum law applies irrespective of the interests of foreign states—even if those states have a stronger interest in having their laws applied.¹⁵ The “focus” test similarly looks to the law of the United States by discerning the “focus” of its laws, and if the “focus” is domestic, it applies U.S. law irrespective of the interests of foreign states—even if those states have a stronger interest in having their laws applied.¹⁶ Currie’s analysis generated severe criticism for marginalizing other states’ interests and creating interstate friction,¹⁷ discarding party rights,¹⁸ and simply calculating state interests wrongly given the qualitatively different nature of multistate disputes;¹⁹ *Morrison*’s “focus” analysis does all the same things.

But how do we tell whether the *lex fori* has an interest? Here again the similarities are striking. Currie instructed courts to use the ordinary means of statutory construction.²⁰ Justice Scalia did the same thing. *Morrison* purports to limit the statutory inquiry to a textual and contextual exegesis; but not even *Morrison* itself was able to honestly follow that directive: there is no provision in the statute *Morrison* analyzed—the Exchange Act—which says “X is the focus of the statute.” Thus the opinion fell back on statutory purpose; namely, preventing fraudulent sales or transactions.²¹ In attempting to follow *Morrison*, lower courts are in disarray in finding the “focus” of statutes²² and, despite *Morrison*’s instructions, look to the purpose of various statutes where the text gives no clear answer. Crucially, the “focus” test is a thoroughgoing judicial exercise of

¹⁴ Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 177-78 (1959), reprinted in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 177, 183-84 (1963). Subsequent citations are to the book.

¹⁵ See *id.*

¹⁶ Anthony J. Colangelo, *An International Approach to Maritime Conflict of Laws*, 6 ARIZ. L. REV. 1072, 1094 (2020).

¹⁷ See Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301, 1305 (1989) (finding the forum law presumption in Currie’s analysis unnecessary).

¹⁸ Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2477 (1999).

¹⁹ *Id.*; Alfred Hill, *Governmental Interest and the Conflict of Laws – A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 485 n.108 (1960).

²⁰ See CURRIE, *supra* note 14, at 183-84.

²¹ *Morrison v. Nat’l Austl. Bank, Ltd.*, 561 U.S. 247, 267 (2010) (“Those purchase-and-sale transactions are the objects of the statute’s solicitude.”).

²² See *infra* note 136.

statutory construction. Again, Currie similarly instructed courts to use ordinary means of statutory construction to reveal the interest of a statute.

All in all, the “focus” test perverts the First Restatement’s localization approach to authorize extravagant assertions of jurisdiction and borrows the worst part of Currie’s interest analysis to authorize the extension of U.S. law abroad without ever looking to the interests of other states in the international system.

Moreover, *Morrison’s* methodology gravely contradicts the original purpose of the presumption against extraterritoriality. The presumption grew out of another canon of statutory construction called the *Charming Betsy* canon, which holds that courts are to interpret statutes in line with international law.²³ Because at the time *Charming Betsy* was born, international law rules of jurisdiction were strictly territorial,²⁴ a presumption against extraterritoriality made sense. But now that international law allows for extraterritoriality and even requires it in some circumstances,²⁵ the presumption contradicts its own roots. When one examines the origins of both canons—avoiding international friction—*Charming Betsy* clearly comes out the winner. That is, both canons permit extraterritoriality, but only one—*Charming Betsy*—stays true to the fundamental purpose of avoiding international friction by incorporating the interests of other states through modern international law.

Thus, just as *Morrison’s* analysis echoes some of the worst parts of conflict of laws analysis when it comes to avoiding international friction, *Charming Betsy’s* international law analysis echoes some of the best. In line with *Charming Betsy*, the Restatement (Third) of Foreign Relations Law is sensitive to foreign interests courts should consider in resolving whether to apply U.S. law abroad consistent with international law. What’s more, it turns out that this provision of the Restatement (Third) of Foreign Relations Law was actually modeled after the Restatement (Second) of Conflict of Laws.²⁶ Both explicitly take into account the needs of the interstate system and the

²³ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

²⁴ Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1058 (2011).

²⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 129 (2013) (Breyer, J., concurring).

²⁶ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 403 rep. n.10 (AM. L. INST. 1987).

interests of other states connected to the dispute.²⁷ Moreover, and of critical importance, this multilateral test also adds predictability to the law – a feature crucial to the Rule of Law. The First Restatement was riddled with randomly applied “escape mechanisms” which allowed courts to circumvent the law prescribed by the Restatement’s localization rule.²⁸ And Currie’s forum favoritism functionally gives only one party – typically the party bringing suit – control over where suit is brought and thus which *lex fori* will apply. A multilateral test that forthrightly considers the interests of other states and the parties to the dispute promises to create an honestly-analyzed body of precedent that, combined with *stare decisis*, will allow parties to better predict the law that will apply to them at the time they act.

In turn, my project proposes disposing of *Morrison*’s presumption which continues to baffle lower courts and promotes the unilateral extension of U.S. law abroad, sparking international friction. A conflict of laws analysis shows that *Morrison* has already outlived itself as a dangerous anachronism. I propose that both federal extraterritoriality and conflict of laws adopt methodologies that promote respect for foreign nations and the smooth working of the international system. *Charming Betsy*’s international law analysis, the Second Restatement of Conflict of Laws, and the Third and Fourth Restatements of Foreign Relations Law do just that and, indeed, are actually modeled after one another.²⁹ This approach would not only stay true to the goal of avoiding international friction, but it also would bring into harmony the law of extraterritoriality governing both state and federal extensions of U.S. law abroad. Finally, as will be seen, it would promote the rule of law by enabling parties to multijurisdictional transactions to better predict what law governs their primary conduct, making them more comfortable with engaging in activity generally considered beneficent to overall social welfare like international commerce, travel, and communication.

²⁷ *Id.* § 403; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(a) (AM. L. INST. 1971).

²⁸ SYMEONIDES & PERDUE, *supra* note 2, at 53.

²⁹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 114 rep. n.1, § 403 rep. n.10 (AM. L. INST. 1987).

II. CONFLICT OF LAWS

Before jumping into a comparison between conflict of laws and extraterritoriality, it will be helpful to trace the development of each field and extract some common themes.

a. Comity

A, or perhaps *the*, dominant theme at the genesis of the modern nation state was territorial sovereignty: each state enjoyed absolute power over persons and things within its borders and thus no state could extend its laws into the territory of another.³⁰ This model of rigidly drawn lines on a map created problems for transnational commerce and trade that touched multiple states, giving rise to multiple state interests in applying their laws.³¹ For in the absence of some other concept that could reconcile strict territoriality with overlapping laws, such cases simply meant that no law could fully apply.

Our story begins in the Netherlands with the Dutch scholar Ulrich Huber. Huber famously set forth three axioms. The first two replicated the dominant territoriality of the times, and the third provided an antidote for multijurisdictional cases:

- (1) The laws of each state have force within the state's territory but not beyond.
- (2) These laws bind all those who are found within the territory, whether permanently or temporarily.

³⁰ See J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 162 (Sir Humphrey Waldock ed., 6th ed. 1963); see also VAUGHAN LOWE, *INTERNATIONAL LAW* 138-44 (2007) ("Sovereignty in the relations between States signifies independence[,] . . . [which] is the right to exercise therein, to the exclusion of any other State, the functions of a State.").

³¹ See Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 22 (2010) (quoting Huber and his use of comity as the "mediating principle of law to prevent international discord and encourage commerce" among territorial sovereignties); see also William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2085-86, 2095-96 (2015) (referring to Huber's three maxims and noting the initial private rationale for comity for "commercial convenience").

(3) *Out of comity*, foreign laws may be applied so that rights acquired under them can retain their force, provided they do not prejudice the state's powers or rights.³²

The genius of the third axiom was that it countenanced the possibility of foreign law being applied but left it to the state into whose territory the law was projected whether to apply it. In this way, Huber was able to reconcile the application of foreign law inside a state's territory and preserve that state's absolute sovereignty by leaving the application of the foreign law to the state's discretion. But while Huber's extraordinarily influential³³ comity concept resolved the vexing question of *how* states apply foreign law, it left open the equally vexing question of *when*?

Stateside, Huber's axioms had a profound influence, especially on Joseph Story, "the intellectual father of American conflicts law."³⁴ In his *Commentaries on the Conflict of Laws*, Story essentially borrowed from Huber, with some elaboration:

[1.] [E]very nation possesses an exclusive sovereignty and jurisdiction within its territory . . . [and its laws] affect, and bind directly all property, whether real or personal, within its territory and all persons, who are residents within it, . . . and also all contracts made, and acts done within it.

[2.] [N]o state or nation can, by its laws, directly affect, or bind property out of its own territory, or bind persons not resident therein

[3.] [W]hatever force and obligation the laws of one country have in another, depend solely upon the laws, and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent. A state may prohibit the operation of all [or of some] foreign laws, and the rights growing out of them, within its own territories When [its law is] silent, then, and then only, can the question properly arise, what law is to govern in the absence of a clear declaration of the sovereign will

[4.] The real difficulty is to ascertain, what principles in point of public convenience ought to regulate the conduct of

³² SYMEONIDES & PERDUE, *supra* note 2, at 13 (emphasis added).

³³ *Id.* at 13 n.17.

³⁴ *Id.* at 16.

nations on this subject in regard to each other [T]he phrase 'comity of nations' . . . is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter; and is inadmissible, when it is contrary to its known policy, or prejudicial to its interests.³⁵

While borrowing largely from Huber, Story put a finer point on exactly where comity comes from. He could not have been clearer: "it is not the comity of the courts but the comity of the nation which is administered and ascertained."³⁶ Writing years later, Justice Cardozo took the same view when confronted with the public policy exception to the traditional approach to conflict of laws.³⁷ In *Loucks v. Standard Oil Co.*, the New York decedent had been killed in a road accident in Massachusetts.³⁸ The administrators of the decedent's estate brought suit in New York and the defendants objected on the grounds that the Massachusetts tort statute violated New York public policy and therefore could not be enforced in New York.³⁹ Cardozo toured a hodgepodge of different approaches from different jurisdictions before substantially curtailing the public policy exception as erroneously bestowing too much discretion to courts. Along the way, he made clear that comity was the comity of the sovereign, not the comity of the courts:

³⁵ *Id.* at 16-17 (emphasis added) (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19, 21, 24-25, 37 (1834)).

³⁶ JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS § 38 (8th ed. 1883). As William Dodge explains, "[i]n England and America, this [comity] discretion was exercised in the first instance by courts but subject always to legislative control. This comity, Story emphasized, was 'not the comity of courts, but the comity of the nation.'" Dodge, *supra* note 31, at 2088.

³⁷ As William Dodge points out, this exception where one state will refuse to enforce foreign law in its courts because that law violates the forum's public policy "is a direct descendant of Huber's third maxim that a government should enforce foreign laws 'so far as they do not cause prejudice to the power or rights of such government or of its subjects.'" Dodge, *supra* note 31, at 2101 (quoting Ulrich Huber, *De Conflictu Legum Diversarum in Diversis Imperiis*, in *PRAELECTIONES JURIS ROMANI ET HODIERNI* § 2 (1689)).

³⁸ *Loucks v. Standard Oil Co.*, 120 N.E. 198, 198 (N.Y. 1918).

³⁹ *See id.*

The misleading word “comity” has been responsible for much of the trouble. It has been fertile in suggesting a discretion unregulated by general principles. The sovereign in its discretion may refuse its aid to the foreign right. From this it has been an easy step to the conclusion that a like freedom of choice has been confided to the courts. But that, of course, is a false view. The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness.⁴⁰

Indeed, “there is nothing in the Massachusetts statute that outrages the public policy of New York. We have a statute which gives a civil remedy where death is caused in our own state. We have thought it so important that we have now embedded it in the Constitution.”⁴¹ Thus, comity resided at the level of the sovereign and courts were merely its enforcers.⁴² The upshot of this power allocation was that in looking for violations of public policy, it was not unusual for courts to consult the forum’s laws and constitutions.⁴³ Thus if Huber tells us *how* states enforce foreign law, Story and Cardozo tell us *who* authorizes the enforcement of foreign law. What still remains is the question of *when*. That question

⁴⁰ *Id.* at 201-02. A brief but necessary word on the Supreme Court’s definitional intervention regarding comity. In *Hilton v. Guyot*, the Court announced:

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1894). As Donald Earl Childress III has explained, this definition was a sharp break from Story. “Comity became in *Hilton* a ‘doctrine of judicial deference’ as well as a ‘doctrine of deference to foreign states,’ as opposed to a doctrine designed to ameliorate sovereign conflict through attention to the precise sovereign interests at stake in the case at bar.” Childress III, *supra* note 31, at 34. Childress further explains that this redefinition “roughly coincides with a larger move in conflicts jurisprudence away from Story’s comity theory.” *Id.* at 35. To be sure, “while comity charted a path of deference in U.S. case law that has continued unabated, it was discarded as the central premise in American conflicts theory.” *Id.* at 44.

⁴¹ *Loucks*, 120 N.E. at 202.

⁴² See Dodge, *supra* note 31, at 2088 (“In England and America, this [comity] discretion was exercised in the first instance by courts but subject always to legislative control. This comity, Story emphasized, was ‘not the comity of the courts, but the comity of the nation.’”).

⁴³ *Kilberg v. Ne. Airlines, Inc.*, 172 N.E.2d 526, 527 (N.Y. 1961).

occupied Joseph Beale in his crafting of the First Restatement of Conflict of Laws, to which we now turn.

b. The First Restatement

As principal draftsman of the First Restatement of Conflict of Laws and a devoted formalist, Joseph Beale sought to construct an entire system of choice of law that explained not only how states enforced other states' laws, but when. The First Restatement or "traditional approach" to conflict of laws was built upon three main pillars: strict territoriality, "localization," and vested rights. Gone were the days in which one state allowed the operation of another state's laws within the former's territory as the traditional approach replaced comity as the leading approach to choice of law in the United States at the beginning of the last century.⁴⁴ The First Restatement held territorial sovereignty as absolute, not subject to exception. According to Beale, "[comity's] error . . . lies in the supposition that the courts are accepting the doctrines of Conflict of Laws by comity rather than the legislative power of the state."⁴⁵ There was simply no choice among sovereigns because there could be no such thing as the exercise of one sovereign's laws inside the territory of another. But Beale needed some mechanism to explain the obvious existence of the field of conflict of laws. Here he hit upon the fiction of localization and the notion of vested rights.

To begin, Beale devised a series of "localization" rules that essentially took one element of a multijurisdictional transaction and "localized" the entire transaction to where that element occurred. Thus in torts, the localization rule in a multijurisdictional tort was where the injury occurred, or the *lex loci delicti*.⁴⁶ Or in contracts, it

⁴⁴ See Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1129 n.10 (2010).

⁴⁵ See JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 6.1 (1935); see also Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 307 (1953) (noting that the "comity of nations" concept was sanctioned by American and English courts in the early eighteenth and nineteenth centuries).

⁴⁶ See *Ex parte* U.S. Bank Ass'n, 148 So.3d 1060, 1069 (Ala. 2014) ("Under [the *lex loci delicti*] principle, an Alabama court will determine the substantive rights of an injured party according to the law of the state where the injury occurred.").

was where the contract was made, or the *lex loci contractus*.⁴⁷ This was the only law that could apply. Thus, take a tort suit where the negligence occurred in State *A*, but the injury occurred in State *B*. The Restatement's localization rule for torts would say the entire tort occurred in State *B*—where the injury was felt—and thus only State *B* law could apply. These were precisely the facts of the famous case *Alabama Great Southern Railroad Co. v. Carroll*.⁴⁸ A brakeman working for the Alabama Great Southern Railroad was injured in Mississippi—which had a fellow servant rule—due to negligence in Alabama, which did not.⁴⁹ The brakeman was from Alabama, as was the defendant railroad.⁵⁰ Moreover, the contract of employment was entered into in Alabama.⁵¹ And again, the negligence producing the injury occurred in Alabama.⁵² But because the injury occurred across the line in Mississippi, Mississippi law governed.⁵³

But the brakeman brought suit in Alabama.⁵⁴ Under Beale's theory as we have articulated it so far, only Alabama law could apply in Alabama courts, leaving the court with only two options: apply the law of the forum (contrary to the *lex loci delicti*) or dismiss the case. Beale's solution to this choice of law dilemma was the concept of vested rights. Here, simply reverse the laws in *Carroll* such that the plaintiff had a right of action under Mississippi law but not under Alabama law. The First Restatement would say that the right "vested" under Mississippi law, and Alabama courts simply enforced that right. And here's the key: in doing so, the Alabama courts were emphatically *not* applying Mississippi law. Rather, they were enforcing or recognizing a *fact*—the right—in their courts. Beale put it this way in his treatise, published one year after the Restatement:

The law annexes to the event a certain consequence, namely, the creation of a legal right When a right has been

⁴⁷ *Levy v. Daniels U-Drive Auto Renting Co.*, 143 A. 163, 164 (Conn. 1928) ("A liability arising out of a contract depends upon the law of the place of contract").

⁴⁸ *Ala. Great S. R.R. v. Carroll*, 11 So. 803, 803 (Ala. 1892).

⁴⁹ *Id.* at 805.

⁵⁰ *Id.* at 803.

⁵¹ *Id.* at 804.

⁵² *See id.*

⁵³ *See id.* at 804, 809.

⁵⁴ *See id.* at 803.

created by law, this right itself becomes a fact [T]he existing right should everywhere be recognized; since to do so is merely to recognize the existence of a fact.⁵⁵

Or in Cardozo's characteristically elegant prose:

"A foreign statute is not law in this state, but it gives rise to an obligation, which, if transitory, 'follows the person and may be enforced wherever the person may be found.'"⁵⁶ This move kept strict territoriality perfectly intact: "No law can exist as such except the law of the land; but . . . it is a principle of every civilized law that vested rights shall be protected. The plaintiff owns something, and we help him to get it."⁵⁷

The supposed advantages of this approach can be grouped into three main concepts: uniformity, predictability, and neutrality. Because the right could vest under the laws of only one state, that right had to be enforced the same way everywhere. Forum shopping was theoretically eliminated. Next, because only one law could create the right, and the right was territorially defined, legal actors could predict what law (or to be more accurate, what vested right) would apply to them no matter where they brought suit. Finally, unlike with fuzzy notions of comity, courts had little⁵⁸ to no discretion but to enforce the right—recall Cardozo: "it is a principle of every civilized law that vested rights shall be protected."⁵⁹ In short, Beale set out to create an entire system that preserved the seemingly irreconcilable goals of strict territoriality and the field of conflict of laws.

But in so doing, he had to manufacture some serious legal fictions, centering mainly on his localization rules. Recall that the law of the place of the injury in a tort suit, or *lex loci delicti*, determined the applicable law. Now let's return to our hypothetical in which the negligence occurred in State A but the injury occurred in State B. Beale would say that State B law governed the entire

⁵⁵ Brilmayer & Anglin, *supra* note 44, at 1130.

⁵⁶ *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201 (N.Y. 1918).

⁵⁷ *Id.* (internal citations and quotations omitted).

⁵⁸ This little discretion would be the so-called "public policy exception" discussed earlier, where the foreign law violates some fundamental policy of the forum.

⁵⁹ *Loucks*, 120 N.E. at 201.

multijurisdictional dispute to create the cause of action, thereby preserving territorial sovereignty. But of course, that was not true. The negligence—a necessary element of the tort—occurred in State A. So what we have, in reality, is State B law reaching into State A to govern conduct inside State A territory. This *extraterritorial* jurisdiction was anathema to the entire system Beale had constructed.

Keep this in mind when we get to *Morrison*, for it basically does the same thing by surreptitiously authorizing extraterritorial jurisdiction through localization fictions, contrary to the very doctrine it set out to strengthen: the presumption against extraterritoriality. Keep in mind also that Beale set out to create a *system*, predicated on the consent of states to his localization fictions. Thus, because State A had agreed *ex ante* to the *lex loci delicti*, it could not complain about State B law invading its territorial sovereignty. *Morrison* will do away with this consent component, promising friction and retaliation from other states.

c. Currie's Interest Analysis

Despite Beale's best efforts, the traditional approach began to crack under the weight of a series of so-called "escape devices." These were tools courts could use to evade the localization rule's predetermined law to achieve the result the court wanted. We have seen the public policy exception already.⁶⁰ There were also characterization devices, whereby the court could take one kind of lawsuit and recast it as another type of lawsuit to get a different localization rule. For example, the court might take what looked like a tort suit arising out of a car accident in State A—leading to the *lex loci delicti*—and recharacterize it as a contract suit relating to the rental of the automobile involved in State B—leading to the *lex loci contractus*.⁶¹ Or the court might recast a tort case involving interspousal immunity to a family law issue governed by the law of the parties' domicile.⁶² Similarly, a court could recharacterize a rule as substantive or procedural to achieve the desired result, usually evading foreign law, for procedural rules are always governed by

⁶⁰ See *id.* at 198.

⁶¹ See *Levy v. Daniels U-Drive Auto Renting Co.*, 143 A. 163, 164 (Conn. 1928).

⁶² See *Haumschild v. Cont'l Cas. Co.*, 95 N.W.2d 814, 818 (Wis. 1959).

forum law.⁶³ Or the court could characterize the law as penal in order to apply its own law (a state will only apply its own penal laws).⁶⁴ What's more, parties had no idea ahead of time if and what "escape device" a court might deploy, rendering the law arbitrary and undermining all three touted goals of the traditional approach.

These and other problems—like the absurd results even faithfully applied localization rules produced—led to the so-called "choice of law revolution," which instead centered around state interests.⁶⁵ Interestingly, viewed through a certain lens, interest approaches were *more* predictable than the traditional approach because parties could look to precedent to see whether and how courts found and measured state interests, and accordingly which law came out on top on a similar set of facts.

The principal revolutionary was Brainerd Currie, who heretically announced: "We would be better off without choice-of-law rules."⁶⁶ In good realist fashion, he explained that "the traditional system of conflict of laws counsels the courts to sacrifice the interests of their own states mechanically and heedlessly, without consideration of the policies and interests involved; and there is need to dispel the paralyzing influence of that system."⁶⁷ Indeed, "[t]he rules so evolved have not worked and cannot be made to work."⁶⁸ Currie proposed instead an approach that looked to state interests to determine which law would apply. He divided up cases into three main categories: false conflicts, true conflicts, and unprovided-for cases.⁶⁹ False conflicts were cases in which only one state had an interest in applying its law; true conflicts were cases in which more than one state had an interest in applying its law; and unprovided for cases were cases where no state had an interest in applying its law.⁷⁰

⁶³ See *Kilberg v. Ne. Airlines, Inc.*, 172 N.E.2d 526, 529 (N.Y. 1961).

⁶⁴ See, e.g., *Loucks*, 120 N.E. at 201-02 (analyzing applicability of other state's law that imposes punitive damages).

⁶⁵ See generally SYMEONIDES & PERDUE, *supra* note 2, at 143-48 (introducing early, prominent scholars critiquing the traditional approach of localization).

⁶⁶ CURRIE, *supra* note 14, at 183.

⁶⁷ BRAINERD CURRIE, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, in *ESSAYS ON THE CONFLICT OF LAWS* 188, 278 (1963).

⁶⁸ CURRIE, *supra* note 14, at 180.

⁶⁹ See SYMEONIDES & PERDUE, *supra* note 2, at 158-59.

⁷⁰ *Id.*

As the quoted language above about courts “sacrific[ing] the interests of their own states” suggests, undergirding this entire approach was a strong preference for the law of the forum, or the *lex fori*.⁷¹ And animating this preference for the *lex fori* was the separation of powers tenet that it simply was not the role of the court to choose foreign law if the forum had any interest in applying its own law – even if the forum’s interest was smaller than the foreign interest.⁷² In Currie’s words, “assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy.”⁷³ The root problem of the traditional approach was that it inadvertently “nullif[ied] state interests,”⁷⁴ and in particular the interests of the sovereign forum of which the court was an extension; for “when the court, in a true conflict situation, holds the foreign law applicable, it is assuming a great deal: it is holding the policy, or interest, of its own state inferior and preferring the policy or interest for the foreign state.”⁷⁵ This courts could not do. A court refusing to apply its home state’s law where its home state has an interest in having its law apply is a blatant disregard of the separation of powers.

But how do we tell whether the forum has an interest? Currie’s reply: “This process is essentially the familiar one of construction or

⁷¹ See *Pritchard v. Norton*, 106 U.S. 124, 129-30 (1882) (discussing the function of *lex fori* in effecting a foreign law).

⁷² See *Foster v. Legget*, 484 S.W.2d 827, 829 (Ky. Ct. App. 1972) (explaining that “if there are significant contacts—not necessarily the most significant contacts—with Kentucky, the Kentucky law should be applied”); *Kennedy v. Ziesmann* 522 F. Supp 730, 731 (E.D. Ky. 1981) (“When the court has jurisdiction of the parties its primary responsibility is to follow its own substantive law.”) (quoting *Foster*, 484 S.W.2d at 829 n.69); *Arnett v. Thompson*, 433 S.W.2d 109, 113 (Ky. Ct. App. 1968) (“[T]he conflicts question should not be determined on the basis of *weighing* of interests, but simply on the basis of whether Kentucky has *enough* contacts to justify applying Kentucky law.”) (emphasis in original); *Mem’l Hall Museum v. Cunningham*, 455 F. Supp. 3d 347, 358 (W.D. Ky. 2020) (“Kentucky courts hold that *any* significant contact with Kentucky is sufficient to allow an application of Kentucky law.”) (internal citations and quotations omitted); *Marsh v. Burrell*, 805 F. Supp. 1493, 1497 (N.D. Cal. 1992) (“[E]ven in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum . . .”) (quoting CURRIE, *supra* note 14, at 183).

⁷³ CURRIE, *supra* note 14, at 182.

⁷⁴ *Id.* at 180.

⁷⁵ *Id.* at 182.

interpretation.”⁷⁶ That is, “the method I advocate is the method of statutory construction, and of interpretation of common-law rules, to determine their applicability.”⁷⁷

Take the case of *Lilienthal v. Kaufman*, which involved an Oregon spendthrift statute.⁷⁸ The defendant was an Oregonian who had been declared a spendthrift under Oregon law.⁷⁹ He executed a contract in California (where the plaintiff was from) for money to engage in a joint venture to sell binoculars; “[t]he money was loaned to defendant in San Francisco, and by the terms of the note, it was to be repaid to plaintiff in San Francisco.”⁸⁰ The Oregon court first determined that under California law, the plaintiff would recover and that both states had an interest in applying their laws,⁸¹ placing the case into the true conflicts category. It then did what Currie advised: defer to the legislature, which was concerned with the spendthrift’s family and Oregon’s public funds.⁸² In the court’s words:

Courts are instruments of state policy. The Oregon Legislature has adopted a policy to avoid possible hardship to an Oregon family of a spendthrift and to avoid possible expenditure of Oregon public funds which might occur if the spendthrift is required to pay his obligations. In litigation Oregon courts are the appropriate instrument to enforce this policy.⁸³

Interestingly, some courts used Currie’s directives to find *no* interest of the forum state, even though superficially there appeared to be one. In *People v. One 1953 Ford Victoria*, a buyer purchased an automobile in Texas from a Texas dealer.⁸⁴ He executed a note for the unpaid balance of the purchase price, giving the dealer a mortgage on the automobile to secure payment.⁸⁵ The dealer in turn

⁷⁶ *Id.* at 183-84.

⁷⁷ BRAINERD CURRIE, *The Verdict of Quiescent Years*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 584, 627 (1963).

⁷⁸ *Lilienthal v. Kaufman*, 395 P.2d 543, 544 (Or. 1964).

⁷⁹ *Id.*

⁸⁰ *Id.* at 545-46.

⁸¹ *Id.* at 545-47.

⁸² *Id.* at 549.

⁸³ *Id.*

⁸⁴ *People v. One 1953 Ford Victoria*, 311 P.2d 480, 480 (Cal. 1957).

⁸⁵ *Id.*

assigned the note and mortgage to a Texas corporation that financed the sales of automobiles.⁸⁶ The buyer then drove the automobile to California, where he used it to transport marijuana.⁸⁷ California had a statute providing that an automobile used to transport narcotics was forfeited to the state, subject to the exception of an innocent mortgagee who conducts “a reasonable investigation of the moral responsibility, character, and reputation of the purchaser.”⁸⁸ Texas had no such law and the mortgagee had conducted no such investigation.⁸⁹ In deciding which law to apply—Texas or California—Justice Traynor did what Currie proposed: he used ordinary methods of statutory construction. In his words:

Not only is section 11620 not made expressly applicable to an innocent mortgagee financing the sale of an automobile in another state for exclusive use there, but the statutory enumeration of relationships between the mortgagor and the state of California in the 1955 amendment to that section (Stats.1955, ch. 1209, § 5), plainly indicates that in requiring a “reasonable investigation” to avoid forfeiture, the Legislature was preoccupied with California mortgagors and mortgagees.⁹⁰

Thus, not only the plain language of the statute, but also the statutory context, helped him draw the spatial reach of the California statute.

The principal takeaways for our purposes are that Currie viewed conflict of laws disputes as essentially separation of powers questions: it simply was not the role of the court to apply a foreign law if the forum had any interest in the application of its own law. The foreign law was completely sidelined. Moreover, in discerning whether the forum had an interest, courts were to use ordinary methods of statutory construction and common law interpretation.

Currie was not without his critics. His forum favoritism was attacked on a number of grounds. First of all, the uncompromising pursuit of forum interests at the expense of foreign states with larger interests in the dispute promised anarchy. In the words of one

⁸⁶ *Id.* at 480-81.

⁸⁷ *Id.* at 481.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 482.

commentator, “Currie’s analysis, which compels him to give to the forum’s law such broad effects, would tend to fasten upon the international and the interstate communities . . . a legal order characterized by chaos and retaliation.”⁹¹ This raises the attendant problem of individual rights, which had no place in Currie’s methodology. As he unapologetically stated, “I can find no place in the conflict-of-laws analysis for a calculus of private interests. By the time the interstate plane is reached the resolution of conflicting private interests has been achieved; it is subsumed in the statement of the laws of the respective states.”⁹²

What is so glaringly absent here are party expectations about what law would apply to their multistate dispute. If we suppose that there are two types of predictability in the law—primary and secondary—Currie ruthlessly sacrifices the former for the latter, creating serious rule of law problems. For in order for law to function, it must be predictable in the sense that it tells legal actors how to behave out in the real world. This is what we might refer to as primary predictability, and the more primary predictability the law has the more legal actors feel free to engage in activity deemed beneficent to overall social welfare like travel, communication, and trade. Secondary predictability, on the other hand, relates only to the predictability of what law will apply once the legal actor is before a certain court. Crucially, under a Currie approach that applies forum law based on only the slightest of interests, at least one actor (usually the defendant) may have had little to no notice of the substantive law being applied to him *at the time he acted*, over time chilling primary behavior good for society overall. The far more predictable law for guiding primary behavior would be that of the state with the most contacts, and the most interest, in the dispute.

Last, some scholars have charged that Currie simply calculated state interests wrong. This criticism centers on a qualitative difference between purely intrastate cases and multistate cases, and observes that “Currie refused to consider a state’s ‘multistate’ interests—namely, interests that, though not reflected directly in a

⁹¹ Arthur Taylor von Mehren, *Book Reviews*, 17 J. LEG. ED. 91, 96-97 (1964) (reviewing CURRIE, *supra* note 14).

⁹² CURRIE, *supra* note 77, at 610.

state's domestic law, stem from the state's membership in a broader community of states."⁹³

To illustrate some of these critiques, and especially the last two, let us return to *Lilienthal v. Kaufman*. Recall that the California plaintiff entered into a contract in California, the money was loaned to the defendant in San Francisco, and by the terms of the note, it was to be repaid to the plaintiff in San Francisco.⁹⁴ Given these contacts, the plaintiff could most reasonably expect California law to govern the transaction. But the Oregon court stretched Oregon's spendthrift statute into California to pull the rug right out from under the California creditor, defeating his reasonable expectations and perhaps chilling his future willingness to engage in commerce with out-of-staters (almost certainly Oregonians). What's more, the court gave an incomplete account of Oregon's interests due to the qualitatively different nature of the multistate dispute. Although it did mention some of this in passing,⁹⁵ the multistate dimension actually favored California law because Oregon had an interest in commercial actors from other states doing business with Oregonians. Put another way, Oregon had an interest in the application of *California* law—an interest that would have been absent in a purely intrastate dispute.

As we will see now, the Supreme Court's most recent jurisprudence on the extraterritorial application of federal law resurrects many of the problems conflict of laws analyses generated, and in some ways the problems are even worse.

III. EXTRATERRITORIALITY

a. Origins

A presumption against the extraterritorial application of U.S. law was born early in the nation's history. As with Huber's and Story's starting points, the root was strict territorial sovereignty. To

⁹³ Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning*, 2015 U. ILL. L. REV. 1847, 1852 (2015).

⁹⁴ See *Lilienthal v. Kaufman*, 395 P.2d 543, 544-49 (Or. 1964).

⁹⁵ See *id.* at 547-49.

borrow Chief Justice Marshall's elegant restatement from *The Schooner Exchange v. McFaddon*:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty

. . . .

. . . [Consequently] [t]his full and absolute territorial jurisdiction being alike the attribute of every sovereign . . . [is] incapable of conferring extra-territorial power⁹⁶

*United States v. Palmer*⁹⁷ is often regarded as the first case to employ the presumption.⁹⁸ At issue was whether section 8 of the first federal criminal statute, enacted in 1790 and outlawing piracy by "any person or persons," reached high-seas robbery committed by foreigners, against foreigners, on a foreign-flag ship.⁹⁹ Looking for clues, Marshall first hit upon the title of the Act, "an act for the punishment of certain crimes against the United States," to glean that Congress's concern was with "offences against the United States, not offences against the human race."¹⁰⁰ From here, he reasoned that the catholicity of the terms "any person or persons" did not "comprehend every human being."¹⁰¹ Instead, the "words must be limited in some degree, and the intent of the legislature will determine the extent of this limitation."¹⁰² This immediately raises the question of whether the legislature *could* extend the law into the territory of a foreign state—for at the time, a ship flying a nation's

⁹⁶ *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–37, *superseded by statute*, Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, *as recognized in* *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1605-06 (2020).

⁹⁷ *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818).

⁹⁸ See Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 511 (1997); see also William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKLEY J. INT'L L. 85, 85 n.2 (1998). But see John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 364 (2010) (distinguishing "extrajurisdictionality" in *Palmer* from extraterritoriality).

⁹⁹ *Palmer*, 16 U.S. (3 Wheat.) at 631.

¹⁰⁰ *Id.*

¹⁰¹ See *id.* at 631-32.

¹⁰² *Id.*

flag was essentially considered a floating piece of that nation's territory¹⁰³ –implying that the legislature did indeed have this power.

But did it use it? Here Marshall made a series of mistakes to conclude that the legislature had not extended U.S. law to the piracy at issue in the case, namely, robbery on the high seas. He noted the statute's other catholic terms: "any captain, or mariner of any ship or other vessel" and "any seaman."¹⁰⁴ And he hypothesized that although the statute prohibited acts of violence against a ship's commander by "any seaman," "it cannot be supposed that the legislature intended to punish a seaman on board a ship sailing under a foreign flag, under the jurisdiction of a foreign government, who should lay violent hands upon his commander, or make a revolt in the ship."¹⁰⁵ For:

[t]hese are offences against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are. Every nation provides for such offences the punishment its own policy may dictate; and no general words of a statute ought to be construed to embrace them when committed by foreigners against a foreign government.¹⁰⁶

Marshall's mistake was that he conflated two types of piracy: piracy by statute and piracy under the law of nations. All of his hypothetical crimes were examples of piracy by statute, which was a creature of municipal law.¹⁰⁷ Robbery on the high seas, on the other hand, was a crime against the law of nations that any state could punish should it lay hands on the perpetrator.¹⁰⁸ This mistake was corrected a year later in an 1819 statute that punished, accordingly, "any person or persons whatsoever" who "shall, on the high seas,

¹⁰³ See *id.* at 632 ("These are offences against the nation under whose flag the vessel sails . . .").

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*; see also *Wilson v. McNamee*, 102 U.S. 572, 574 (1880) ("A vessel at sea is considered as a part of the territory to which it belongs when at home. It carries with it the local legal rights and legal jurisdiction of such locality."); *St. Clair v. United States*, 154 U.S. 134, 152 (1894); *United States v. Smiley*, 27 F. Cas. 1132, 1134 (C.C.N.D. Cal. 1864).

¹⁰⁶ *Palmer*, 16 U.S. (3 Wheat.) at 632-33.

¹⁰⁷ See generally Colangelo, *supra* note 24, at 1047-54 (noting the distinction between unilateral and multilateral sources of legislative authority).

¹⁰⁸ See *id.*

commit the crime of piracy, *as defined by the law of nations.*"¹⁰⁹ By this language, Congress clearly intended to extend U.S. law to robbery on the high seas or piracy against the law of nations.¹¹⁰ Hence, the presumption was overcome. In sum, the Court transformed Huber's first two axioms and Story's first three into a legislative presumption against the extraterritorial application of U.S. law. This superable presumption is in keeping with the relationship between U.S. and international law; Congress can override international law—here the law of territorial sovereignty—if it wants to.¹¹¹

One interesting aspect of *Palmer* and the 1819 statute that corrected it is whether the statute actually authorized the extraterritorial extension of U.S. law at all. Recall that the statute applied to piracy the phrase "as defined by the law of nations."¹¹² The law of nations, or international law, is not territorially circumscribed; it applies everywhere. Moreover, piracy was, and still is, a crime of "universal jurisdiction" that any state can prosecute no matter where it occurs or whom it involves.¹¹³ Thus instead of viewing the 1819 statute as authorizing the projection of U.S. law into the territory of another state, it may be seen as the domestic enforcement mechanism for an international law that covers the globe.

¹⁰⁹ Act of Mar. 3, 1819, Pub. L. No. 15-77, § 5, 3 Stat. 510, 513-14 (1819) (An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy) (emphasis added).

¹¹⁰ See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161, 163 n.8 (1820).

¹¹¹ See *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983) ("[I]n enacting statutes, Congress is not bound by international law. If it chooses to do so, it may legislate with respect to conduct outside the United States, in excess of the limits posed by international law.").

¹¹² Act of Mar. 3, 1819 § 5, 3 Stat. at 513-14.

¹¹³ See *Convention on the High Seas*, art. 19, Apr. 29, 1958, 13 U.S.T. 2312, 2314, 2319-2320, 450 U.N.T.S. 82, 96-98.

b. The Modern Presumption

i. The “Focus” Localization Rule

The history of the presumption against extraterritoriality in U.S. law has been exhaustively and ably described elsewhere.¹¹⁴ Suffice it to say that the Supreme Court completely revamped it in *Morrison v. National Australia Bank*,¹¹⁵ and accordingly we will use that as our starting point. *Morrison* was an example of what is often referred to as a “foreign cubed case” – foreign plaintiff, foreign defendant, foreign harm. In *Morrison*, all three were Australian.¹¹⁶ Despite all these foreign elements, some of the fraud leading to the foreign harm, i.e., the sale of the securities, occurred in Florida.¹¹⁷ Writing for the Court, Justice Scalia set out a two-step framework, now well-known to those laboring in the field of extraterritoriality: (1) was the presumption against extraterritoriality overcome;¹¹⁸ and (2) if not, was the “focus” of the statute the domestic element of the multistate dispute before the Court.¹¹⁹

¹¹⁴ William S. Dodge, *The New Presumption against Extraterritoriality*, 133 HARV. L. REV. 1582, 1589-603 (2020).

¹¹⁵ *Morrison v. Nat’l Australia Bank, Ltd.*, 561 U.S. 247 (2010).

¹¹⁶ *See id.* at 251-52.

¹¹⁷ *See id.*

¹¹⁸ *See id.* at 255.

¹¹⁹ *See id.* at 266.

Step one has produced a tremendous outpouring of scholarly commentary¹²⁰ and judicial analysis,¹²¹ but it is not the part of the framework I principally focus on (no pun intended). Boiled down, in order to overcome the presumption against extraterritoriality, the statute must contain a “clear indication” or “affirmative indication” of extraterritorial application.¹²² This is not a “clear statement” rule, for “[a]ssuredly context can be consulted as well.”¹²³ But neither will boilerplate language like “foreign commerce” satisfy the test.¹²⁴ What’s important for our purposes is the *reason* for the presumption: “The probability of incompatibility with the applicable laws of other

¹²⁰ See Dodge, *supra* note 114; Colangelo, *supra* note 24; Natascha Born, *The Presumption Against Extraterritoriality: Reconciling Canons of Statutory Interpretation with Textualism*, 41 U. PA. J. INT’L L. 541 (2020); Daniel E. Herz-Roiphe, Comment, *Innocent Abroad? Morrison, Vilar, and the Extraterritorial Application of the Exchange Act*, 123 YALE L.J. 1875 (2014); Lea Brilmayer, *The New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. L. REV. 655 (2011); John H. Knox, *The Unpredictable Presumption Against Extraterritoriality*, 40 SW. L. REV. 635 (2011); S. Nathan Williams, Note, *The Sometimes “Craven Watchdog”: The Disparate Criminal-Civil Application of the Presumption Against Extraterritoriality*, 63 DUKE L.J. 1381 (2014); 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 (2012); R. Davis Mello, Note, *Life After Morrison: Extraterritoriality and RICO*, 44 VAND. J. TRANSNAT’L L. 1385 (2011); Marc I. Steinberg & Kelly Flanagan, *Transnational Dealings – Morrison Continues to Make Waves*, 46 INT’L L. 829 (2012).

¹²¹ See, e.g., *Loginovskaya v. Batratchenko*, 764 F.3d 266, 270-72 (2d Cir. 2014) (applying Morrison’s two-step framework strictly); see also *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 178-183 (2d Cir. 2014); *Prime Int’l Trading, LTD. v. BP P.L.C.*, 937 F.3d 94, 102-03 (2d Cir. 2019); *Norex Petroleum Ltd. v. Access Industries, Inc.*, 631 F.3d 29, 32-33 (2d Cir. 2010); *SEC v. Scoville*, 913 F.3d 1204, 1215-16 (10th Cir. 2019) (finding that Congress gave affirmative indication of extraterritorial reach in the securities acts); *In re Warrant to Search a Certain E-mail Account Controlled and Maintained by Microsoft Corp.*, 829 F.3d 197, 210 (2d Cir. 2016), *vacated*, *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 22 (D.C. Cir. 2011) (discussing the Alien Tort Statute), *vacated in part*, 527 F. App’x 7 (D.C. Cir. 2013); *United States v. Harris*, 991 F.3d 552, 559 (4th Cir. 2021) (acknowledging that the coercion and enticement statute likely passes the first step but deciding the situation calls for a domestic application); *Int’l Brotherhood of Teamsters v. Amerijet Int’l, Inc.*, 604 F. App’x 841, 852-53 (finding that the statute does not apply extraterritorially but the particular situation would not be an extraterritorial application); *United States v. Rojas*, 812 F.3d 382, 391-93 (5th Cir. 2016) (analyzing the statute criminalizing possession, manufacture, or distribution of controlled substance); *Keller Found. v. Tracy*, 696 F.3d 835, 845-46 (9th Cir. 2012).

¹²² See *Morrison v. Nat’l Australia Bank, Ltd.*, 561 U.S. 247, 265 (2010).

¹²³ *Id.*

¹²⁴ *Id.* at 263.

countries is so obvious that if Congress intended such foreign application it would have addressed the subject of conflicts with foreign laws and procedures.”¹²⁵ The Court would three years later elaborate that the “presumption serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”¹²⁶ It explained:

For us to run interference in . . . a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.¹²⁷

When it comes to the reach of U.S. law abroad, “[t]he presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.”¹²⁸ In short, the presumption is a separation of powers canon: the United States can cause friction with foreign nations through the extraterritorial application of its laws, it is just that the actor causing those frictions must be Congress, not the courts. This makes perfect sense not only to avoid international friction sparked by a non-political actor, but to avoid the potential mess of different courts applying the same law differently, leading to a cacophony of voices in U.S. foreign relations when there should be only one.¹²⁹

After finding that the presumption had not been overcome in *Morrison*, the Court turned to the petitioners’ second argument, namely, the case simply did not involve the extraterritorial application of U.S. law at all. Because some of the fraudulent conduct occurred in Florida, *Morrison* merely presented the domestic application of U.S. law.¹³⁰ The Court’s response: “[I]t is a

¹²⁵ *Id.* at 269 (internal citations and quotation marks omitted).

¹²⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 155 (2013) (internal quotation marks omitted).

¹²⁷ *Id.* at 115-16.

¹²⁸ *Id.* at 116.

¹²⁹ See generally David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953 (2014) (discussing the failings of the one voice doctrine which states that the United States must be able to speak in one voice in its external relations).

¹³⁰ *Morrison*, 561 U.S. at 266.

rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. 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.”¹³¹

The key, according to the Court, was discerning the “focus” of the statute.¹³² Performing a textual exegesis of the Exchange Act, Scalia concluded that the “focus” of the Act was “not upon the place where the deception originated, but upon purchases and sales of securities in the United States.”¹³³ In his words, “[t]hose purchase-and-sale transactions are the objects of the statute’s solicitude.”¹³⁴ What’s so remarkable about this move from a separation of powers standpoint is that discerning the statute’s “focus” is a thoroughgoing judicial exercise; nowhere in the Exchange Act does it say “purchase and sale transactions are the focus of this Act.” Thus, while bowing to legislative supremacy and embracing judicial modesty in the first part of the opinion, Scalia arrogates to courts the power to determine a law’s “focus” in the second. Of course, none of this would matter if we were dealing with purely domestic cases. But the “focus” inquiry was designed specifically for cases with multijurisdictional elements. And those elements completely vanish when a statute applies to a domestic “focus.”¹³⁵ Indeed, courts freely admit this.¹³⁶ Make no mistake, the “focus” test is a species of localization rule.

To illustrate what I mean, flip the facts of *Morrison*. In *Morrison*, there was fraudulent conduct in Florida that led to fraudulent sales

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 267.

¹³⁵ See *United States v. Hussain*, 972 F.3d 1138, 1142 (9th Cir. 2020) (“Federal criminal law generally applies to domestic conduct, so when foreign conduct is also involved, questions arise as to whether a U.S. prosecution exceeds its proper bounds. Under the longstanding ‘presumption against extraterritoriality,’ the Supreme Court has held that ‘[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.’ . . . But if the object of a federal law is conduct that occurs in this country, the concerns associated with a potentially extraterritorial application of our laws do not come into play.” (quoting *RJR Nabisco, Inc. v. Eur. Cmty.*, 136 S. Ct. 2090 (2016)).

¹³⁶ See *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2138 (2018); *Loginovskaya v. Batratchenko*, 764 F.3d 266, 275 (2d Cir. 2014); *United States v. Wolfenbarger*, No. 16-CR-00519-LHK-1, 2020 WL 2614958, at *11-12 (N.D. Cal. May 22, 2020).

in Australia.¹³⁷ The Supreme Court found that the “focus” of the Exchange Act was the sales, and since they were foreign, U.S. law did not apply.¹³⁸ Now imagine that the fraudulent conduct took place in Australia, leading to fraudulent sales in the United States. The “focus” would be on the sales, leading to the ‘domestic’ application of U.S. law. In reality, however, the application of U.S. law would also encompass the fraudulent conduct in Australia, and *that* would be an extraterritorial application of U.S. law. And this extraterritoriality would completely ignore, to use the Supreme Court’s language—backed up by numerous amicus briefs from foreign countries—those countries’ laws, for:

Like the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction. And the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney’s fees are recoverable, and many other matters.¹³⁹

Indeed, the amicus briefs in the case “all complain of the interference with foreign securities regulation that application of § 10(b) abroad would produce.”¹⁴⁰

Or take a fairly recent case from the Court itself illustrating these principals. *WesternGeco LLC v. ION Geophysical Corporation* involved the respondent shipping components overseas and combining those components abroad to create a system indistinguishable from that of petitioners.¹⁴¹ The question presented was whether petitioners could recover damages under 35 U.S.C. § 284 of the Patent Act for a violation of § 271(f)(2).¹⁴² Section 284 states that “the court shall award the claimant damages adequate to compensate for the infringement.”¹⁴³ The Court “conclude[d] that ‘the infringement’ is

¹³⁷ *Morrison*, 564 U.S. at 273.

¹³⁸ *Id.* at 266-67.

¹³⁹ *Id.* at 269.

¹⁴⁰ *Id.*

¹⁴¹ *WesternGeco LLC*, 138 S. Ct. at 2135.

¹⁴² *Id.* at 2134-35.

¹⁴³ *Id.* at 2137.

the focus of this statute.”¹⁴⁴ But, as the Court observed, there are many ways to infringe a patent, which is where § 271(f)(2) comes in as the basis for the infringement in the case.¹⁴⁵ According to the Court:

Section 271(f)(2) focuses on domestic conduct. It provides that a company “shall be liable as an infringer” if it “supplies” certain components of a patented invention “in or from the United States” with the intent that they “will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States.” The conduct that §271(f)(2) regulates—*i.e.*, its focus—is the domestic act of “suppl[ying] in or from the United States.”¹⁴⁶

This was so, even though “lost-profits damages occurred extraterritorially, and foreign conduct subsequent to [respondent’s] infringement was necessary to give rise to the injury.”¹⁴⁷ Yet nowhere in the case is an analysis of the presumption against extraterritoriality, not to mention the possibility—so salient in *Morrison*—that other countries may have patent laws that differ from our own.

Seeing through the “focus” test’s localization façade, Justice Gorsuch dissented. In his words, “[p]ermitting damages of this sort would effectively allow U.S. patent owners to use American courts to extend their monopolies to foreign markets. That, in turn, would invite other countries to use their own patent laws and courts to assert control over our economy.”¹⁴⁸ To be sure, “principles of comity counsel against an interpretation of our patent laws that would interfere so dramatically with the rights of other nations to regulate their own economies.”¹⁴⁹ In sum—*and without any extraterritoriality analysis whatsoever*—“the Court ends up assuming that patent damages run (literally) to the ends of the earth. It allows U.S. patent owners to extend their patent monopolies far beyond

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 2137-38.

¹⁴⁷ *Id.* (internal citation omitted).

¹⁴⁸ *Id.* at 2139 (Gorsuch, J., dissenting).

¹⁴⁹ *Id.* at 2143.

anything Congress has authorized and shields them from foreign competition U.S. patents were never meant to reach.”¹⁵⁰

Finally, if the “focus” test is a species of localization rule, it differs from the First Restatement’s localization rules in one crucial respect. Unlike the First Restatement, it does not purport to be part of a *system*. Recall that Beale had in mind a world where states had agreed upon the localization rules such that if a tortious injury occurred in State A but the negligence occurred in State B, State B would have accepted application of the *lex loci delicti* as part of its conflict of laws methodology. This *a priori* consent is nowhere to be found in *Morrison’s* framework, which blatantly countenances the unilateral projection of U.S. law abroad by courts through the resurrection of an anachronistic conflict of laws fiction.

ii. *Currie’s Ghost*

Next, federal courts employing *Morrison’s* “focus” test have precisely followed Currie’s forum-centric methodology of applying forum law if the forum has any interest—even if it is the lesser one—as determined by ordinary means of statutory construction.¹⁵¹ Thus, in *United States v. McLellan*,¹⁵² the court construed the federal wire fraud statute, 18 U.S.C. § 1343, to conclude that “the structure, elements, and purpose of the wire fraud statute indicate that its focus is not the fraud itself but the abuse of the instrumentality in furtherance of a fraud.”¹⁵³ Moreover, “it does not matter if the bulk of the scheme to defraud involves foreign activity[] [b]ecause the focus of the wire fraud statute is misuse of U.S. wires to further a fraudulent scheme.”¹⁵⁴

¹⁵⁰ *Id.* at 2143-44.

¹⁵¹ See CURRIE, *supra* note 14, at 178.

¹⁵² *United States v. McLellan*, 959 F.3d 442 (1st Cir. 2020).

¹⁵³ *Id.* at 469.

¹⁵⁴ *Id.* at 470 (internal citation omitted); see *United States v. Elbaz*, 332 F. Supp. 3d 960, 974 (D. Md. 2018); see also *United States v. Wolfenbarger*, No. 16-CR-00519-LHK-1, 2020 WL 2614958, at *11-12 (N.D. Cal. May 22, 2020)

(holding that U.S. law applies to the solicitation of child pornography in the Philippines because the minors were enticed to engage in the activity in California. The focus of the statute was domestic adult conduct—namely, the act of enticement. Thus, because the defendant enticed the minors in California, U.S. law applied even though a substantial amount of the illegal conduct happened in the Philippines); *United States v. Kalichenko*, 840 F. App’x 644 (2d Cir. 2021) (holding that U.S. law

As to true conflicts of law, it is irresistible not to marshal the famed pre-*Morrison* case, *Hartford Fire Insurance Co. v. California*.¹⁵⁵ In brief, a group of London reinsurers conspired to adversely affect the U.S. insurance market.¹⁵⁶ The Court observed that—as a result of ordinary methods of statutory construction—“the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”¹⁵⁷ To be sure, “[s]uch is the conduct alleged here: that the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect.”¹⁵⁸ In short, the “substantial effect” was the domestic trigger for the unilateral projection of U.S. law abroad. Currie would have been proud.

This drew a scathing dissent from none other than Justice Scalia, who felt constrained by precedent to take an entirely opposite approach to the one he would fashion in *Morrison*. For as the majority itself conceded, “applying the Act to [the London reinsurers’] conduct would conflict significantly with British law, and the British Government, appearing before us as *amicus curiae*, concurs,”¹⁵⁹ creating a true conflict of laws within Currie’s methodology. Or, as Justice Scalia elaborated:

applied to the defendant, a Ukrainian citizen, who created child pornography in the Ukraine and sold it to a U.S. citizen; the focus of the statute was the domestic market for illicit material, thus, due to the receipt of compensation from a U.S. citizen, U.S. law applied even though most of the illegal activity happened in the Ukraine).

¹⁵⁵ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993). *Hartford Fire* is best understood as a *Charming Betsy* case since the presumption had already been overcome by precedent as to antitrust law. *Id.* at 814-15 (Scalia, J., dissenting). Justice Souter, writing for the majority, limited true conflicts of law under international law to situations where it is impossible to comply with two states’ laws at once. *Id.* at 799. This is clearly wrong as a matter of conflict of laws, and indeed describes a whole other phenomenon altogether. See Anthony J. Colangelo, *Absolute Conflicts of Law*, 91 IND. L.J. 719, 727-729 (2016). An interesting thought experiment is what if *Hartford Fire* had been decided under *Morrison*’s framework and the Court found protection of consumers to be the “focus” of the Sherman Act, rendering it a domestic application of U.S. law? At least in *Hartford Fire* there was a presumption against extraterritoriality to overcome, while under *Morrison*’s “focus” fiction the presumption would have been completely—and, given *Morrison*’s desire to strengthen the presumption, perversely—absent.

¹⁵⁶ *Hartford Fire Ins. Co.*, 509 U.S. at 776.

¹⁵⁷ *Id.* at 796.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 798. Amicus briefs are one powerful way for other nations to show displeasure with the extraterritorial application of U.S. law. In *F. Hoffmann-La Roche*

The activity relevant to the counts at issue here took place primarily in the United Kingdom, and the defendants in these counts are British corporations and British subjects having their principal place of business or residence outside the United States. Great Britain has established a comprehensive regulatory scheme governing the London reinsurance markets, and clearly has a heavy “interest in regulating the activity.”¹⁶⁰

At this point, we can preview – or one might even say transition to – the final Part of this Article. Because the presumption against extraterritoriality had already been overcome by precedent as to antitrust law, Scalia began with another canon of statutory construction: the *Charming Besty* canon, which holds that “[a]n act of Congress ought never to be construed to violate the law of nations

Ltd. v. Empagran S.A., 542 U.S. 155, 167 (2004), the majority itself noted, referencing the London reinsurance companies’ argument:

[E]ven where nations agree about primary conduct, say, price fixing, they disagree dramatically about appropriate remedies. The application, for example, of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy. See, e.g., 2 ABA Section of Antitrust Law, *Antitrust Law Developments* 1208-1209 (5th ed. 2002). And several foreign nations have filed briefs here arguing that to apply our remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody. E.g., Brief for Government of Federal Republic of Germany et al. as *Amici Curiae* 2 (setting forth German interest “in seeing that German companies are not subject to the extraterritorial reach of the United States’ antitrust laws by private foreign plaintiffs—whose injuries were sustained in transactions entirely outside United States commerce—seeking treble damages in private lawsuits against German companies”); Brief for Government of Canada as *Amicus Curiae* 14 (“treble damages remedy would supersede” Canada’s “national policy decision”); Brief for Government of Japan as *Amicus Curiae* 10 (finding “particularly troublesome” the potential “interfere[nce] with Japanese governmental regulation of the Japanese market”).

These briefs add that a decision permitting independently injured foreign plaintiffs to pursue private treble-damages remedies would undermine foreign nations’ own antitrust enforcement policies by diminishing foreign firms’ incentive to cooperate with antitrust authorities in return for prosecutorial amnesty. Brief for Government of Federal Republic of Germany et al. as *Amici Curiae* 28-30; Brief for Government of Canada as *Amicus Curiae* 11-14.

¹⁶⁰ *Hartford Fire Ins. Co.*, 509, U.S. at 819.

if any other possible construction remains.”¹⁶¹ This canon predates the presumption of extraterritoriality; to be sure, “the presumption against extraterritoriality is essentially an out-growth of *Charming Betsy*.”¹⁶² Both were concerned with jurisdictional incursions into the territorial sovereignty of other states sparking international discord, which made perfect sense since international law at the time of the canon’s birth was strictly territorial.¹⁶³ But while international law grew to authorize and even require extraterritoriality in some situations,¹⁶⁴ the presumption remained frozen in time. Which is not to say *Charming Betsy* gives free reign to courts to extend U.S. law abroad anytime there is a U.S. interest; rather, it is cabined by “prevalent doctrines of international law.”¹⁶⁵ Or, to use another phrase, “international comity.”¹⁶⁶ Citing Justice Story, Scalia explained:

The “comity” [at issue] is not the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed “prescriptive comity”: the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted. *It is a traditional component of choice-of-law theory.*¹⁶⁷

Whether one views international law and international comity as the same or separate doctrines¹⁶⁸ is immaterial for our purposes, for both contain a reasonableness requirement.¹⁶⁹ And applying that requirement using the criteria of the Third Restatement of Foreign Relations Law, Scalia clearly got it right.

It will be worth a somewhat lengthy block quote from his analysis, because I want to tie it to the Second Restatement of

¹⁶¹ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

¹⁶² Colangelo, *supra* note 24, at 1060.

¹⁶³ See SYMEONIDES & PERDUE, *supra* note 2, at 53; Colangelo, *supra* note 24.

¹⁶⁴ Colangelo, *supra* note 24, at 1078.

¹⁶⁵ *Hartford Fire Ins. Co.*, 509 U.S. at 816 (internal citations and quotations omitted).

¹⁶⁶ *Id.* at 817.

¹⁶⁷ *Id.* (emphasis added).

¹⁶⁸ See Childress III, *supra* note 31, at 22; RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 405 cmt. a (AM. L. INST. 2018).

¹⁶⁹ *Id.*

Conflict of Laws; for—remarkably—the Third Restatement of Foreign Relation Law’s reasonableness factors “adopt the factors listed in § 6 of the Restatement, Second, of Conflict of Laws”:

The “reasonableness” inquiry turns on a number of factors including, but not limited to: “the extent to which the activity takes place within the territory [of the regulating state],” *id.*, § 403(2)(a); “the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated,” *id.*, § 403(2)(b); “the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted,” *id.*, § 403(2)(c); “the extent to which another state may have an interest in regulating the activity,” *id.*, § 403(2)(g); and “the likelihood of conflict with regulation by another state,” *id.*, § 403(2)(h). Rarely would these factors point more clearly against application of United States law. The activity relevant to the counts at issue here took place primarily in the United Kingdom, and the defendants in these counts are British corporations and British subjects having their principal place of business or residence outside the United States. Great Britain has established a comprehensive regulatory scheme governing the London reinsurance markets, and clearly has a heavy “interest in regulating the activity.” Considering these factors, I think it unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable, and therefore it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion.¹⁷⁰

Section 6 is the “cornerstone”¹⁷¹ of the Second Restatement’s choice-of-law methodology¹⁷² and lists a number of similar factors courts should consider in resolving choice-of-law disputes. They are:

¹⁷⁰ *Hartford Fire Ins. Co.*, 509 U.S. at 818–19.

¹⁷¹ SYMEONIDES & PERDUE, *supra* note 2, at 176.

¹⁷² RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. L. INST. 1971).

(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.¹⁷³

According to the comments section, “[p]robably the most important function of choice-of-law rules is to make the interstate and international systems work well. Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them.”¹⁷⁴ And:

Rules of choice of law formulated with regard for such needs and policies are likely to commend themselves to other states and to be adopted by these states. Adoption of the same choice-of-law rules by many states will further the needs of the interstate and international systems and likewise the values of certainty, predictability and uniformity of result.¹⁷⁵

CONCLUSION: NORMATIVE SUPERIORITY

The multilateral approaches just laid out in the previous Part are superior to the other choice of law and attendant presumption against extraterritoriality approaches described throughout this Article. Unlike the First Restatement and the “focus” test, they do not rely on formalist fictions that, in reality, sideline the interests of other states and destroy parties’ primary predictability about what law will apply to them *at the time they act*—a crucial element to the rule of law. The First Restatement is riddled with randomly applied “escape devices” to arrive at a law different from the one prescribed by the Restatement, and the “focus” test requires parties to guess at a U.S. law’s “focus” ahead of time—something even U.S. courts struggle with. Next, unlike Currie’s forum favoritism and the

¹⁷³ *Id.*

¹⁷⁴ *Id.* § 6 cmt. d.

¹⁷⁵ *Id.*

attendant “focus” test, the multilateral approaches take into consideration other states’ interests, avoiding anarchy and retaliation. Moreover, by applying forum law on what may be only minor interests compared with those of other states, these tests also destroy parties’ primary predictability about what law will apply to them at the time they act since at least one of them will have no control over where suit will be brought (and thus which *lex fori* will apply). By contrast, the multilateral approaches allow parties to consult precedent and rely on *stare decisis* to predict what law will apply to their multijurisdictional activity. Besides shoring up the rule of law, such an approach encourages activity generally considered beneficent to the domestic and international systems like international commerce, travel, and communication because multistate actors will be able to predict with more certainty the law that will apply to their activities.

Finally, the Supreme Court may be moving in this direction, even if somewhat unconsciously. In its most recent extraterritoriality case, *Nestlé USA, Inc. v. Doe*,¹⁷⁶ foreign plaintiffs sued U.S. corporations for aiding and abetting child slavery abroad under the Alien Tort Statute (ATS),¹⁷⁷ which allows aliens to sue for torts in violation of the law of nations.¹⁷⁸ In *Kiobel v. Royal Dutch Petroleum*,¹⁷⁹ the Court had already held that the ATS did not overcome the presumption against extraterritoriality.¹⁸⁰ Thus respondents argued that domestic conduct—namely, “operational decisions” to aid and abet the child slavery—authorized application of the ATS.¹⁸¹ The Court disagreed, observing that “[t]o plead facts sufficient to support a domestic application of the ATS, plaintiffs must allege more domestic conduct than general corporate activity.”¹⁸² As William Dodge has observed, this domestic conduct requirement appears both new and to supplement the “focus”

¹⁷⁶ *Nestlé USA, Inc. v. Doe* 141 S. Ct. 1931 (2021).

¹⁷⁷ *Id.* at 1931-32.

¹⁷⁸ See generally Alien Tort Statute, 28 U.S.C. § 1350 (2006) (granting federal courts jurisdiction for “a tort only, committed in violation of the law of nations or a treaty of the United States”).

¹⁷⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 117 (2013).

¹⁸⁰ *Id.* at 125.

¹⁸¹ *Nestlé USA, Inc.*, 141 S. Ct. at 1935.

¹⁸² *Id.* at 1937.

test.¹⁸³ Thus, in at least one area, the law of extraterritoriality would require more substantial connections with the United States for U.S. law to apply.

Now, this would leave the author in the rather uncomfortable position of letting serious international law offenses like child slavery go unremedied in U.S. courts. But upon closer inspection, that is not the case at all. Indeed, quite the opposite. All we have to do is return to the piracy example.¹⁸⁴ Like piracy, child slavery is a universal jurisdiction offense under the law of nations or international law¹⁸⁵ that all states have an interest in, and perhaps an obligation to, assert jurisdiction over.¹⁸⁶ To be sure, there would not be—indeed, there could not be—a conflict of laws because states would be applying the *same law* through their municipal laws: international law, with the obvious caveat that the municipal law definition matches the international law definition of the offense. But that is the subject of another article.¹⁸⁷

¹⁸³ See William S. Dodge, *The Surprisingly Broad Implications of Nestlé USA, Inc. v. Doe for Human Rights Litigation and Extraterritoriality*, JUST SEC. (June 18, 2021), <https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality/> [<https://perma.cc/LGM8-X6JE>] (“[T]he Restatement (Fourth) of Foreign Relations Law rejected a separate requirement of conduct in the United States when the focus of the statutory provision is on something other than conduct . . . providing simply: ‘If whatever is the focus of the provision occurred in the United States, then application of the provision is considered domestic and is permitted’ (§ 404 cmt. c).”).

¹⁸⁴ See *supra* Section III.a.

¹⁸⁵ See Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour art. 3(a), June 17, 1999, 2133 U.N.T.S. 161.

¹⁸⁶ RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 301(3) (AM. L. INST. 2018) (“Treaties create international legal obligations for the United States . . .”).

¹⁸⁷ Anthony J. Colangelo, *Universal Jurisdiction as an International “False Conflict” of Laws*, 30 MICH. J. INT’L L. 881 (2009); Anthony J. Colangelo, *International Law in U.S. State Courts: Extraterritoriality and ‘False Conflicts’ of Law*, 108. AMER. SOC’Y INT’L L. PROC. 436 (2014).