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## *ARTICLES*

### A UNIFIED APPROACH TO EXTRATERRITORIALITY

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*THIS Article develops a unified approach to extraterritoriality. It uses the source of lawmaking authority behind a statute to discern the proper canon for construing that statute's geographic reach and to evaluate whether application of the statute violates due process.*

*The approach holds important implications for a variety of high-stakes issues with which courts are presently wrestling, including: the proper role of the presumption against extraterritorial application of U.S. law, whether international law or federal common law should supply the rule of decision in Alien Tort Statute cases, the scope of U.S. jurisdiction over terrorism offenses, and the viability of due process objections to the application of U.S. law abroad.*

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## INTRODUCTION

The increasing phenomenon of U.S. extraterritoriality, or extension of federal law to activity outside U.S. borders,<sup>1</sup> embroils a

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<sup>1</sup> The noun “extraterritoriality” requires elaboration. See Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 *Am. J. Comp. L.* 631, 635 (2009) (“‘Territoriality’ and ‘extraterritoriality’ . . . are legal constructs. They are claims of authority, or of resistance to authority, that are made by particular actors with particular substantive interests to promote.”). By its use, I mean that at least one relevant act occurs outside the United States and that the United States seeks to regulate the act abroad. See Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 *Harv. L. Rev.* 1217, 1218 & n.3 (1992). To this extent, and as will become apparent throughout this Article, I would view a claim of what conventionally is referred to by international lawyers as “objective territoriality” over activity abroad as a claim to regulate extraterritorially. See Buxbaum, *supra*, at 635.

complex tangle of multifaceted and often overlapping legal doctrines. The messiness of the law in this area is generating difficult and novel questions for courts given the deepening interconnect- edness of world markets,<sup>2</sup> the push to better regulate harmful transnational conduct like cybercrime<sup>3</sup> and child sex tourism,<sup>4</sup> and growing efforts by plaintiffs to recover in U.S. courts for a variety of alleged harms abroad ranging from securities fraud<sup>5</sup> to human rights abuses.<sup>6</sup>

Academic debate has raged for decades over whether, and how, courts should construe statutes silent on geographic scope to reach extraterritorially.<sup>7</sup> Different scholars have proposed different ap- proaches, with the only common point of agreement seeming to be that judicial resolution of this question is badly fragmented and confused<sup>8</sup>—an assessment with which the Supreme Court evidently now agrees.<sup>9</sup>

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<sup>2</sup> See Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 *Vand. L. Rev.* 1455, 1478 & n.124 (2008).

<sup>3</sup> For instance, the United States has prosecuted foreign hackers operating abroad who have targeted computer systems in the United States. See, e.g., *United States v. Ivanov*, 175 F. Supp. 2d 367, 367–70 (D. Conn. 2001); see also *Computer Fraud and Abuse Act of 1986*, 18 U.S.C. § 1030 (2006).

<sup>4</sup> For an unprecedented and aggressively extraterritorial law over this type of conduct abroad, see the *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003*, 18 U.S.C. § 2423 (2006). For an evaluation of the constitutionality of this law under the Foreign Commerce Clause, see Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 *Va. L. Rev.* 949, 991–1003 (2010).

<sup>5</sup> See, e.g., *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869, 2876 (2010).

<sup>6</sup> The most prominent and controversial statute generating these kinds of suits is the *Alien Tort Statute*, 28 U.S.C. § 1350 (2006) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

<sup>7</sup> See Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 *Minn. L. Rev.* 110, 113–21 (2010) (surveying different scholarly approaches and proposing new approach).

<sup>8</sup> *Id.* at 129; see also Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 *Va. J. Int'l L.* 505, 507 (1997); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 *Berkeley J. Int'l L.* 85, 89–90 (1998); John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 *Am. J. Int'l L.* 351, 351–52, 396 (2010); Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 *Am. J. Int'l L.* 750, 752 (1995); Parrish, *supra* note 2, at 1459; Jonathan Turley, “When in Rome”: *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 *Nw. U. L. Rev.* 598, 599–601 (1990).

<sup>9</sup> See *Morrison*, 130 S. Ct. at 2878 (condemning “a collection of tests for divining what Congress would have wanted, complex in formulation and unpredictable in ap-

More recently, a second scholarly and judicial trend has also begun to take shape. With the proliferation of laws seeking aggressively to regulate foreign conduct,<sup>10</sup> some commentators and courts have started to engage more foundational questions about the existence and contours of constitutional limits on Congress's power to legislate extraterritorially in the first place<sup>11</sup> and the potential for individual rights violations under the Due Process Clause resulting from arbitrary or unfair applications of U.S. law abroad.<sup>12</sup> In short, two main lines of extraterritoriality analysis have emerged: one, long discussed but still hotly debated, involves how to construe statutes silent on geographic scope; the other, gaining scholarly momentum and bubbling up in lower courts, involves the constitutionality of unprecedented and ambitious projections of U.S. law abroad.

This Article's main objective is to bring these related, but until now analytically isolated, strands of thinking together to create a conceptually coherent, methodologically clean, and normatively appealing framework regarding extraterritoriality. My basic thesis is that the sources of Congress's lawmaking power can and should inform both the statutory construction and due process analyses. I argue that this unified approach trims away doctrinal redundancy and confusion, supplies courts with an intuitive and cogent blueprint for extraterritoriality issues, and not least, produces sound results.

Broadly framed, extraterritoriality cases raise three types of issues: (1) What is the source of Congress's power to legislate extraterritorially? (2) If a statute is silent on geographic scope, should it be construed extraterritorially? (3) And does the extraterritorial application

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plication"). It remains to be seen whether the Court's new transactional test regarding the statute at issue in *Morrison*, Section 10(b) of the Securities and Exchange Act of 1934, clears away this complexity and unpredictability.

<sup>10</sup> See, e.g., Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, 18 U.S.C. § 2423 (2006) (criminalizing under U.S. law sexual abuse of a minor abroad).

<sup>11</sup> See Colangelo, *supra* note 4, at 951–58; Eugene Kontorovich, Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes, 93 Minn. L. Rev. 1191, 1219–23 (2009) [hereinafter Kontorovich, Article I Horizon]; Eugene Kontorovich, The "Define and Punish" Clause and the Limits of Universal Jurisdiction, 103 Nw. U. L. Rev. 149, 150–53 (2009) [hereinafter Kontorovich, "Define and Punish" Clause].

<sup>12</sup> See Brilmayer & Norchi, *supra* note 1, at 1223; Anthony J. Colangelo, Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law, 48 Harv. Int'l L.J. 121, 158–62 (2007).

of U.S. law violate due process? The unified approach uses the answer to the first inquiry to help resolve the other two. In brief, some sources of legislative authority grant Congress power to implement international law or legal obligations.<sup>13</sup> Other sources do not require a predicate international norm; Congress simply may enact national law and project it abroad.<sup>14</sup> The unified approach holds that when Congress enacts a statute silent on geographic scope designed to implement international substantive law, courts should construe that statute in line with international jurisdictional law, including attendant principles of extraterritorial jurisdiction. That is to say, when Congress implements international law, courts should presume Congress intended to implement *all* of international law—including international jurisdictional law, which may permit, encourage, or even obligate extraterritoriality. In this respect, the relevant tool of statutory construction is the *Charming Betsy* canon, under which courts construe ambiguous statutes in conformity with international law.<sup>15</sup>

This result is superficially at odds with another popular interpretive canon regularly used to construe statutes quiet on geographic scope—the presumption against extraterritoriality—which presumes “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”<sup>16</sup> The tension vanishes, however, in light of the presumption’s original motivation: to avoid unintended discord with foreign nations.<sup>17</sup> A presumption against extraterritoriality made sense when the international law of jurisdiction was strongly territorial in nature.

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<sup>13</sup> Examples include the power to “define and punish . . . Offences against the Law of Nations,” U.S. Const. art. I, § 8, cl. 10, and to effectuate treaties through the Necessary and Proper Clause, *id.* art. I, § 8, cl. 18, both of which are discussed *infra* Part II.

<sup>14</sup> A key example is the Foreign Commerce Clause. *Id.* art. I, § 8, cl. 3; see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813–14 (1993) (Scalia, J., dissenting on the statutory issue) (“There is no doubt, of course, that Congress possesses legislative jurisdiction over the acts alleged in this complaint: Congress has broad power under Article I, § 8, cl. 3, ‘[t]o regulate Commerce with foreign Nations,’ and this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected.”); Colangelo, *supra* note 4, at 952.

<sup>15</sup> *Murray v. The Schooner Charming Betsy (The Charming Betsy)*, 6 U.S. (2 Cranch) 64, 118 (1804).

<sup>16</sup> *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

<sup>17</sup> *Id.* at 248.

But now that international law embraces and sometimes even requires extraterritorial jurisdiction, the presumption not only is anachronistic, it perversely may achieve precisely what it was designed to avoid: discord with foreign nations. Suppose Congress enacts a statute implementing an international customary or treaty-based norm that carries with it the encouragement or obligation to exercise extraterritorial jurisdiction. If courts apply the presumption against extraterritoriality to that statute, it will have accomplished exactly what it was designed to avoid by blocking fulfillment of U.S. international responsibilities.<sup>18</sup> Unfortunately, when courts have been faced with this type of question, they have tended to do just that, sometimes triggering a swift response by Congress.<sup>19</sup>

Indeed, the reasons traditionally underwriting the presumption against extraterritoriality drop out for statutes implementing international law. Concerns about extraterritorial applications of U.S. law conflicting with foreign law inside foreign territory largely evaporate, since the U.S. law by nature will not conflict with the international law also operative inside the foreign territory. Moreover, while the conventional assumption that Congress legislates with only domestic concerns in mind may make sense for statutes reflecting national values and preferences,<sup>20</sup> that assumption holds far less intuitive force when Congress implements international law—which, after all, deals by definition with foreign nations and shared values and preferences with those nations. Finally, concerns about courts usurping or intruding upon sensitive foreign policy decisions by extending U.S. law abroad<sup>21</sup> can be turned upside down when it comes to statutes implementing international law. Here it is the deployment of a thoroughly judicial contrivance—the presumption against extraterritoriality—that threatens to interfere with U.S. foreign relations by potentially stunting the ability of the United States to fulfill its international obligations, not the construction of statutes in line with

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<sup>18</sup> See, e.g., *infra* notes 256–66 and accompanying text; see also Knox, *supra* note 8, at 380 (“[I]nternational norms often do require their parties to fulfill obligations with respect to places outside their sovereign territory but subject to their jurisdiction.”).

<sup>19</sup> See *infra* notes 256–66 and accompanying text.

<sup>20</sup> Cf. Arthur Taylor von Mehren, *Choice of Law and the Problem of Justice*, 41 *Law & Contemp. Probs.* 27, 28 (1977) (noting that laws are a reflection of the values and traditions of the community).

<sup>21</sup> See Bradley, *supra* note 8, at 516.

those obligations.<sup>22</sup> All of this is not to say that potential frictions will never arise regarding the choice of forum, as opposed to the choice of law. But that is a separate question, governed by separate jurisdictional principles that directly take into account those frictions when evaluating whether U.S. courts can or should entertain suits involving foreign elements.<sup>23</sup> My argument here relates only to the choice of law, which by definition is the same everywhere for statutes that implement or apply international law.

By contrast, the reasons traditionally favoring the presumption against extraterritoriality persist for statutes enacted under legislative sources authorizing the enactment of purely national law. Extraterritorial application of these statutes elevates the risk of discord with foreign nations resulting from both jurisdictional overreaching and conflicts with foreign law in foreign territory. Furthermore, extending these laws abroad defeats the (here quite sensible) assumption that when Congress passes laws reflecting and advancing national values and preferences, those laws are directed primarily toward domestic concerns. And, because of all of these features—the risk of jurisdictional overreach, clashes with foreign law, and applying U.S. national values and preferences inside other countries—concerns about judicial interference in sensitive foreign policy matters have traction.

A unified approach would affect extraterritoriality cases involving a range of hot-button issues including, among other things, modern piracy and terrorism, which are subjects of U.S. laws that implement international law. The theory's crux that statutes implementing international norms ought to be construed differently also holds implications for jurisdictional statutes, such as the Alien Tort Statute ("ATS")—an ever more polemical law allowing foreigners to recover in U.S. courts for violations of international law.<sup>24</sup> For one quick ex-

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<sup>22</sup> See Knox, *supra* note 8, at 387.

<sup>23</sup> See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115–16 (1987) (setting outer limits on the exercise of personal jurisdiction in the international arena); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 & n.6 (1981) (applying the doctrine of *forum non conveniens* in the international arena); see also *infra* notes 65–67 and accompanying text (discussing adjudicative jurisdiction doctrines in this regard).

<sup>24</sup> 28 U.S.C. § 1350 (2006). Some scholars have argued that the ATS was enacted precisely to “remedy an important category of law of nations violations committed by US citizens against aliens.” Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 446 (2011); see also *id.* at 2 (concluding that “[r]ead in light of Article III, the common law forms of action applicable to intentional torts against aliens, and the background law of nations principles

ample discussed below,<sup>25</sup> in *Morrison v. National Australia Bank*, the Supreme Court very recently and very forcefully yanked back to U.S. borders the principal antifraud provision of the Securities Exchange Act, which lower courts had been construing extraterritorially for over four decades.<sup>26</sup> On its face, the Court's powerful reinvigoration of the presumption against extraterritoriality appears to cover other laws silent on geographic scope, like the ATS, instantly wiping away an avalanche of high-stakes cases alleging harms outside the United States. In fact, the Second Circuit already has used *Morrison* to cut off at the U.S. border another geographically silent statute, RICO.<sup>27</sup> Unless one can come up with a principled reason for treating one context differently than the other, entertaining suits based on foreign conduct under the ATS appears in open tension with *Morrison*, and the ATS is now susceptible to judicial paring—all the way back to U.S. borders.

The distinguishing principle this Article advances is that, unlike the Securities Exchange Act, the ATS applies international substantive law, and therefore should also apply international jurisdictional law. Because international law has evolved to authorize extraterritoriality, so too should the ATS. Accordingly, as long as courts apply international law under the statute (as opposed to, say, uniquely U.S. federal common-law rules), the ATS's scope should also be construed in conformity with international law, which contemplates extraterritoriality. In this regard, the approach meshes nicely with *Morrison*'s direction that courts may consult statutory "context" in construing geographic reach.<sup>28</sup> Here the relevant context is that the statute authorizes application not of uniquely national law but of international law, which applies everywhere and authorizes extraterritorial jurisdiction.

Next, the legislative source behind a statute can inform current due process analyses of federal extraterritoriality. Courts are in agreement that Fifth Amendment due process shields parties from "arbitrary or fundamentally unfair" applications of federal law

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that informed the statute, the ATS restricted suits to those against US citizens, but permitted aliens to sue for any intentional tort to their person or property").

<sup>25</sup> See *infra* Subsection III.C.1.

<sup>26</sup> 130 S. Ct. 2869, 2878 (2010).

<sup>27</sup> *Norex Petroleum v. Access Indus.*, 631 F.3d 29, 32–33 (2d Cir. 2010).

<sup>28</sup> *Morrison*, 130 S. Ct. at 2883.



abroad,<sup>29</sup> measured in large part by whether parties reasonably could have expected the law to govern their conduct when they engaged in it.<sup>30</sup> Yet courts have applied federal common-law rules to relationships between foreign corporations acting outside the United States and have entertained suits by foreign plaintiffs against foreign defendants for conduct taking place entirely abroad.<sup>31</sup> The U.S. government similarly has claimed power to prosecute foreigners for terrorist acts halfway around the world with no overt connection to the United States.<sup>32</sup> How, if at all, do these applications of U.S. law comport with due process and, more specifically, defendants' reasonable expectations?

Under a unified approach, the answer depends on whether the U.S. law implements an international law to which the defendant was already subject. If U.S. law does, the defendant is on notice and the application does not run afoul of due process. Thus, statutes that implement international law constitutionally may reach a wider variety of situations abroad than statutes that do not.

Because these areas have not previously been united in this way<sup>33</sup> and because each area is on its own fairly intricate, Part I provides a

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<sup>29</sup> See *infra* note 432 (citing cases from numerous courts of appeal to have considered the issue).

<sup>30</sup> See, e.g., *United States v. Yousef*, 327 F.3d 56, 111–12 (2d Cir. 2003); *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990); cf. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985) (noting this concern in the interstate choice of law context); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13, 318 n.24 (1981) (same).

<sup>31</sup> See *infra* notes 339–42 and accompanying text.

<sup>32</sup> See *infra* notes 436–40 and accompanying text.

<sup>33</sup> There have been a couple of brief judicial overtures in this general direction. See *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 195–96 (1820) (“[I]n construing [statutory scope] we should test each case by a reference to the punishing powers of the body that enacted it.”) (discussed *infra* Section III.B); see also *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 206 (1993) (Blackmun, J., dissenting). Also, John Knox has advanced a nuanced approach to the statutory construction issue using international rules of jurisdiction. Knox’s approach focuses on facts or “situations” of cases and applies irrespective of whether a statute implements international or a purely domestic law. See Knox, *supra* note 8, at 358–59. As a result, Knox’s approach would retain a presumption against extraterritoriality for statutes that implement international law where a basis of U.S. jurisdiction exists but is not what he refers to as the “sole or primary” basis. *Id.* at 353, 358–59. The unified approach, by contrast, focuses on the nature of the statute and, more fundamentally, the constitutional source of legislative power behind its enactment and whether it implements international law. It assigns canons of construction to particular statutes on this distinction and denies the presumption against extraterritoriality for statutes that implement international law.

conceptual and doctrinal overview of the approach to orient the reader. Parts II, III, and IV then break down and illustrate each area in more depth, demonstrating where and how the unified approach would apply to a variety of pressing extraterritoriality issues presently facing courts and litigants.

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Before elaborating the approach any further, a word is needed on scope of argument and methodology. The Article does not attempt to bring coherence to the law on extraterritoriality by exposing some latent, heretofore unidentified yet unifying theme in the cases that makes them all make sense. The case law is so riddled with inconsistencies and exceptions that such an exercise is probably futile and maybe even counterproductive. To be sure, as noted, the only thing courts and scholars seem to agree on is that the law in this area is a mess.<sup>34</sup> It is therefore not my intention to comprehensively describe the law as it is. The very fact that the canons are so perforated with exception and susceptible to inconsistent treatment by courts suggests they do not work as broad rules of general application. The incessant academic struggle and lingering judicial inability to untangle this area is symptomatic of the canons' defectiveness as across-the-board interpretive rules for all types of statutes.

In place of this blanket approach, I advance a new way of looking at extraterritoriality that unifies constitutional and statutory analyses by using the source of lawmaking power behind a statute to help determine the appropriate interpretive canon for that statute. In this respect, my approach differs from other approaches that generally oppose the presumption against extraterritoriality,<sup>35</sup> as well as those that suggest more statute-specific inquiries.<sup>36</sup> The former fall prey to the same problem with a blanket presumption against extraterritoriality, but in reverse, because they fail to appreciate the continuing validity of some rationales supporting the presumption, at least with respect to laws enacted under purely national legislative sources.

As to the few other statute-specific proposals, I naturally agree that this is generally the best way to view extraterritoriality issues.

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<sup>34</sup> See *supra* note 8.

<sup>35</sup> See Turley, *supra* note 8, at 602–03.

<sup>36</sup> See Kramer, *supra* note 8, at 758; Meyer, *supra* note 7, at 165.

Recommending my approach, however, and what sets it apart from other approaches,<sup>37</sup> is once again that it grounds itself in the constitutional source behind the statute. This provides a surer and more principled look into congressional intent;<sup>38</sup> by nature guarantees harmonization with foreign law, thereby reducing the potential for international conflicts;<sup>39</sup> and for the same reasons, conforms to inter-

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<sup>37</sup> See, e.g., Kramer, *supra* note 8, at 758 (recommending that courts “balance U.S. and foreign interests on a statute-by-statute basis and read specific limitations into particular statutes” but providing little guidance on when or how a statute should be construed to apply extraterritorially other than suggesting that it should vary depending on the purpose of the statute).

<sup>38</sup> Professor Jeffrey Meyer has proposed a rule of “dual illegality” for statutes silent on geographic scope. See Meyer, *supra* note 7, at 165. Under this rule, if the foreign jurisdiction where the conduct occurred similarly prohibits the conduct and the United States has a basis to exercise jurisdiction under international law, courts should interpret the U.S. statute to apply extraterritorially. *Id.* This rule, while it holds intuitive appeal, may lead in practice to counter-intuitive results because of its seeming over-inclusiveness—results that appear contrary to congressional intent. For instance, the rule in practice could end up having courts apply extraterritorially U.S. statutes that seem plainly intended to regulate purely domestic, garden-variety crimes like carjacking, automobile destruction, drive-by shootings, owning a machine gun, and even burning the U.S. flag. See Meyer, *supra* note 7, at 165, app. at 184–86. It also fails to heed the assumption that Congress generally legislates with domestic concerns in mind, which the Supreme Court recently and forcefully reaffirmed in *Morrison v. National Austl. Bank*, 130 S. Ct. 2869, 2877–78 (2010). The unified approach distinguishes *Morrison* and better incorporates congressional intent by permitting extraterritoriality only for crimes whose proscription, definition, and attendant jurisdictional scope is a matter of international, as opposed to just domestic, concern—a concern necessarily captured in U.S. laws that implement international law.

<sup>39</sup> In this connection, Professor Hannah Buxbaum argues persuasively for what she calls “transnational regulatory litigation” cases that seek to apply extraterritorially U.S. domestic regulatory law regarding, *inter alia*, antitrust, securities, and RICO, where that U.S. law “reflects an internationally shared norm.” Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 *Va. J. Int’l L.* 251, 255, 268, 298 (2006). As Buxbaum explains, however, “these cases apply domestic economic law,” *id.* at 255; that is, they “seek[] to apply not international law but domestic regulatory law.” *Id.* at 298. As a result, Buxbaum recommends that to ensure the extraterritorial application of these domestic laws does not conflict with foreign law, and is not viewed as U.S. jurisdictional overreaching by other states, will “depend[] on securing the consent of other states,” *id.* at 257, and she suggests procedural mechanisms to achieve that consent. *Id.* at 257, 309. By contrast (though obviously in keeping with the theme that U.S. courts have a role to play in advancing shared values), the unified approach argues that for U.S. statutes implementing international law, such foreign nation consent has already been established. Unlike with the purely domestic regulatory laws at issue in transnational regulatory litigation, other states will already have agreed—by way of either international custom or treaty—to both the norm implemented in the

national rules of jurisdiction to avoid discord with foreign nations. The approach also neatly accommodates calls to curb unilateral extension of U.S. law and use instead international lawmaking mechanisms<sup>40</sup> by illuminating how Congress already does, and can do, just that through sources of legislative authority that apply either international treaty or customary law.

Finally, to be clear from the outset, the approach is not meant to be either surefire or airtight in every situation. My argument is only that it can supply an untapped resource for guidance where the scope of statutes is otherwise unclear<sup>41</sup> and offers a more coherent mechanism for framing and resolving extraterritoriality issues than the jumble of disjointed yet overlapping doctrines courts are presently tasked with untangling. Further recommending the approach is that while it seeks to re-conceptualize and add coherence to the field, it does so in ways that are compatible with recent Supreme Court holdings and is therefore of timely and practical utility to litigants and courts right now contesting and defining the cutting edge of extraterritoriality.

#### I. A UNIFIED APPROACH TO EXTRATERRITORIALITY: AN OVERVIEW

The approach begins with a distinction between the types of law-making powers Congress may use to legislate extraterritorially. One class of powers can be thought of as “unilateral” in the sense that the powers do not depend upon foreign-nation consent, either for Congress to enact law or for how Congress prescribes the law it enacts.<sup>42</sup>

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U.S. law and its accompanying jurisdictional rules. For elaboration of this point, see *infra* Part I.

<sup>40</sup> See Austen L. Parrish, Reclaiming International Law from Extraterritoriality, 93 *Minn. L. Rev.* 815, 869–74 (2009).

<sup>41</sup> Congress also may clearly indicate the reach of statutes. See *Morrison*, 130 S. Ct. at 2878.

<sup>42</sup> While I chose the terms “unilateral” and “multilateral” because I believe them to be accurate descriptors of what I would like to convey, they are also used in other areas of law. In particular, their use here in relation to Congress’s power to legislate should be differentiated from their use in the conflicts-of-law sense, where they describe different choice-of-law methodologies. In that context,

[u]nilateral conflicts theories focus simply on whether the forum’s law applies to the activity in question, without worrying that another forum might also apply its law. Multilateral conflicts theories, on the other hand, try to resolve conflicts

Chief among this class is the power “[t]o regulate Commerce with foreign Nations.”<sup>43</sup> Thus Congress may, on its own, determine that foreign anticompetitive behavior or securities activity affecting U.S. markets is prohibited under U.S. law and may regulate that activity essentially how it chooses<sup>44</sup>—within limits of the U.S. Constitution of course,<sup>45</sup> but without any agreement or consent from foreign nations.

“Multilateral” powers, by contrast, contemplate some degree of foreign-nation consent for Congress to legislate, which also shapes the subject matter and content of the law Congress enacts. Included within this class are the necessary and proper power to effectuate treaties<sup>46</sup> and the power to “define and punish . . . Offences against the Law of Nations.”<sup>47</sup> For example, Congress self-evidently cannot enact a law implementing an international treaty unless there is a treaty. And where there is a treaty, any implementing legislation is shaped by that treaty.<sup>48</sup> Similarly, Congress cannot define and punish an offense against the law of nations if no offense exists in international law.<sup>49</sup> Here, too, the subject matter of the U.S. law is shaped by the subject matter of the international offense.<sup>50</sup>

The distinction between unilateral and multilateral sources of power can profitably inform judicial analysis of whether statutes quiet on geographic scope should be construed extraterritorially and whether the extraterritorial application of U.S. law violates due process. I set forth the argument’s central structure here, and then fill it out with more detail and case illustration in the remainder of the Article.

As indicated, courts presently employ two longstanding canons of construction to gauge the geographic coverage of U.S. law. One is the

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of jurisdiction so that each activity is assigned exclusively to the legislative jurisdiction of one state.

William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 *Harv. Int’l L.J.* 101, 104 (1998).

<sup>43</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>44</sup> See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813–14 (1993) (Scalia, J., dissenting on the statutory issue); Colangelo, *supra* note 4, at 952.

<sup>45</sup> See *supra* notes 11–12 and accompanying text.

<sup>46</sup> U.S. Const. art. I, § 8, cl. 18.

<sup>47</sup> *Id.* art. I, § 8, cl. 10.

<sup>48</sup> See *infra* Subsection II.B.2.

<sup>49</sup> See Colangelo, *supra* note 12, at 137–42; Kontorovich, *Article I Horizon*, *supra* note 11, at 1219–23.

<sup>50</sup> Kontorovich, *Article I Horizon*, *supra* note 11, at 1219–23.

presumption against extraterritoriality,<sup>51</sup> which the Supreme Court just reinvigorated energetically and in broad language.<sup>52</sup> A crucial question now facing courts and litigants is whether this revitalized presumption also cuts off at the U.S. border other laws silent on geographic reach, including laws that purport to implement international law.<sup>53</sup> The other canon is taken from Chief Justice Marshall's statement in *Murray v. The Schooner Charming Betsy* that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."<sup>54</sup> Under the *Charming Betsy* canon, the law of nations, or international law, contains jurisdictional rules that both authorize and limit the extraterritorial reach of federal statutes ambiguous on geographic sweep.<sup>55</sup>

The unified approach holds that when Congress enacts law under multilateral sources of legislative authority, the first of these canons—the presumption against extraterritoriality—should not apply. Rather, the only relevant tool of construction for these statutes is the *Charming Betsy* canon. The reason is that Congress's multilateral powers are predicated upon international law and function largely to implement that law in U.S. domestic law. Congress may implement a treaty through the Necessary and Proper Clause<sup>56</sup> or define and punish an offense against customary international law under the Offences Clause.<sup>57</sup> In either case, there must be some international law authorizing Congress to act. Yet international law is not comprised of only substantive rules; it is also jurisdictional—including rules of extraterritorial jurisdiction.<sup>58</sup> My argument is simply that when Con-

<sup>51</sup> *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991).

<sup>52</sup> See *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869, 2882–83 (2010).

<sup>53</sup> See, e.g., Conditional Cross-Petition for a Writ of Certiorari at 14–17, *Presbyterian Church of Sudan v. Talisman Energy*, 131 S. Ct. 122 (2010) (No. 09-1418).

<sup>54</sup> *Murray v. The Schooner Charming Betsy (The Charming Betsy)*, 6 U.S. (2 Cranch) 64, 118 (1804); see also *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963).

<sup>55</sup> *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004); see also *Lauritzen v. Larsen*, 345 U.S. 571, 577–78 (1953) (recounting and applying the jurisdictional principle of "international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory").

<sup>56</sup> See U.S. Const. art. I, § 8, cl. 18.

<sup>57</sup> See *id.* art. I, § 8, cl. 10.

<sup>58</sup> See Restatement (Third) of Foreign Relations Law of the United States §§ 402–04 (1987) (setting forth bases and a test for the exercise of jurisdiction under international law).

gress implements international law via multilateral power, it should be presumed to implement *all* of international law, including the relevant international law of jurisdiction. Absent some indication to the contrary, Congress should not be presumed to implement only a part of the international law governing certain activity, but all of it.

Looking to the sources of lawmaking power behind statutes to determine the appropriate canon of construction makes good doctrinal, conceptual, and practical sense. The approach also negotiates and, in fact, nicely harmonizes arguments for and against the presumption against extraterritoriality. It shows that arguments favoring the presumption make the most sense when the statute at issue derives from a unilateral source of domestic legislative authority. But these same arguments, upon inspection, do not apply with equal force when the lawmaking power behind a statute is multilateral. And sometimes they may even favor extraterritoriality.

The presumption's doctrinal origins and motivating rationales reveal why. It originated in jurisdictional rules of international law that were, at the time of the presumption's genesis, strongly territorial.<sup>59</sup> But as critics have observed for some time, the presumption no longer vindicates these international rules because the rules themselves have evolved to embrace extraterritoriality.<sup>60</sup> If international law were the doctrinal anchor for the presumption today, it would be remarkably anachronistic. On the surface, then, the presumption has long been unmoored from its original doctrinal foundations.

Yet just because the presumption against extraterritoriality no longer mirrors international law does not necessarily condemn its present-day value or function. Perhaps the rationale behind it still has sway. The reason jurisdictional rules of international law motivated the presumption in the first place was "to protect against unintended clashes between our laws and those of other nations which could result in international discord."<sup>61</sup> Surely this rationale might claim continuing relevance today, the idea being that if U.S. laws were not applied extraterritorially, they would not overlap with—and thus could not conflict with—foreign laws, thereby causing international dis-

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<sup>59</sup> See *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909); *The Apollon*, 22 U.S. (9 Wheat.) 362, 370–71 (1824); see also *infra* Section III.A.

<sup>60</sup> See Bradley, *supra* note 8, at 517; Dodge, *supra* note 8, at 113–14; Turley, *supra* note 8, at 607, 655, 659.

<sup>61</sup> *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991).

cord. Whatever the merit of this rationale with respect to statutes enacted under unilateral sources of legislative authority, and there may be merit,<sup>62</sup> the rationale cannot support a presumption against extraterritoriality for statutes enacted under multilateral sources and may sometimes cut in the opposite direction: namely, in favor of extraterritoriality.

First, the worry about clashes between U.S. and foreign laws is minimal if not illusory when it comes to statutes enacted under multilateral sources. Because the root prescription embodied in—and indeed authorizing—these statutes is an international norm necessarily agreed to by other nations through either treaty or custom, it also applies within those nations.<sup>63</sup> The result is a reduction if not an outright elimination of potential for true international “clashes” or conflicts of laws. In fact, the presumption itself might spur precisely what it was designed to avoid, since modern international law sometimes may encourage or even require extraterritorial jurisdiction. Application of the presumption therefore could lead to a failure to fulfill certain international obligations, and this failure could inadvertently generate international discord. Where international law authorizes instead of requires extraterritoriality the potential for discord remains reduced because the United States is still enforcing a norm shared by all.

This is not to say that the approach will lead to all statutes implementing international law automatically being construed extraterritorially in all situations. Under *Charming Betsy*, application of ambiguous U.S. laws still must comport with jurisdictional “principles of customary international law,” as the Supreme Court has recently explained, to “avoid unreasonable interference with the sovereign authority of other nations.”<sup>64</sup> The unified approach merely supplies a more nuanced mechanism for discerning when and how the jurisdictional assertion may generate discord, unlike the blunt hammer of the presumption against extraterritoriality, which inadvertently may create such discord by ignoring the modern international law of jurisdiction.

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<sup>62</sup> See *infra* Section III.A.

<sup>63</sup> If U.S. law implements a treaty, this may not be true for nations not party to the treaty, unless the treaty creates or evidences a customary norm generalizable to all nations. For elaboration of this point and examples, see *infra* Section III.C.

<sup>64</sup> *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).



There may also, of course, be potential frictions associated with the assertion of *adjudicative* or judicial jurisdiction by U.S. courts over suits with little or no U.S. connection. But that is a separate question. Those frictions arise principally from the choice of forum, not the choice of law. As to choice of forum, well-known adjudicative jurisdiction tests take these frictions directly into account. For example, due process limits on personal jurisdiction specifically accommodate and elevate concerns about “procedural and substantive interests of other nations . . . as well as the Federal Government’s interest in its foreign relations policies” and accordingly require “a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State.”<sup>65</sup> And conventional *forum non conveniens* analysis incorporates a variety of public and private factors that consider, among other things, practical problems and burdens on foreign litigants associated with trials in a remote forum, as well as “local interest[s] in having localized controversies decided at home.”<sup>66</sup> It is important to understand the distinction, long-recognized in both U.S. and international law, between the law sought to be applied and the forum applying it.<sup>67</sup> The present approach addresses only the choice of law, which is, by virtue of the source of lawmaking authority when Congress implements international law, the same everywhere.

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<sup>65</sup> *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987). In the criminal context, there is no such thing as extraterritorial adjudicative jurisdiction because the accused must be physically present at the start of trial. See *Crosby v. United States*, 506 U.S. 255, 261–62 (1993). The exercise of personal jurisdiction, therefore, is generally predicated upon the United States either having custody of the accused already or some prior consent and cooperation by the foreign nation, usually through the international legal mechanism of extradition. See, e.g., *United States v. Yousef*, 327 F.3d 56, 82, 88–90 (2d Cir. 2003) (discussed *infra* at Subsection III.C.2.a and Part IV).

<sup>66</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 & n.6 (1981).

<sup>67</sup> See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 317 n.23 (1981) (“The Court has recognized that examination of a State’s contacts may result in divergent conclusions for jurisdiction and choice-of-law purposes.”); see also *id.* at 321 n.3 (Stevens, J., concurring) (“[T]he Court has made it clear over the years that the personal jurisdiction and choice-of-law inquiries are not the same.”). This distinction is often referred to as a question of prescriptive (or legislative) jurisdiction versus adjudicative (or judicial) jurisdiction. See Restatement (Third) of Foreign Relations Law of the United States § 401 (1987).

Other rationales supporting the presumption are also unpersuasive when the source of lawmaking power behind the statute is multilateral. The most notable are the commonsense assumption that Congress legislates with domestic concerns in mind<sup>68</sup> and the separation of powers concern that the judiciary is institutionally ill-suited to determine whether and how U.S. law applies extraterritorially because such determinations involve “difficult and sensitive policy questions.”<sup>69</sup>

The assumption that Congress generally legislates with only domestic concerns in mind may comport with common sense when Congress uses unilateral sources of lawmaking power.<sup>70</sup> But it does not have the same intuitive strength when Congress uses multilateral sources rooted in international law, which by its nature deals with relations with foreign nations and norms shared with those nations. Rather, the opposite assumption makes more sense; that is, it makes more sense to presume that, in translating international law to U.S. law, Congress intended application of all of international law, including attendant jurisdictional rules that contemplate—and may even obligate—extraterritoriality.

If this is correct, then reading (out) the presumption against extraterritoriality in this manner tends to turn on its head the separation of powers argument, at least with respect to statutes enacted under multilateral sources. If we are truly worried about courts interfering in U.S. foreign affairs through determinations of “whether and how

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<sup>68</sup> *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991).

<sup>69</sup> Bradley, *supra* note 8, at 516. In addition, Bradley notes two other rationales: international comity and choice-of-law principles. See *id.* at 513–14. These more or less coincide with or are captured by the international law rationale discussed in the text, at least as I have articulated it. The comity rationale is avoidance of clashes with foreign law, specifically where U.S. interests may be inferior to foreign interests, and the operative choice-of-law principle is *lex loci delicti*, or the law of the place of the act determines its legality. *Id.* at 515. The comity rationale is essentially a restatement of the international law concern, albeit with a softer touch since comity is viewed not as a legal obligation but as a matter of mutual respect among sovereigns to consider each other’s interests. See *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895). The *lex loci delicti* principle matches up with the strict territoriality of the old international jurisdiction rules, and it has similarly fallen largely into desuetude. See Symeon C. Symeonides, *Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should*, 61 *Hastings L.J.* 337, 346 (2009).

<sup>70</sup> See Dodge, *supra* note 8, at 117–19. Dodge uses this concern to argue in favor of extraterritoriality in some instances, on the rationale that “what Congress is primarily concerned with is preventing harmful effects in the United States.” *Id.* at 118.

to apply federal legislation to conduct abroad,”<sup>71</sup> the solution is not to place an indiscriminate blanket presumption against extraterritoriality on all federal laws, but rather to inquire into the nature of specific laws, as derived from the legislative sources behind their enactment, to determine the proper canon or canons of construction. Under such an inquiry the construction that, absent evidence to the contrary, most aligns with political-branch intent and U.S. foreign affairs interests emerges.

Indeed, without insights gained by looking to the source of the statute for interpretive guidance, one could easily imagine a situation in which the two presumptions—both designed to capture congressional intent—run up against each other. For instance, if international law provides extraterritorial jurisdiction under *Charming Betsy*, and the presumption against extraterritoriality by definition provides the opposite, the two canons would conflict. How to resolve such a conflict? This Article suggests that the answer is what initially motivated both presumptions in the first place: avoiding international discord, which points toward construing statutes enacted via multilateral sources under *Charming Betsy*, and away from failing to fulfill U.S. obligations under that same law through context-blind application of the presumption against extraterritoriality. Yet when some courts have faced this sort of dilemma, they have come out the other way.<sup>72</sup>

Before turning to due process, I want to take some room to address a potential concern extrapolated from the heated and now fairly longstanding debate about the status of customary international law in U.S. courts.<sup>73</sup> Recently, Professors Anthony J. Bellia

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<sup>71</sup> Bradley, *supra* note 8, at 516.

<sup>72</sup> See *infra* notes 256–66, 366–91 and accompanying text.

<sup>73</sup> See Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 870 (1997); Harold Hongju Koh, Commentary, Is International Law Really State Law?, 111 Harv. L. Rev. 1824, 1825 (1998); Gerald L. Neuman, Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith, 66 Fordham L. Rev. 371, 371–72 (1997). For a nice summary of the main lines of debate, see Anthony J. Bellia Jr. & Bradford R. Clark, The Federal Common Law of Nations, 109 Colum. L. Rev. 1, 3 (2009) (explaining that “[t]he ‘modern’ position asserts that federal and state courts should recognize and enforce customary international law as supreme federal law whether or not the political branches have incorporated it through constitutional lawmaking processes” and that “[t]he ‘revisionist’ position, by contrast, asserts that customary international law is federal law only to the extent that

and Bradford Clark persuasively articulated a separation of powers theory to explain the status of certain rules of customary international law as federal law.<sup>74</sup> According to Bellia and Clark, “The Supreme Court has treated certain aspects of the law of nations as a set of background rules to guide its implementation of the Constitution’s allocation of powers.”<sup>75</sup> They draw upon the now extinct notion of “perfect rights” in the law of nations, whose violation “provided just cause for war.”<sup>76</sup> Included within this list are the “perfect rights of every other nation to exercise territorial sovereignty, conduct diplomatic relations, exercise neutral rights, and peaceably enjoy liberty.”<sup>77</sup> On Bellia and Clark’s separation of powers model, “the Court has respected foreign sovereigns’ ‘perfect rights’ (and close analogues) as a means of ensuring that any decision to commit the nation to war would rest exclusively with the political branches, and not with the judiciary or the states.”<sup>78</sup> In short, they argue that “the best reading of Supreme Court precedent dating from the founding to the present” is that the Court has upheld perfect rights, thereby avoiding international discord unless the political branches clearly direct otherwise.<sup>79</sup>

Toward the end of their article, Bellia and Clark apply this separation of powers model to modern extraterritoriality. They argue that territorial sovereignty was traditionally a perfect right that the Supreme Court has continued to protect and use as their principal modern example *Banco Nacional de Cuba v. Sabbatino*.<sup>80</sup> In *Sabbatino*, the Court refused to invalidate the nationalization and expropriation of property by another sovereign, Cuba, within its own territory where the act arguably violated international law.<sup>81</sup> According to Bellia and Clark, “the Court refused to depart from a

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the political branches have properly incorporated it; otherwise, it may operate as state law if a state has incorporated it”).

<sup>74</sup> Bellia & Clark, *supra* note 73, at 5.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 6.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 5.

<sup>79</sup> *Id.* at 9; see also *id.* at 76 (“[F]rom the early decades of the Republic and across changing eras of American legal thought, the Court has continued to enforce what were traditionally considered perfect rights of sovereign nations (or close analogues) as a means of upholding key allocation of powers principles.”).

<sup>80</sup> 376 U.S. 398 (1964).

<sup>81</sup> *Id.* at 420, 428–29.

traditional rule of territorial sovereignty (historically regarded as a perfect right), even though the Court acknowledged that the community of nations no longer recognized absolute territorial sovereignty,” and “[i]n effect, the Court held that any decision to abandon the traditional perfect rights of recognized foreign sovereigns would foster resentment and thus should be made by the political branches rather than the courts or the states.”<sup>82</sup> Indeed, Bellia and Clark find *Sabbatino* particularly powerful given that the taking itself was claimed to violate international law. Thus, on their reading, the Supreme Court “embrace[d] a traditional rule rooted in perfect territorial rights and reject[ed] a modern rule curtailing such rights.”<sup>83</sup>

Since my argument here deals with federally enacted statutes, the critique about the status of international law in U.S. courts does not affect the substantive law itself; Congress already has incorporated international law into a domestic rule of decision as a matter of positive lawmaking. But the separation of powers critique might potentially be extended to questions about the reach of that statute. Assuming strict territorial jurisdiction is still the default rule (an assumption to which I shall return below), the argument would be that by construing geographically silent statutes extraterritorially, courts would be using modern international rules of jurisdiction to effectively amend statutes in a way that could interfere with the rights of other sovereigns. And that, on a separation of powers theory, is properly left to the political branches. Hence, to paraphrase the Supreme Court’s recent decision in *Morrison*, unless the political branches clearly give the statute extraterritorial reach, it has none.<sup>84</sup>

Extending in this way the critique about the status of customary international law to questions about the reach of already enacted statutes is logical. But it is an extension, and it comes into tension with Supreme Court case law in other areas: namely, where the Court has construed enacted federal laws extraterritorially (as opposed to the Court applying unincorporated international law on its own, as was the issue in *Sabbatino*). To the extent the separation

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<sup>82</sup> Bellia & Clark, *supra* note 73, at 89.

<sup>83</sup> *Id.* at 88.

<sup>84</sup> *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869, 2878 (2010).

of powers model claims to describe Supreme Court jurisprudence, and it does,<sup>85</sup> it therefore does not extend to giving extraterritorial effect to enacted federal laws, which the Court has been doing for decades in a variety of contexts, even where those laws sharply conflict with territorial rights of other sovereigns.

After revealing this tension between the separation of powers model and the more apposite Supreme Court decisions to the present argument, that is, decisions construing federal laws, and indicating the limitations of *Sabbatino* on its own terms,<sup>86</sup> I demonstrate that even under a robust presumption against extraterritoriality like the one the Court recently erected in *Morrison*, courts invariably must confront the possibility of interfering with territorial rights of other sovereigns any time a case involves multijurisdictional elements. Indeed, all *Morrison* does is resurrect an outdated private international law approach, critiqued and largely abandoned for its reliance on the formalist fiction that multijurisdictional claims can be “localized” to a single territory. It is a rule courts and litigants are now stuck with, but the notion that courts do not engage in projecting U.S. law extraterritorially simply by localizing the entire multijurisdictional claim to one territory is a mirage. The unified approach, I will argue throughout the rest of this Article using case examples involving piracy, terrorism, and human rights norms, does a better job of acknowledging the reality of multijurisdictional claims by using current international law rules of jurisdiction, at least with respect to U.S. laws that implement international substantive law. Thus, to choose one of the options Bellia and Clark propose for translating their nineteenth century separation of powers theory to the use of modern international law, I would adopt a “broad view,” whereby courts could “incorporate elements of modern customary international law on their own,”<sup>87</sup> at least when construing the reach of statutes that themselves are designed by the political branches to implement international law.

To begin with, the Supreme Court began construing laws silent on geographic scope extraterritorially in the early part of the last

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<sup>85</sup> See supra note 79 and accompanying text.

<sup>86</sup> See infra note 96.

<sup>87</sup> Bellia & Clark, supra note 73, at 91.

century—and the Court explicitly used international jurisdictional rules to support its construction. In *United States v. Bowman*, for example, the Court extended a criminal statute silent on geographic reach to a conspiracy that started on a U.S. ship on the high seas headed towards Brazil and that continued in the foreign territory upon arrival.<sup>88</sup> Acknowledging that Congress had not specifically directed the statute to apply extraterritorially, the Court explained:

We have in this case a question of statutory construction. The necessary locus, when not specially defined, depends upon the purpose of Congress as evidenced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations.<sup>89</sup>

Using this approach, the Court concluded, “Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, *but allows it to be inferred from the nature of the offense*,” which was against the United States thereby authorizing jurisdiction under international law.<sup>90</sup> This type of judicial inference, in the absence of a clear congressional command to extend U.S. law inside a foreign sovereign’s territory, is precisely what would be *disallowed* on a separation of powers model that preferences foreign territorial sovereignty over more modern rules of international jurisdiction—rules the Court in *Bowman* used to construe the statute extraterritorially.

Even more problematic for a separation of powers model is the famous *Hartford Fire* case.<sup>91</sup> There the Supreme Court extended the Sherman Act—a statute silent on geographic reach—to prohibit entirely foreign conduct by British reinsurers inside Britain in complete conformity with British law.<sup>92</sup> The interference with Britain’s territorial sovereignty is stark, and in fact prompted intervention by the British government as *amicus curiae* before the Court.

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<sup>88</sup> 260 U.S. 94, 95–100 (1922).

<sup>89</sup> *Id.* at 97–98.

<sup>90</sup> *Id.* at 98 (emphasis added).

<sup>91</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

<sup>92</sup> *Id.* at 798–99.

It is worth quoting the Court's rehearsal and rejection of the British government's arguments:

The London reinsurers contend that applying the [Sherman] Act to their conduct would conflict significantly with British law, and the British Government, appearing before us as *amicus curiae*, concurs. They assert that Parliament has established a comprehensive regulatory regime over the London reinsurance market and that the conduct alleged here was perfectly consistent with British law and policy. But this is not to state a conflict. "The fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws," even where the foreign state has a strong policy to permit or encourage such conduct.<sup>93</sup>

Whatever one thinks of the Court's understanding of conflicts of law (which is clearly mistaken in this author's view), the fact remains that this holding is in no way compatible with, and indeed stands in severe tension with, the idea that the Court has respected the territorial sovereignty of a foreign nation absent a clear direction to the contrary from the political branches. Even Justice Scalia in dissent agreed that the presumption against extraterritoriality did not block the reach of the Sherman Act to prohibit foreign conduct that was perfectly—and purposely—legal under the foreign sovereign's laws where it occurred, despite the Act's "boilerplate language" quiet on geographic coverage.<sup>94</sup> Justice Scalia instead would have used the *Charming Betsy* canon to curtail the reach of the Act as unreasonable under international law.<sup>95</sup> It should be noted that under a unified approach, the presumption against extraterritoriality would apply to the Sherman Act as an exercise of unilateral lawmaking authority (the Commerce Clause) that, as *Hartford Fire* highlights, elevates the potential for conflicts with foreign law and international friction. Thus the unified ap-

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<sup>93</sup> Id. (quoting Restatement (Third) of Foreign Relations Law of The United States § 415 cmt. j (1987)).

<sup>94</sup> Id. at 814 (Scalia, J., dissenting). Justice Scalia did suggest that "if the question were not governed by precedent, it would be worth considering whether that presumption controls the outcome here," *id.*, perhaps presaging his opinion in *Morrison* applying the presumption to the Securities Exchange Act.

<sup>95</sup> Id. at 814–22.



proach would be more protective of foreign sovereignty than the Court's current approach in this area.<sup>96</sup>

On the other hand, the Court's recent reinvigoration of the presumption against extraterritoriality in *Morrison* appears strongly to support a separation of powers model that preferences foreign territorial sovereignty as a default rule. It requires a "clear indication of an extraterritorial application" by Congress to overcome the presumption<sup>97</sup>—though the Court also went out of its way to stress that "we do not say . . . that the presumption against extraterritoriality is a 'clear statement rule' . . . . Assuredly context can be consulted as well."<sup>98</sup> The Court did not elaborate what this means, but a unified approach would take the relevant context to be that a statute implements an international norm to which extraterritoriality attaches.<sup>99</sup>

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<sup>96</sup> I suppose one might also argue that the closer situation to *Sabbatino* would be extending international law rules like those relating to human rights governing how a state treats its own nationals to conduct by foreign sovereigns inside their own territories. But *Sabbatino* does not reach that far. To be sure, the Court explicitly and carefully cabined its holding, observing that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens," 376 U.S. 398, 428 (1964), and thus,

rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

*Id.*; see also *id.* at 430 n.34 ("There are, of course, areas of international law in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies. This decision in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law."). In addition to treating a far more extensive array of subject matter than government takings, the overwhelming majority of human rights norms concerning how a state treats its own nationals inside its own territory *are* subjects of multilateral "treat[ies] or other unambiguous agreement[s] regarding controlling legal principles," see *infra* note 283 and accompanying text; see also Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 *Colum. L. Rev.* 1110, 1127–47 (1982), which would then have to be implemented in U.S. domestic law to fall within the scope of this Article's argument.

<sup>97</sup> *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869, 2878 (2010).

<sup>98</sup> *Id.* at 2883.

<sup>99</sup> See *supra* notes 13–15 and accompanying text.

In any event, a couple of points about *Morrison* ought to be made in the separation of powers context because the decision ultimately may undermine both respect for foreign sovereigns and deference to the political branches. The first point is that *Morrison* resurrects an old-fashioned and largely abandoned conflict-of-laws rule to figure out whether the presumption against extraterritoriality even applies to multijurisdictional claims to begin with. After erecting a robust presumption against extraterritoriality in the first part of the opinion, the Court turned to the argument that, since some fraudulent conduct occurred in the United States, application of the Exchange Act was not extraterritorial but domestic.<sup>100</sup> The Court rejected this argument and found that the “focus” of the Exchange Act was not the deceptive conduct in the United States but rather the purchase or sale, which occurred abroad.<sup>101</sup> Here the Court essentially returned the law to the old vested rights theory in choice of law, in which an entire multijurisdictional claim was “localized” based on a single element. Thus, just as the traditional *lex loci delicti* rule provides that a multijurisdictional tort occurs entirely where the ultimate injury took effect, even if the conduct precipitating the injury occurred in another jurisdiction,<sup>102</sup> the Court in *Morrison* held that a violation of the Exchange Act occurs where the ultimate sale takes place even if the fraudulent conduct predating the sale occurred in another jurisdiction. Obviously, this approach captures formalist themes of predictability and judicial restraint, precisely the themes *Morrison* touts.<sup>103</sup>

But the idea that localizing a multijurisdictional claim to one jurisdiction and then applying that jurisdiction’s laws to all elements of the claim somehow does *not* implicate extraterritoriality is to engage in a legal fiction. Indeed, it is a fiction that has been recognized at least since the legal realists attacked the vested rights theory in the middle of the last century. It is enough simply to reverse either the facts in *Morrison* or the “focus” of the Exchange Act to expose it. If, for instance, the sale took place in the United States and the conduct predating it occurred abroad, applying the Ex-

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<sup>100</sup> *Morrison*, 130 S. Ct. at 2883–86.

<sup>101</sup> *Id.*

<sup>102</sup> See Restatement of Conflict of Laws §§ 377, 378, 384 (1934); see also Ala. Great S. R.R. Co. v. Carroll, 11 So. 803, 803–07 (Ala. 1893).

<sup>103</sup> *Morrison*, 130 S. Ct. at 2881.

change Act to its statutory “focus” as a matter of territorial jurisdiction would, in reality, clearly constitute applying U.S. law to conduct inside a foreign territory. Or suppose the Court found the “focus” of the Exchange Act to be prohibiting fraudulent conduct. Then, on the facts of *Morrison*, the Exchange Act would, as a legal fiction, apply only territorially to U.S. conduct, but in reality could reach foreign purchases and sales. Not only do concerns about interfering with foreign sovereignty vanish under this focus technique, the presumption itself is completely absent. One need only recall an actual example of this kind of technique in the antitrust context. By focusing on the domestic effects of foreign anticompetitive conduct in *Hartford Fire*, the Supreme Court applied the Sherman Act inside Britain and, as a result, interfered with the British government’s territorial sovereignty. Yet *Hartford Fire*’s methodology is in some ways *more* protective of foreign territorial sovereignty than *Morrison*’s. At least in *Hartford Fire* the Court acknowledged the existence of a presumption against extraterritoriality and concluded that it had been overcome. Under *Morrison*’s approach, the Court could simply avoid the presumption altogether by localizing the focus of a statute to the domestic element of the multijurisdictional claim—something courts presumably are now completely free to do with respect to all sorts of statutes.<sup>104</sup>

This points up another problem for *Morrison*’s approach on a separation of powers theory: it “marginalizes Congress and then showcases judicial creativity.”<sup>105</sup> At least under the traditional conflict-of-laws approach, localization rules were supposed to provide a neutral *a priori* framework immune from judicial tampering. But by giving courts total discretion to discern the “focus” of any given

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<sup>104</sup> See Austen Parrish, *Evading Legislative Jurisdiction*, 86 *Notre Dame L. Rev.* 1, 1 (forthcoming 2011). For the dangers of using an “effects test” to overcome the presumption against extraterritoriality, see Parrish, *supra* note 2, at 1456 (“In the United States, domestic laws now commonly regulate extraterritorial conduct and transnational litigation has blossomed. No longer limited to the antitrust and commercial contexts, courts apply all sorts of public and private laws to activity occurring abroad.”). Now all courts need do under *Morrison* is determine the “focus” is the domestic effect, and the presumption not only is overcome but becomes totally irrelevant.

<sup>105</sup> Lea Brilmayer, *The New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law* (June 29, 2011) (manuscript at 2, on file with Virginia Law Review Association).

statute, *Morrison* “creates a major loophole.”<sup>106</sup> Professor Lea Brilmayer explains the irony from a separation of powers perspective as follows:

Rather than undertaking a thankless (and probably fruitless) search for indications about what Congress wanted, a court need only decide that the presumption against extraterritoriality is inapplicable because the “focus” of the substantive law in question is something that took place in the United States. The irony is that the evidentiary standard needed to invoke the loophole—which no one pretends has been authorized by Congress—is considerably lower than the evidentiary standard needed to satisfy the presumption—a presumption that supposedly reflects what Congress wanted. *Morrison* makes it more difficult than before to base the result on what Congress wanted and easier than before to base the decision on undeniably judge-made concepts.<sup>107</sup>

It is not my objective here to engage in a full-throated critique of *Morrison* specifically or the presumption against extraterritoriality more generally; indeed, I am in favor of a stronger presumption for laws that implement purely U.S. domestic norms. I simply want to observe that any time a court decides whether U.S. law applies to a multijurisdictional claim, that decision invariably implicates extraterritoriality and triggers potential interference with foreign territorial sovereignty, as the Supreme Court precedent in this area manifestly shows. Localizing the focus of transnational claims to U.S. territory may sound nice in theory, but in reality U.S. law applies extraterritorially to whatever element of the multijurisdictional claim is foreign. This localization rule moreover may unintentionally sideline the political branches even more by giving total discretion to judges to discern the statutory “focus” and thereby circumvent the presumption altogether. By virtue of their status as customary law, modern international jurisdictional rules more realistically and transparently capture how and when states exercise jurisdiction;<sup>108</sup> this Article argues that courts should use these rules to construe federal statutes enacted by Congress to implement international substantive law.

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<sup>106</sup> *Id.* at 9.

<sup>107</sup> *Id.*

<sup>108</sup> See *infra* Part III.

Lastly, looking to the nature of the lawmaking source behind a statute helpfully informs reigning Fifth Amendment due process tests, which hold that extraterritorial applications of U.S. law can be “neither arbitrary nor fundamentally unfair.”<sup>109</sup> Briefly stated, if the source of the statute is multilateral, its extraterritorial application is far less likely to violate the defendant’s due process rights because the statute is, in effect, enforcing an international law to which the defendant is already subject in the territory where the conduct occurred. The defendant may still claim that the court’s assertion of personal jurisdiction violates due process if he lacks an adequate connection to the U.S. forum;<sup>110</sup> but again, that is a separate question.<sup>111</sup> When it comes to the law being applied, the defendant cannot claim an unfair lack of notice if U.S. law applies and enforces an international norm to which the defendant was already subject.

## II. LEGISLATIVE SOURCES

This Part draws a basic and uncultivated distinction between unilateral and multilateral sources of legislative authority. Unilateral sources grant Congress legislative power independent of foreign nation agreement, and U.S. laws enacted under these sources need not reflect preexisting international norms. Multilateral sources, on the other hand, are rooted in some preexisting international norm born of international agreement—whether through treaty or custom—that both authorizes Congress to legislate and shapes the resulting law.<sup>112</sup> I do not intend to map here the contours of all Con-

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<sup>109</sup> See, e.g., *United States v. Lei Shi*, 525 F.3d 709, 724 (9th Cir. 2008); *Goldberg v. UBS AG*, 690 F. Supp. 2d 92, 105 (E.D.N.Y. 2010).

<sup>110</sup> Although the Supreme Court has never squarely addressed the issue, it has implied that the Fifth Amendment would apply to assertions of extraterritorial personal jurisdiction by the federal government in the civil context. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 n.\* (1987). Lower courts have applied the Fifth Amendment in this way. See, e.g., *United States v. Swiss Am. Bank*, 274 F.3d 610, 618 (1st Cir. 2001) (“[U]nder the Fifth Amendment, a plaintiff need only show that the defendant has adequate contacts with the United States as a whole, rather than with a particular state.”). Because personal jurisdiction requires physical custody of the accused in the criminal context, there is no such thing as extraterritorial personal jurisdiction in criminal matters.

<sup>111</sup> See *supra* notes 65–67 and accompanying text.

<sup>112</sup> While it may not be patently obvious for every single federal statute on the books, the legislative source is easily detectable for the overwhelming majority of them, usually on the face of the statutes themselves. For instance, statutes enacted

gress's powers to legislate abroad. That endeavor alone would require book-length treatment<sup>113</sup> and is beyond the scope of this project. My purpose in this Part is more modest: to sketch this division with enough substance that it may be used to inform resolution of the statutory construction and due process issues in Parts III and IV. The ultimate aim is to construct a doctrinally and normatively better approach based on these insights.

### A. *Unilateral Sources*

To illustrate unilateral sources of extraterritorial power, we can use the most prolific: the Foreign Commerce Clause, which grants Congress power “[t]o regulate Commerce with foreign Nations.”<sup>114</sup> Congress has used this power to regulate a wide variety of activity abroad, including child sex tourism,<sup>115</sup> airplane bombing,<sup>116</sup> and computer fraud,<sup>117</sup> and it arguably undergirds controversial extraterritorial extensions of U.S. laws governing antitrust and financial markets like the Sherman Act<sup>118</sup> and the Securities Exchange Act.<sup>119</sup> The foreign commerce power also appears in numerous statutes

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under the Foreign Commerce Clause consistently include the language “in foreign commerce,” see *infra* notes 115–24 and accompanying text, statutes that implement customary international law tend to reference “the law of nations,” see *infra* notes 278, 384 and accompanying text, and statutes that implement treaties reflect faithfully the treaty language, see *infra* note 369 and accompanying text. Again, the source is intended only to supply helpful data about the statute’s scope. To the extent it is easier to discern than, say, Congress’s specific intent about the geographic scope of the specific statute at issue—which it will be in the vast majority of cases, as the jurisprudence in this area shows—it offers a useful resource.

<sup>113</sup> For example, my recent effort to explore just one of Congress’s powers resulted in a ninety-three page article. See Colangelo, *supra* note 4.

<sup>114</sup> U.S. Const. art. I, § 8, cl. 3. Although the Foreign Commerce Clause is used often, there are potentially other unilateral powers, such as the amorphous foreign affairs power. See, e.g., *United States v. Bin Laden*, 92 F. Supp. 2d 189, 220–21 (S.D.N.Y. 2000) (suggesting in dicta that Congress may have power to enact “foreign affairs legislation” over conduct abroad).

<sup>115</sup> 18 U.S.C. § 2423 (2006).

<sup>116</sup> *Id.* § 32.

<sup>117</sup> *Id.* § 1030.

<sup>118</sup> 15 U.S.C. § 1 (2006) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”); see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813–14 (1993) (Scalia, J., dissenting on the statutory issue).

<sup>119</sup> See, e.g., *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206, 208–09 (2d Cir. 1968), modified on other grounds en banc, 405 F.2d 215 (2d Cir. 1968).

quiet on geographic scope that cover more garden-variety offenses<sup>120</sup> like theft from common carriers,<sup>121</sup> destruction of motor vehicles,<sup>122</sup> drive-by shootings,<sup>123</sup> and carjacking.<sup>124</sup> I have identified and explored elsewhere limits on Congress's power under the Clause:<sup>125</sup> namely, that the commerce Congress seeks to regulate must be "with" not only foreign nations but also "with" the United States—that is, there must be a U.S. nexus; and that Congress has no more, and in some contexts has less, power to regulate inside foreign nations than inside the several U.S. states.<sup>126</sup>

Critical for present purposes, however, is that for Congress to legislate there need not be any agreement or consent from other nations. In this sense, the Foreign Commerce Clause is a unilateral source of legislative authority. Congress simply may decide on its own to regulate foreign activity, and then, within constitutional bounds, regulate it. No foreign-nation consent is needed to trigger the power.<sup>127</sup>

But the Clause is unilateral in another way too. Just as Congress unilaterally may decide to exercise this power, it unilaterally may decide what the law it enacts says. No foreign agreement or consent shapes the content of the law Congress enacts. So long as there is a constitutionally sufficient nexus to the United States,<sup>128</sup> Congress may, for instance, apply U.S. antitrust restrictions to behavior by foreign entities acting entirely in a foreign nation—even

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<sup>120</sup> For a fuller listing, see Meyer, *supra* note 7, app. at 184–86.

<sup>121</sup> 18 U.S.C. § 659 (2006).

<sup>122</sup> *Id.* § 33.

<sup>123</sup> *Id.* § 36.

<sup>124</sup> *Id.* § 2119.

<sup>125</sup> Colangelo, *supra* note 4.

<sup>126</sup> *Id.* at 954.

<sup>127</sup> While this is true for the vast majority of activity abroad that Congress seeks to regulate, it may overstate things at the outer reaches of Congress's foreign commerce power, at least according to the framework I have developed elsewhere. For example, although under the Interstate Commerce Clause Congress can create comprehensive national regulatory schemes "among" the several states and, by extension, reach purely intrastate conduct that threatens to undercut those schemes, Congress has no power under the Foreign Commerce Clause to create comprehensive international regulatory schemes "among" foreign nations—but only "with" them. Therefore, to reach purely intra-national conduct abroad Congress must have created the regulatory scheme jointly "with" the foreign nation. *Id.* at 958.

<sup>128</sup> This can be a complex question. See *id.* at 986.

if the law of that foreign nation permits<sup>129</sup> or requires the behavior prohibited by U.S. law. The potential for jurisdictional overreach and conflicts of laws should be clear, and will help form the basis of the statutory construction and due process analyses in the next two Parts.

### *B. Multilateral Sources*

Multilateral sources are different. For Congress to legislate there must be a predicate international legal norm that justifies and, in turn, shapes the legislation. Whether embodied in treaty or customary law, this predicate international norm is by nature a product of foreign nation agreement. The United States does not make international law on its own.<sup>130</sup> The chief multilateral sources for implementing international law are Congress's powers "[t]o define and punish . . . Offences against the Law of Nations"<sup>131</sup> and to effectuate treaties via the Necessary and Proper Clause.<sup>132</sup>

#### *1. The Offences Clause*

Until recently, the Offences Clause had not been the subject of much scholarly or judicial attention.<sup>133</sup> That has changed, especially in light of headline-grabbing cases involving piracy off the coast of Somalia.<sup>134</sup> Although the contours of Congress's Offences Clause power have not been precisely defined, it is generally understood that Congress cannot create offenses against the law of nations on its own.<sup>135</sup> Rather, the Clause authorizes Congress to enforce via domestic law

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<sup>129</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798–99 (1993) (noting that conduct in London reinsurance market, even if lawful under English law, may be illegal under U.S. antitrust law); see also *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 167 (2004) (describing the Court's holding in *Hartford Fire*).

<sup>130</sup> See *The Paquete Habana*, 175 U.S. 677, 700 (1900); *The Antelope*, 23 U.S. (10 Wheat.) 66, 120–22 (1825).

<sup>131</sup> U.S. Const. art. I, § 8, cl. 10.

<sup>132</sup> *Id.* art. I, § 8, cl. 18.

<sup>133</sup> See Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 *Wm. & Mary L. Rev.* 447, 449 (2000).

<sup>134</sup> These cases are discussed *infra* notes 278–80 and accompanying text.

<sup>135</sup> Colangelo, *supra* note 12, at 141–42; Kontorovich, *Article I Horizon*, *supra* note 11, at 1219–23; Charles D. Siegal, *Deference and Its Dangers: Congress' Power to "Define . . . Offenses Against the Law of Nations,"* 21 *Vand. J. Transnat'l L.* 865, 879 (1988).



international legal norms. This would seem imperative as a structural matter. If Congress could unilaterally invent offenses against the law of nations, anything could fall within its regulatory authority; the Offences Clause could single-handedly demolish the axiom of a government of limited and enumerated powers, not to mention swallow all other enumerated powers in the Constitution.

The drafting history and precedent support this view. For instance, James Wilson expressed concern during the drafting that the word “define” indicated, wrongly, that Congress could discern independently of other nations the content of the law of nations. Wilson protested that “[t]o pretend to *define* the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance[] that would make us ridiculous.”<sup>136</sup> To ease these concerns, Gouverneur Morris responded that “define” was appropriate because the law of nations was a raw set of norms often needing legislative refinement for conversion into domestic rules of decision. Thus Morris explained that “[t]he word *define* is proper when applied to *offences* in this case; the law of nations being often too vague and deficient to be a rule.”<sup>137</sup> These views suggest that “Congress could not create offenses, but retained only the second-order authority to assign more definitional certainty to those offenses already existing under the law of nations at the time it legislated.”<sup>138</sup>

The view that Congress cannot unilaterally determine the law of nations was also echoed forcefully by Justice Johnson in an oft-quoted dictum from the era. Rejecting the contention that Congress could declare murder to be piracy, an offense against the law of nations, and therefore bring that crime within congressional power when committed by foreigners against foreigners on a foreign ship, Johnson retorted:

Nor is it any objection to this opinion, that the law declares murder to be *piracy*. These are things so essentially different in their nature, that not even the omnipotence of legislative power can confound or identify them. Had Congress, in this instance, declared piracy to be murder, the absurdity would have been felt and acknowledged; yet, with a view to the exercise of jurisdic-

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<sup>136</sup> 2 The Records of the Federal Convention of 1787, at 615 (Max Farrand ed., 1911).

<sup>137</sup> *Id.*

<sup>138</sup> Colangelo, *supra* note 12, at 141.

tion, it would have been more defensible than the reverse, for, in one case it would restrict the acknowledged scope of its legitimate powers, in the other extend it. If by calling murder *piracy*, it might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device?<sup>139</sup>

On the other hand, when the Supreme Court has upheld U.S. law pursuant to the Offences Clause, the Court has identified and emphasized extant international norms. In *United States v. Arjona*, the Court went to lengths to demonstrate that U.S. law prohibiting counterfeiting foreign securities arose from “a duty . . . which the law of nations has imposed on [the United States] as part of their international obligations.”<sup>140</sup> The statute, “as a means of performing a duty which had been cast on the United States by the law of nations,” was therefore a constitutional exercise of the necessary and proper power to carry out Congress’s power under the Clause.<sup>141</sup> The Court also made clear that “[w]hether the offence as defined is an offence against the law of nations depends on the thing done, *not on any declaration to that effect by Congress.*”<sup>142</sup> Hence constitutional structure, history, and precedent all suggest that for Congress to enact law under the Offences Clause there must be a preexisting norm of international law. Congress cannot unilaterally invent offenses against the law of nations but has auxiliary power to assign more specificity where the international norm is too vague to serve as a domestic rule of decision.

## 2. *The Necessary and Proper Power to Effectuate Treaties*

The Necessary and Proper Clause gives Congress power to effectuate through domestic law treaties entered into by the Executive with the advice and consent of the Senate.<sup>143</sup> According to Chief Justice Marshall’s classic test for measuring the constitutionality of laws passed under the Clause, “[l]et the end be legitimate, let it be within

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<sup>139</sup> *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 198 (1820).

<sup>140</sup> 120 U.S. 479, 487 (1887).

<sup>141</sup> *Id.* at 488.

<sup>142</sup> *Id.* (emphasis added).

<sup>143</sup> U.S. Const. art. I, § 8, cl. 18; *id.* art. II, § 2, cl. 2; see also *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”<sup>144</sup> In the context of effectuating treaties, courts have held this “plainly adapted” test to ensure implementing legislation “bears a rational relationship to the Convention.”<sup>145</sup> But if there is no treaty Congress obviously cannot effectuate it through implementing legislation. Thus to trigger the power in the first place, foreign-nation agreement is needed. In this respect, the source of legislative power is distinctly multilateral.

The treaty also necessarily shapes the implementing legislation. As to how closely implementing legislation must reflect the treaty, the Eleventh Circuit recently observed that “the existence of slight variances between a treaty and its congressional implementing legislation do not make the enactment unconstitutional; identity is not required. Rather . . . legislation implementing a treaty bears a rational relationship to that treaty where the legislation tracks the language of the treaty in all material respects.”<sup>146</sup> Applying this standard, the court found for example that the U.S. Torture Act’s use of the term “under the color of law” did not render the statute an unconstitutional implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which instead uses the term “in an official capacity.”<sup>147</sup> The court relied on the report of the Senate Executive Committee charged with evaluating the Convention, noting that the report “aptly explained that there is no distinction between the meaning of the phrases ‘under the color of law’ and ‘in an official capacity.’”<sup>148</sup>

Accordingly, just as Congress enjoys some prescriptive flexibility to add definition to customary international law under the Offences Clause, Congress enjoys “a realm of flexibility . . . [to] carry out its delegated responsibilities” to effectuate treaties under the Necessary and Proper Clause.<sup>149</sup> Yet both sources fundamentally and necessarily

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<sup>144</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

<sup>145</sup> *United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998); see also *United States v. Belfast*, 611 F.3d 783, 800 (11th Cir. 2010).

<sup>146</sup> *Belfast*, 611 F.3d at 806 (emphasis omitted) (quoting *Lue*, 134 F.3d at 84).

<sup>147</sup> *Id.* at 808.

<sup>148</sup> *Id.*

<sup>149</sup> *Lue*, 134 F.3d at 84.

rely upon international law as a product of agreement between nations, which in turn shapes the resultant U.S. law. The next Part's statutory construction argument contends that these features tend to erase or minimize conflicts with foreign laws and ease concerns about jurisdictional overreaching.

At the risk of moving the cart slightly before the horse, I want to anticipate briefly the careful reader's objection that because Congress has some flexibility when implementing international law, U.S. law may not match up exactly with the international norms operative in foreign nations as a result of their own international legal obligations. I also do not rule out the possibility that Congress may have some leeway to push international law in new directions.<sup>150</sup> This is one of the ways international law is formed: such pushes gain acceptance and blossom into new rules.<sup>151</sup> It is not unreasonable to think the Constitution endows Congress a margin of international lawmaking power in this regard.<sup>152</sup> Again, however, such flexibility cannot be unbounded or it would destroy the axiom of limited and enumerated powers and render redundant all other enumerated powers.<sup>153</sup>

In any event, there are a number of responses to this concern. First and foremost, whatever flexibility there is to implement international law, it belongs to Congress. The next Part deals with courts—specifically, judicial tools of statutory construction. Concerns about what Congress does are therefore misplaced. To put the point another way, if the concern is that Congress's flexibility to implement international law may produce U.S. laws that do not match up exactly with international law, it is irrelevant to the next Part's discussion about statutory construction. Courts face one of two scenarios: If Congress's intent is unclear, courts must construe the statute in conformity with existing international law under *Charming Betsy*.<sup>154</sup> If, on

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<sup>150</sup> Colangelo, *supra* note 12, at 142.

<sup>151</sup> For the classic articulation of this phenomenon, see Anthony A. D'Amato, *The Concept of Custom in International Law* 97–98 (1971).

<sup>152</sup> Cf. Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 *Vand. L. Rev.* 819, 846 (1989) (“Diplomatic negotiations from the Revolutionary days onward found Americans consciously attempting to depart from the law of nations—with the intent to change international custom—on issues dealing with treaty formulations and the rights of neutrals trading in wartime.”).

<sup>153</sup> See *supra* notes 135–42.

<sup>154</sup> *Murray v. The Schooner Charming Betsy* (The *Charming Betsy*), 6 U.S. (2 Cranch) 64, 118 (1804); see also *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 178 n.35 (1993).

the other hand, Congress does clearly intend to move international law, the canons are moot—they are designed to avoid only *unintended* international discord.<sup>155</sup> But if Congress *intends* to implement international law in a way that varies (within constitutional bounds) from international law, that intended variation becomes a non-issue for the next Part’s discussion.

Second, the extent to which this is actually a problem, or could be, is an empirical question impossible to answer without comprehensively canvassing all statutes implementing international law. To the degree I have undertaken such an effort, U.S. implementing legislation largely if not identically mirrors the international law it seeks to implement,<sup>156</sup> sometimes even incorporating the latter by reference.<sup>157</sup> This is perhaps why this issue has seldom arisen.<sup>158</sup>

Third, the next Part does not require identical laws anyway. It is concerned primarily with avoiding *conflicts* of laws, not differences in laws. Under any permutation of what are termed “false conflicts”—where two laws are substantially the same or lead to the same outcome<sup>159</sup>—U.S. implementing legislation that survives the Offences Clause and Necessary and Proper Clause tests above tends to qualify by avoiding true conflicts between U.S. and international law. And finally, as we will see in Part IV, if a material difference does happen

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<sup>155</sup> *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991); see also Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. Rev. 293, 333 n.181 (2005).

<sup>156</sup> See Colangelo, *supra* note 12, app. at 189–201.

<sup>157</sup> *Id.* at 189; see also, e.g., *United States v. Bond*, 581 F.3d 128, 138 (3d Cir. 2009) (observing that implementing legislation “closely adheres to the language of the . . . Convention”).

<sup>158</sup> Apart from *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820), and *United States v. Arjona*, 120 U.S. 479 (1887), I found only three modern cases squarely addressing the issue. See *United States v. Belfast*, 611 F.3d 783, 805 (11th Cir. 2010); *United States v. Ferreira*, 275 F.3d 1020, 1027–28 (11th Cir. 2001); *United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998). A related but separate question involves federalism concerns with Congress’s power to effectuate treaties where the legislation would otherwise fall outside of Congress’s lawmaking powers. See, e.g., *Bond*, 581 F.3d at 135 & n.4.

<sup>159</sup> See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985); see also *id.* at 838 n.20 (Stevens, J., concurring) (“‘[False] conflict’ really means ‘no conflict of laws.’ If the laws of both states relevant to the set of facts are the same, or would produce the same decision in the lawsuit, there is no real conflict between them.” (quoting Robert A. Leflar, *American Conflicts Law* § 93, at 188 (3d ed. 1977))).

inadvertently to sneak in, the Fifth Amendment's Due Process Clause acts as a side constraint<sup>160</sup> to block that law as applied to individuals abroad having no reasonable expectation they would be subject to it.<sup>161</sup>

### III. STATUTORY CONSTRUCTION

This Part fills out and explores the implications of the argument that the presumption against extraterritoriality should not apply to statutes that implement international law and that the only relevant rule of construction for gauging the reach of these statutes should be the *Charming Betsy* canon. It begins by tracing both canons back to the same fundamental concern: avoiding unintended discord with foreign nations. It then argues that, based on this original motivating concern, the presumption should not apply to statutes that implement international law because such statutes present no or minimal risk of both conflicts with foreign law and jurisdictional overreaching. In addition, applying the presumption to these statutes may result in the United States failing to fulfill international obligations to exercise jurisdiction. The presumption thus could generate exactly what it was designed to avoid: unintended discord with foreign nations.

To illustrate, I take the early (though resurgent) example of piracy, which is again the subject of headline-grabbing cases and also provides an analogically valuable prologue to other extraterritoriality issues courts face today. I explain how the Supreme Court used an early variety of the presumption against extraterritoriality to stunt U.S. jurisdiction over piracy under international law and, in the process, hobble the United States's ability to fulfill its international responsibilities contrary to Congress's intent. I next apply the approach to recent issues like the application of U.S. laws to modern piracy and terrorism, and the increasingly famous (and controversial) ATS.<sup>162</sup> Although a jurisdictional statute enacted at the founding,<sup>163</sup> the ATS has generated an abundance of recent cases and a robust

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<sup>160</sup> I borrow this term from Robert Nozick. See Robert Nozick, *Anarchy, State and Utopia* 33–35 (1974).

<sup>161</sup> See *infra* Part IV.

<sup>162</sup> 28 U.S.C. § 1350 (2006).

<sup>163</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004).

modern debate about the use of international law in U.S. courts and the reach of U.S. jurisdiction abroad. I explain that the unified approach does a good job distinguishing laws that seek to apply international law—like laws relating to piracy, terrorism, and the ATS—from laws that prescribe purely national laws, like the principal anti-fraud provision of the Securities Exchange Act, to which the Supreme Court just applied what amounts to a presumption against extraterritoriality on steroids.<sup>164</sup>

The approach also holds implications for two other highly charged ATS issues currently being litigated in lower courts and destined for Supreme Court review:<sup>165</sup> whether courts should use international law or purely federal common law as operative rules of decision and the level of specificity and international acceptance needed for particular norms to be actionable under the statute.<sup>166</sup> On the first issue, if courts use international law, the ATS should authorize suits for conduct abroad according to jurisdictional principles of international law in line with this Article's thesis. But if courts apply purely federal common-law rules, the ATS becomes essentially identical to the Exchange Act as a unilateral projection of U.S. domestic law abroad, risking both conflicts with foreign law and jurisdictional overreaching.<sup>167</sup> Consequently, the Supreme Court's decision in *Morrison* applying the presumption against extraterritoriality to the Exchange Act could control construction of the ATS as well, and ATS causes of action—to the extent they rely on federal common law—could be restricted to U.S. territory.

On the second issue, because actionable ATS norms must obey both substantive and jurisdictional international law, for a foreigner to sue a foreigner for conduct abroad in U.S. courts, the violation

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<sup>164</sup> See *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869, 2878 (2010) (“When a statute gives no clear indication of an extraterritorial application, it has none.”).

<sup>165</sup> See Conditional Cross-Petition for a Writ of Certiorari 14–17, *Presbyterian Church of Sudan v. Talisman Energy*, 131 S. Ct. 122 (2010) (No. 09-1418).

<sup>166</sup> For a recent account of why the Supreme Court's current approach is partially misguided based on the original purpose of the ATS, see Bellia & Clark, *supra* note 24. This Article evaluates ATS claims on the present state of the law.

<sup>167</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 140–41 (2d Cir. 2010) (“Unilaterally recognizing new norms of customary international law—that is, norms that have not been universally accepted by the rest of the civilized world—would potentially create friction in our relations with foreign nations and, therefore, would contravene the international comity the statute was enacted to promote.”).

should be subject to universal jurisdiction under international law.<sup>168</sup> This casts doubt on a slew of recent cases by foreigners against foreign financial institutions for aiding and abetting and financing acts of terrorism abroad ever since the Second Circuit held in *United States v. Yousef* that “terrorism” is not subject to universal jurisdiction because it has no commonly agreed-upon definition under international law.<sup>169</sup> Much like the Supreme Court in the early piracy cases failed to extend U.S. law prohibiting piracy to the full extent of international law, the Second Circuit’s holding threatens a similar failure to extend U.S. law to certain acts of terrorism to the full extent permitted by modern international law. I then explain how these cases can, and how some already have, overcome *Yousef*’s hurdle. Indeed these two ATS issues—whether federal common law or international law provides the operative rule of decision and what level of specificity and international acceptance is needed for a norm to be actionable—intersect to determine whether plaintiffs can succeed on arguably one of the only avenues left for corporate liability under the ATS: financing terrorism.<sup>170</sup>

#### A. *The Canons’ Common Concern*

The presumption against extraterritoriality was born of international law. It is nothing new to observe that the international law of jurisdiction at the founding and up through the start of the twentieth century was strongly territorial.<sup>171</sup> To 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

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<sup>168</sup> See Michael D. Ramsey, International Law Limits on Investor Liability in Human Rights Litigation, 50 Harv. Int’l L.J. 271, 319 (2009). But see William S. Dodge, Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy, 51 Harv. Int’l L.J. Online 35, 37 (2010) (discussed *infra* note 318). For an argument that “[t]he historical meaning of the ATS does not in itself support the lower courts’ continuing practice of allowing aliens to sue other aliens under the ATS for conduct occurring outside the United States,” see Bellia & Clark, *supra* note 24, at 99. For purposes of this Article, I am taking that continuing lower court practice as I find it. See also *id.* at 100–01 (“Most lower courts have followed *Filartiga*’s lead in allowing suits between aliens under the ATS, and this practice has continued after *Sosa*.”).

<sup>169</sup> 327 F.3d 56, 98–108 (2d Cir. 2003).

<sup>170</sup> See *infra* Subsection III.C.2.b.

<sup>171</sup> See Colangelo, *supra* note 4, at 1026; Meyer, *supra* note 7, at 130–32.



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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 power . . . .<sup>172</sup>

The Court even used these international law principles later that same century to craft the landmark personal jurisdiction decision in *Pennoyer v. Neff*, translating to the U.S. interstate system “well established principles of public law respecting the jurisdiction of an independent State over persons and property.”<sup>173</sup> Under such principles, and echoing Marshall’s language above, the Court began with the “general, if not universal, law” that jurisdiction is “necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse.”<sup>174</sup> Similarly, in *American Banana v. United Fruit Co.*, a 1909 decision applying the presumption against extraterritoriality to limit the geographic reach of U.S. antitrust law, Justice Holmes affirmed the “general and almost universal rule,” which held “that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”<sup>175</sup> According to Holmes:

[f]or another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.<sup>176</sup>

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<sup>172</sup> 11 U.S. (7 Cranch) 116, 136–37 (1812).

<sup>173</sup> 95 U.S. 714, 722–23 (1877).

<sup>174</sup> *Id.* at 720.

<sup>175</sup> 213 U.S. 347, 356 (1909).

<sup>176</sup> *Id.* This rule reflects the prevailing conflict of laws or private international law rule at the time. Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 Sup. Ct. Rev. 179, 186.

Part IV explores why such an assertion of extraterritorial jurisdiction would be “unjust” by squarely addressing individual rights and due process concerns.<sup>177</sup> The important point for this Part is that, under these early rules, the mutually “exclusive and absolute”<sup>178</sup> jurisdiction of every nation inside its own territory by definition discouraged extraterritorial jurisdiction inside other nations.

The relationship to the *Charming Betsy* canon is obvious. If “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”<sup>179</sup> and international law discourages extraterritorial jurisdiction inside other nations, statutes should be construed not to apply extraterritorially unless Congress indicates otherwise.<sup>180</sup> In this respect, the presumption against extraterritoriality is essentially an outgrowth of *Charming Betsy*.<sup>181</sup> Both canons sprung from the same fundamental desire: avoiding discord with foreign nations through unintended clashes with international or foreign law.

The clash with international law would be the extraterritorial jurisdictional overreach itself. Extending U.S. law into the territory of a foreign nation contrary to international law would, to use Marshall’s phrase, “imply a diminution of [that nation’s] sovereignty,”<sup>182</sup> or, in Holmes’s formulation, “interfere[] with the authority of another sovereign”<sup>183</sup>—itself a potentially serious source of international friction.<sup>184</sup> On top of that source of potential friction, the extraterritorial projection of U.S. law would overlap, and therefore could conflict, with a foreign nation’s law within its own territory, creating a conflict

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<sup>177</sup> See *Infra* Part IV.

<sup>178</sup> *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–37 (1812).

<sup>179</sup> *Murray v. The Schooner Charming Betsy (The Charming Betsy)*, 6 U.S. (2 Cranch) 64, 118 (1804).

<sup>180</sup> John Knox points out that, regarding vessels at sea, this is better thought of as a presumption against “extrajurisdictionality” since the high seas are not U.S. territory. See Knox, *supra* note 8, at 364–65. As discussed below, see *infra* note 196 and accompanying text, and as Knox himself recognizes, however, “throughout the nineteenth century, the Court regarded U.S.-flagged vessels as if they were floating bits of U.S. territory.” Knox, *supra* note 8, at 365 n.87. Whatever term one uses, the concerns about sovereign interference and conflict of laws are the same.

<sup>181</sup> Cf. Knox, *supra* note 8, at 364–66.

<sup>182</sup> *McFaddon*, 11 U.S. (7 Cranch) at 136.

<sup>183</sup> *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

<sup>184</sup> *Id.*

of national laws.<sup>185</sup> These concerns drove early extraterritoriality cases.

### *B. Early Examples: The Piracy Cases*

A series of piracy cases decided between 1818 and 1820 engagingly illustrates the issues. In particular, the cases show the danger of using the presumption against extraterritoriality to construe statutes that implement international law, resulting in a failure to fulfill international legal responsibilities contrary to congressional intent.

The first case is *United States v. Palmer*,<sup>186</sup> an 1818 decision that some have identified as an early example of the presumption against extraterritoriality.<sup>187</sup> *Palmer* asked whether Section 8 of the first federal criminal statute,<sup>188</sup> 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.<sup>189</sup> Chief Justice Marshall made two interpretive moves to conclude that the statute did not apply. He first looked to the title of the entire 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.”<sup>190</sup> This offers an early example of the assumption that Congress legislates with only domestic concerns in mind. For Marshall, the title suggested that the 1790 statute’s general terms “any person or persons” did not “comprehend every human being.”<sup>191</sup> Rather, the “words must be limited in some degree, and the intent of the legislature will determine the extent of

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<sup>185</sup> *Id.* (warning against using a nation’s “own notions rather than those of the place where [the defendant] did the acts”).

<sup>186</sup> 16 U.S. (3 Wheat.) 610 (1818).

<sup>187</sup> See Bradley, *supra* note 8, at 511; Dodge, *supra* note 8, at 85. But see Knox, *supra* note 8, at 364 (distinguishing “extrajurisdictionality” in *Palmer* from extraterritoriality).

<sup>188</sup> Kontorovich, “Define and Punish” Clause, *supra* note 11, at 175.

<sup>189</sup> *Palmer*, 16 U.S. (3 Wheat.) at 631. The defendants may, in fact, have been Americans claiming allegiance to a South American republic engaged in a revolt against Spain. *Id.* at 611; see also G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 *Am. J. Int’l L.* 727, 731 (1989). The Court, however, treated them as non-citizens. See *Palmer*, 16 U.S. (3 Wheat.) at 630.

<sup>190</sup> *Palmer*, 16 U.S. (3 Wheat.) at 631.

<sup>191</sup> *Id.* at 631–32.

this limitation”<sup>192</sup>—which led to the second interpretive move: discerning the legislative intent.

Here Marshall’s reasoning reveals the international and conflicts-of-law motivations behind the presumption. He began by touring the statute’s language, pointing out other instances of general terms, such as “any captain, or mariner of any ship or other vessel” and “any seaman.”<sup>193</sup> Noting the abundance of these other general terms, he was troubled by the implications of using them globally.

To illustrate his concerns, Marshall offered a hypothetical example to which we will return throughout this Section: although the statute prohibited acts of violence against a ship’s commander by “any seaman,” according to Marshall, “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.”<sup>194</sup> The reason was that

[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.<sup>195</sup>

Put another way, if the United States extended U.S. law to a foreign seaman on a foreign ship who committed an act of violence against his commander, the United States would overreach its jurisdiction under international law. Such an exercise of jurisdiction not only could interfere with the sovereignty of another nation but also could risk conflict with that nation’s law inside its own territory since, at the time, a vessel on the high seas was deemed part of the nation’s territory under whose flag it sailed.<sup>196</sup> Reasoning backward from this

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 632.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 632–33.

<sup>196</sup> *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.”); see also *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) (No. 16,317).

proposition about “any seaman” to the “any person” language directly at issue in the case, Marshall found that like other terms of literally global but, in his view, implicitly limited scope, neither did the term “any person” embrace literally any person. Whom the term did embrace, however, was not settled by *Palmer*; and the answer came two years later in *United States v. Klintock*.<sup>197</sup>

To fully understand *Klintock*, it is important to appreciate what happened in the interim. *Palmer* was “roundly criticized by contemporaries” for limiting the scope of the 1790 statute and thereby stunting the United States’s ability to prosecute piracy under the law of nations,<sup>198</sup> which all agreed included robbery on the high seas.<sup>199</sup> In one famous criticism, John Quincy Adams renounced *Palmer* as “a sample of judicial logic—disingenuous, false, and hollow” and an “enormous hole in the moral garment of this nation made by this desperate thrust of the Supreme Court.”<sup>200</sup> In fact, in 1819, the year after *Palmer* was decided, Congress passed a new piracy statute to remedy precisely the hole *Palmer* had hewn. The statute punished, accordingly, “any person or persons whatsoever” who “shall, on the high seas, commit the crime of piracy, as defined by the law of nations.”<sup>201</sup> As we will see, the definition of piracy under the law of nations becomes crucial to determining the jurisdictional reach of the statute under this Article’s thesis—but first the Court’s decision in *Klintock*.

*Klintock* was decided in 1820 and dealt with the same section of the same 1790 statute as *Palmer* (since the defendant had been accused prior to the enactment of the 1819 statute).<sup>202</sup> The facts were

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<sup>197</sup> 18 U.S. (5 Wheat.) 144 (1820).

<sup>198</sup> White, *supra* note 189, at 731; see also Kontorovich, “Define and Punish” Clause, *supra* note 11, at 187.

<sup>199</sup> See *infra* note 229 and accompanying text.

<sup>200</sup> J. Q. Adams, diary entry for May 11, 1819, in 4 *The Memoirs of John Quincy Adams* 363 (C. Adams ed., 1874–77).

<sup>201</sup> Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14; see also *United States v. Hasan*, No. 2:10cr56, 2010 U.S. Dist. LEXIS 115746, at \*39 (E.D. Va. Oct. 29, 2010) (“In response to the Supreme Court’s interpretation of the Act of 1790 in *Palmer*, Congress passed the Act of 1819 to make clear that it wished to proscribe not only piratical acts that had a nexus to the United States, but also piracy as an international offense subject to universal jurisdiction.”); Alfred P. Rubin, *The Law of Piracy* 158 (2d ed. 1998) (“The immediate result of *U.S. v. Palmer* in the halls of the Congress was the passage of [the Act of 1819] . . .”).

<sup>202</sup> *Klintock*, 18 U.S. (5 Wheat.) at 151–52.

similar to *Palmer*, except the defendant in *Klintock* was a U.S. citizen and the acts were committed on a stateless, instead of a foreign-flag, vessel.<sup>203</sup> As in *Palmer*, Marshall penned the opinion for the Court. *Klintock*, however, came out the other way.

On the issue of the statute's reach, Marshall began by distinguishing *Palmer* on the status of the ship. The Chief Justice explained that the rule in *Palmer* "appl[ie]d] exclusively to a robbery or murder committed by a person on board of any ship or vessel belonging exclusively to subjects of a foreign State."<sup>204</sup> And, leaving no doubt as to the narrowness of *Palmer*'s holding, Marshall reiterated that for it to govern, the ship "must at the time be sailing under the flag of a foreign State, whose authority is acknowledged. This is the case which was presented to the Court [in *Palmer*]; and this is the case which was decided."<sup>205</sup> Not so in *Klintock*. Because the acts were committed

by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, [their conduct] is within the true meaning of this act, and is punishable in the Courts of the United States.<sup>206</sup>

Marshall went on to observe that while general statutory terms "ought not to be so construed as to extend to persons under the acknowledged authority of a foreign State, [such terms] ought to be so construed as to comprehend those who acknowledge the authority of no State."<sup>207</sup> In short, the international and conflict-of-laws concerns that had animated limiting the 1790 statute in *Palmer* vanished in *Klintock* by virtue of the vessel's statelessness. Because of this status, application of U.S. law did not infringe another nation's sovereignty and could not conflict with another nation's laws on its own flag vessel, or floating piece of its territory.<sup>208</sup>

Although Marshall did his best to atrophy *Palmer* through the construct of statelessness, the decision partially survived and in ways that

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<sup>203</sup> Id. at 144, 147–48.

<sup>204</sup> Id. at 151.

<sup>205</sup> Id.

<sup>206</sup> Id. at 152.

<sup>207</sup> Id.

<sup>208</sup> This had actually been argued by the Attorney General in *Klintock* to distinguish the case from *Palmer*, id. at 146–48, and the Chief Justice bit.

potentially curtailed U.S. jurisdiction over piracy under the law of nations: namely, where the crime occurred on a foreign-flag ship. This made the 1819 statute still necessary, and led Justice Johnson in another 1820 piracy case, *United States v. Furlong*, to declare that

[i]f such cases occur under the act of 1790, I shall respectfully solicit a revision of Palmer's case, if it be considered as including those cases. . . . under the belief that it never could have been the intention of Congress that such an offender should find this country a secure assylum to him.<sup>209</sup>

Johnson instead proposed a different rule of construction, and one that matches up quite neatly with the approach espoused by this Article: "in construing [statutory scope] we should test each case *by a reference to the punishing powers of the body that enacted it.*"<sup>210</sup> Under this rule, "[t]he reasonable presumption is . . . general words made use of in that law, ought not . . . to be restricted so as to exclude any cases within their natural meaning."<sup>211</sup> According to Johnson, "this view of the subject appears to me to furnish the only sufficient key to the construction of the 8th section of the act of 1790."<sup>212</sup>

Johnson therefore sought to use the source of Congress's powers in enacting the law to inform the law's jurisdictional scope. Under this construction, Johnson explained, Congress did not "intend[] . . . [to] leave unpunished the crime of piracy in any cases in which they might punish it."<sup>213</sup> To understand "the cases in which [Congress] might punish it," and how Johnson's—and this Article's—approach work, we must return to the definition of piracy.

What has gone largely undetected in both the cases themselves and commentary since they were decided is that the 1790 statute actually outlawed two types of piracy: piracy under the law of nations and piracy under municipal law, or what was called "piracy by statute." These were different offenses with different attendant jurisdictional rules. As I now show, they should have been construed differently, but were not. The analysis here requires some delicate turns given the law at the time and the poor drafting of the 1790 statute.

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<sup>209</sup> 18 U.S. (5 Wheat.) 184, 198–99 (1820).

<sup>210</sup> *Id.* at 195–96 (emphasis added).

<sup>211</sup> *Id.* at 196.

<sup>212</sup> *Id.* at 198.

<sup>213</sup> *Id.*

But courts today are being forced to rediscover this very distinction to prosecute modern day piracy,<sup>214</sup> and the larger discussion sets a rich analogical stage for the next Section where I connect the Court's mistake in these early piracy cases to more recent cases involving, among other things, modern piracy, terrorism, and the ATS.

### 1. Piracy under the Law of Nations

The 1790 statute at issue in these early piracy cases was the first federal criminal statute.<sup>215</sup> It was enacted by the first Congress and outlawed a wide range of activity.<sup>216</sup> Its broad definition of piracy, which, as we know from Marshall's hypothetical in *Palmer*, included acts like "lay[ing] violent hands upon [one's] commander,"<sup>217</sup> not only troubled the Chief Justice but has perplexed scholars as well, leading one expert recently to note that "[t]he reasons, if any, for the language are unknown."<sup>218</sup> Yet upon inspection, the 1790 statute tracks in part Blackstone's definition of piracy in his *Commentaries*, whose influence on the founding generation is well known.<sup>219</sup> Indeed Blackstone's authority in this area has not much waned; recent decisions show his enduring and powerful influence on how the Supreme Court interprets the scope of early statutes implementing international law, such as the ATS.<sup>220</sup>

According to Blackstone, "piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there."<sup>221</sup> The 1790 act similarly defined piracy "upon the high seas" as "robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punish-

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<sup>214</sup> *United States v. Hasan*, No. 2:10cr56, 2010 U.S. Dist. LEXIS 115746, at \*18–20 (E.D. Va. Oct. 29, 2010) (discussing the difference between "general piracy" and "municipal piracy").

<sup>215</sup> Act of Apr. 30, 1790, ch. 9, 1 Stat. 112.

<sup>216</sup> *Id.*

<sup>217</sup> *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 627 (1818).

<sup>218</sup> Kontorovich, "Define and Punish" Clause, *supra* note 11, at 176.

<sup>219</sup> *Bullard v. Bell*, 4 F. Cas. 624, 632 (C.C.D.N.H. 1817) (No. 2,121); *The Ann*, 1 F. Cas. 926, 927 (C.C.D. Mass. 1812) (No. 397); 1 *The Records of the Federal Convention of 1787*, at 472 (Max Farrand ed., 1911); 2 *id.* at 448.

<sup>220</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714–16, 719–24, 737 (2004).

<sup>221</sup> 4 William Blackstone, *Commentaries* \*72.



able with death.”<sup>222</sup> At the time, felony meant a serious crime punishable by death.<sup>223</sup> The 1790 statute thus codified in part the common-law definition of piracy as described by Blackstone. This was in keeping with “the relationship between common law and positive law in the late 18th century, when positive law was frequently relied upon to reinforce and give standard expression to the ‘brooding omnipresence’ of the common law.”<sup>224</sup> The 1790 statute’s codification of common-law piracy was also the definition squarely at issue in *Palmer*: robbery on the high seas.<sup>225</sup>

Three key features of this definition unlock its jurisdictional potential. First, it captured the definition of piracy under the law of nations.<sup>226</sup> In another piracy case of the era, *United States v. Smith*,<sup>227</sup> which interpreted the 1819 statute’s language punishing piracy “as defined by the law of nations,”<sup>228</sup> famed internationalist Justice Story explained that “robbery, or forcible depredations upon the sea, *animo furandi*, is piracy.”<sup>229</sup>

Second, at the time Blackstone wrote,<sup>230</sup> and in the United States when these early piracy cases were decided,<sup>231</sup> the law of nations was considered part of the common law. Describing this jurisprudential dynamic, Story explained that

[t]he common law . . . recognises and punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations, (which is part of the common law,) as

<sup>222</sup> *Palmer*, 16 U.S. (3 Wheat.) at 626.

<sup>223</sup> Blackstone, *supra* note 221, at \*94.

<sup>224</sup> *Sosa*, 542 U.S. at 722 (internal citation omitted). Or, as Blackstone explained: those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of [its] decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world.

Blackstone, *supra* note 221, at \*67.

<sup>225</sup> *Palmer*, 16 U.S. (3 Wheat.) at 626.

<sup>226</sup> An exception would be standard murder committed by a foreigner, against a foreigner, on a foreign-flag vessel. See *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 196–98 (1820).

<sup>227</sup> 18 U.S. (5 Wheat.) 153 (1820).

<sup>228</sup> Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14.

<sup>229</sup> *Smith*, 18 U.S. (5 Wheat.) at 161.

<sup>230</sup> See Blackstone, *supra* note 221, at \*72.

<sup>231</sup> See *Smith*, 18 U.S. (5 Wheat.) at 161–62.

an offence against the universal law of society, a pirate being deemed an enemy of the human race.<sup>232</sup>

Blackstone similarly described the pirate as “*hostis humani generis*”—an enemy of the human race—who had committed “an offence against the universal law of society”<sup>233</sup> and was punishable under “the law of nations, as a part of the common law.”<sup>234</sup>

Third, with respect to the particular offense of piracy under the law of nations, there existed what was, at the time of these cases, and is still now, called “universal jurisdiction.”<sup>235</sup> That is, any nation had jurisdiction over piracy under the law of nations, irrespective of who perpetrated the crime or the status of the ships involved. Story described these three features with far more concision than I have. According to Story, piracy was

an offence against the law of nations, and . . . its true definition by that law is robbery upon the sea. And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offence is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment.<sup>236</sup>

To sum up, the definition of piracy at issue in *Palmer* codified and tracked Blackstone’s definition of common-law piracy. It was an offense not against municipal law, but against the law of nations, over which all states had universal jurisdiction irrespective of national links. The diagram below attempts to depict these interactive features:

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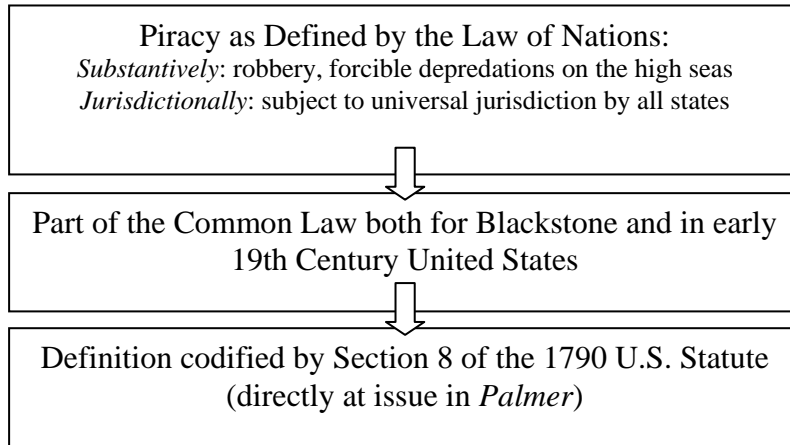
<sup>232</sup> *Id.* at 161.

<sup>233</sup> Blackstone, *supra* note 221, at \*71.

<sup>234</sup> *Id.* at \*73.

<sup>235</sup> *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820).

<sup>236</sup> *Smith*, 18 U.S. (5 Wheat.) at 162.



## 2. Piracy by Statute

But the similarities between the 1790 statute and Blackstone do not end there. Blackstone explained further that, in addition to the common-law definition of piracy (which again, incorporated the law of nations), “by statute, some other offences are made piracy also.”<sup>237</sup> For example, Blackstone observed that “any commander, or other seafaring person . . . running away with any ship, boat, ordnance, ammunition, or goods; or yielding them up voluntarily to a pirate” could be guilty of piracy by statute.<sup>238</sup> Significantly, the 1790 statute reflected this same piracy by statute: “if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandize . . . or yield up such ship or vessel voluntarily to any pirate,” he would be guilty of piracy.<sup>239</sup>

Moreover, according to Blackstone, piracy by statute included “any person confining the commander of a vessel, to hinder him from fighting in defence of his ship, or to cause a revolt on board.”<sup>240</sup> Likewise—and as we know from Marshall’s use of this very language for his hypothetical in *Palmer*—the 1790 statute defined a pirate as “any seaman [who] shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship . . . or [who]

<sup>237</sup> Blackstone, *supra* note 221, at \*72.

<sup>238</sup> *Id.*

<sup>239</sup> *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 626–27 (1818).

<sup>240</sup> Blackstone, *supra* note 221, at \*72.

shall make a revolt in the ship.”<sup>241</sup> The correspondence between the two definitions is plain.

What is striking for present purposes is that the parallel definitions employ virtually identical general terms like “any commander”<sup>242</sup> and “any captain,”<sup>243</sup> and any “seafaring person”<sup>244</sup> and “any seaman”<sup>245</sup>—precisely the terms Marshall construed in limited fashion in *Palmer* and then reasoned backward from to limit U.S. jurisdiction over classic piracy under the law of nations by “any person” at issue in that case.<sup>246</sup> The problem that emerges in sharp relief when one reads the 1790 statute next to Blackstone is that the general terms from which Marshall reasoned backward relate exclusively to what both Blackstone and international lawyers at the time the case was decided designated “piracy . . . by statute.”<sup>247</sup>

This was not the same as piracy under the law of nations. Piracy by statute was instead a label affixed by municipal law to crimes that did *not* constitute piracy under the law of nations but which municipal legal systems wished to condemn with equal force.<sup>248</sup> And, unlike piracy under the law of nations, which had a uniform definition, definitions of piracy by statute could vary across municipal legal systems.<sup>249</sup> Thus, piracy by statute was not an offense under international law but instead comprised “certain acts which are considered piracy by the internal laws of a State, to which the law of nations does not attach the same signification.”<sup>250</sup>

Importantly, laws regarding piracy by statute were jurisdictionally limited.<sup>251</sup> As one renowned nineteenth-century international

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<sup>241</sup> *Palmer*, 16 U.S. (3 Wheat.) at 627.

<sup>242</sup> Blackstone, *supra* note 221, at \*72.

<sup>243</sup> *Palmer*, 16 U.S. (3 Wheat.) at 626.

<sup>244</sup> Blackstone, *supra* note 221, at \*72.

<sup>245</sup> *Palmer*, 16 U.S. (3 Wheat.) at 627.

<sup>246</sup> *Id.* at 632–33.

<sup>247</sup> Blackstone, *supra* note 221, at \*72; 10 Annals of Cong. 600 (1800) (distinguishing piracy “under the law of nations” from “piracy by statute” and warning against “confounding” the two, which would lead to “indistinct” jurisdiction).

<sup>248</sup> Kontorovich, “Define and Punish” Clause, *supra* note 11, at 166.

<sup>249</sup> See 10 Annals of Cong. 600 (1800) (statement of John Marshall) (“A statute may make any offence piracy, committed within the jurisdiction of the nation passing the statute . . .”).

<sup>250</sup> Henry Wheaton, *Elements of International Law*, § 124, at 164 (George Grafton Wilson ed., Oxford Univ. Press 1936) (1866). For a good discussion, see Kontorovich, “Define and Punish” Clause, *supra* note 11, at 166.

<sup>251</sup> Kontorovich, “Define and Punish” Clause, *supra* note 11, at 166.

lawyer and statesman explained, piracy by statute “can only be applied . . . with reference to [a nation’s] own subjects, and in places within its own jurisdiction.”<sup>252</sup> Accordingly, and in contrast to piracy under the law of nations, which was subject to universal jurisdiction, “piracy created by municipal statute can only be tried by that State within whose territorial jurisdiction” or “on board of whose vessels, the offence thus created was committed.”<sup>253</sup> Indeed Marshall himself had made this very distinction in a famous speech, warning against “confounding general piracy with piracy by statute,” and declaring that

[a] statute may make any offence piracy, committed within the jurisdiction of the nation passing the statute, and such offence will be punishable by that nation. But piracy under the law of nations . . . alone is punishable by all nations . . . . No particular nation can increase or diminish the list of offences thus punishable.<sup>254</sup>

In sum, the 1790 statute tracking in part Blackstone’s definition prohibited two types of piracy, each with its own jurisdictional rule: piracy under the law of nations by “any person,” which was subject to universal jurisdiction, and piracy by statute committed by, for example, “any captain” or “any seaman” against the safety of the ship, which was subject only to territorial or flag jurisdiction.

Marshall’s mistake in *Palmer* was extrapolating jurisdictional limits over piracy by statute to constrain U.S. jurisdiction over piracy under the law of nations, thereby hobbling the United States’s ability to punish piracy under international law—a mistake Congress remedied the very next year by enacting a new statute punishing “any person or persons whatsoever” who “shall, on the high seas, commit the crime of piracy, *as defined by the law of nations*.”<sup>255</sup> Another diagram may be helpful here:

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<sup>252</sup> Wheaton, *supra* note 250, at 164. Wheaton’s treatise was later relied upon by the Supreme Court in the famous international law decision, *The Paquete Habana*, 175 U.S. 677, 691 (1900).

<sup>253</sup> Wheaton, *supra* note 250, at 164.

<sup>254</sup> *United States v. Robins*, 27 F. Cas. 825, 862 (D.S.C. 1799) (No. 16,175).

<sup>255</sup> Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14 (emphasis added).

**Piracy by Statute:**

*Substantively:* municipal offense, definition varied across jurisdictions; though both Blackstone and 1790 statute (tracking Blackstone) include as piracy by statute preventing commanders from defending their ships

*Jurisdictionally:* subject only to national, territorial, or flag jurisdiction; no universal jurisdiction



Codified by Section 8 of the 1790 U.S. Statute (not directly at issue in *Palmer* but used as a hypothetical example of the international jurisdictional and conflict of laws problems with construing general terms globally)

*Palmer* highlights the mistake of using a presumption against extraterritoriality to construe statutes that implement international law. By worrying about jurisdictional overreach and conflicts with foreign law, Marshall limited the United States's ability to punish piracy under the law of nations, contrary to congressional intent. To be sure, these worries vanished in *Klintock*: because the ship was deemed stateless, U.S. law did not apply inside another nation's territory, or flag vessel, as the case may be. *Klintock* accordingly makes some sense in light of the early presumption's concerns.

My point, however, is that this was the wrong presumption, accompanied by the wrong concerns, to use in these cases. And, when viewed under the right presumption—the *Charming Betsy* canon—there was never any threat of international discord resulting from jurisdictional overreach or conflicts with foreign law. Rather, just the opposite: by limiting U.S. jurisdiction over piracy under the law of nations, the Court's parochial construction threatened precisely what the canons were designed to avoid: unintentional international discord, here by jeopardizing the young nation's ability to fulfill its international responsibility to combat piracy. The proof, after all, was the immediate enactment of a new piracy statute punishing “any person or persons whatsoever” who commit “piracy, as defined by the law of nations.”<sup>256</sup> The reasoning

<sup>256</sup> *Id.*

behind this position, perhaps evident already in my discussion of the cases, is nonetheless worth setting out in condensed form and proceeds as follows.

A distinction existed that reference to Blackstone helps identify between, on the one hand, the 1790 statute's codification of the common-law offense of piracy, and, on the other, what was called piracy by statute. The common-law definition implemented the law of nations, while piracy by statute was solely a creature of a nation's "internal"<sup>257</sup> or municipal law. This distinction cuts to the heart of why, while prosecuting piracy by statute may have created a conflict of national laws since definitions could vary across municipal legal systems,<sup>258</sup> using the common-law definition to prosecute, as the Court had been asked to do in *Palmer*, simply could not result in a conflict.

There could be no conflict of laws because there was, in effect, only one law being applied—the law of nations, under which piracy had a fixed definition that indisputably included robbery on the high seas.<sup>259</sup> In this connection, Justice Story's elucidation bears repeating: the offense was prosecuted as "an offence, not against [a nation's] own municipal code, but as an offence against the law of nations, (which is part of the common law[])."<sup>260</sup> As such, "the offence is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment."<sup>261</sup> Consequently, using the law of nations definition did not, indeed could not, produce a conflict of laws. As a matter of international law, nations had agreed upon the offense definition of piracy; U.S. courts merely implemented via domestic legislative and judicial mechanisms the international legal prohibition.

Yet there might still remain a problem of jurisdictional overreach. Even if nations agreed as a matter of international law that robbery on the high seas constituted piracy, thereby erasing any conflict of laws where U.S. law implemented the international prohibition, the United States might still jurisdictionally overextend by

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<sup>257</sup> Wheaton, *supra* note 250, at 164.

<sup>258</sup> See 10 *Annals of Cong.* 600 (1800).

<sup>259</sup> *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161–62 (1820).

<sup>260</sup> *Id.* at 161.

<sup>261</sup> *Id.* at 162.

punishing the offense, as Marshall had speculated, “on board a ship sailing under a foreign flag, under the jurisdiction of a foreign government.”<sup>262</sup> But *Charming Betsy* erases this concern as well. In fact, it cuts the other way in these cases.

Unlike piracy by statute, which as a creature of solely municipal law applied only to a state’s own nationals or vessels, piracy under the law of nations was subject to universal jurisdiction.<sup>263</sup> It was punishable by all states, irrespective of the nationality of the perpetrators, victims, or vessels involved.<sup>264</sup> And like all nations, the United States had an international obligation to repress it.<sup>265</sup> By limiting the reach of U.S. law over the international crime in *Palmer*, Marshall constrained the United States’s ability to fulfill this international responsibility and hence perversely accomplished exactly what the canons were designed to avoid: potential discord with foreign nations. In addition, employing the *Charming Betsy* canon in this context disabuses courts of the assumption that Congress always legislates with only domestic concerns in mind. The more sensible assumption is that when Congress implements international substantive law—like the law against piracy—it also implements attendant international jurisdictional law, which by its nature deals with foreign concerns and, in the case of piracy, encouraged if not obligated the exercise of extraterritorial jurisdiction. Using *Charming Betsy* in this way also turns the separation of powers concern on its head. By restricting U.S. jurisdiction over piracy against the law of nations in *Palmer*, Marshall substituted his own foreign policy judgment for that of the political branches.<sup>266</sup>

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<sup>262</sup> *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 632 (1818). Notably, Marshall stated this concern with respect to piracy by statute. As discussed above, he then used this construction by extension to limit the 1790 statute’s prohibition on piracy under the law of nations.

<sup>263</sup> *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820); *Smith*, 18 U.S. (5 Wheat.) at 161–62.

<sup>264</sup> *Smith*, 18 U.S. (5 Wheat.) at 161–62; see also Blackstone, *supra* note 221, at \*71 (“[T]he crime of *piracy*, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being . . . *hostis humani generis*. As therefore he has renounced all the benefits of society and government . . . by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right . . . to inflict that punishment upon him . . .”).

<sup>265</sup> Blackstone, *supra* note 221, at \*71.

<sup>266</sup> See *Knox*, *supra* note 8, at 387.



Again, the immediate post-*Palmer* enactment of the 1819 piracy statute validates such a view.

The better approach in these cases would have been to accord piracy, as an offense under the law of nations, its attendant rule of universal jurisdiction under the law of nations, and to accord piracy by statute, as a municipal offense, the presumption against extra-territoriality. This reading better comports with congressional intent than Marshall's incongruous construction in *Palmer*, which mixed the two. Arriving at this reading admittedly required some technical maneuvering in light of the law at the time and overcoming the 1790 statute's sloppy drafting. But unpacking the cases in this way supplies a wonderfully intricate illustration of a problem that has continuing relevance right up to the present day.

### *C. Modern Examples: Piracy, Terrorism, and the ATS*

A lot has changed about the nature and substance of international law since the early piracy cases, including international law's evolving constitutive processes and seemingly ever-expanding subject matter. But the law of nations then, as now, comprised customary norms derived from the practice of states accompanied by a sense of legal obligation, or *opinio juris*.<sup>267</sup> Early courts engaged in extensive divination exercises to translate these often raw norms into domestic rules of decision for specific offenses. For instance, the Supreme Court in *Smith* faced the question, under the 1819 piracy statute, of whether "the crime of piracy is defined by the law of nations with reasonable certainty."<sup>268</sup> To answer this question, Justice Story resorted to the writings of no less than twenty-five publicists, or scholars,<sup>269</sup> to conclude that international law defined piracy with reasonable certainty to mean robbery on the high seas.<sup>270</sup>

The modern proliferation of ATS litigation displays continued wrangling over the scope of offenses under the law of nations, par-

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<sup>267</sup> Jay, *supra* note 152, at 822–23.

<sup>268</sup> *Smith*, 18 U.S. (5 Wheat.) at 160.

<sup>269</sup> *United States v. Yousef*, 327 F.3d 56, 100 n.33 (2d Cir. 2003) ("Publicists' is an antique word used in the parlance of international law as a synonym for writers who, in other areas of scholarship, are called 'scholars' . . .").

<sup>270</sup> *Smith*, 18 U.S. (5 Wheat.) at 161, 163 n.8.

ticularly regarding secondary liability,<sup>271</sup> as well as methodological disputes over how to properly determine that scope.<sup>272</sup> Yet the core definitional substance of most offenses is now spelled out in detail in positive international law, or treaties. These instruments reflect not only positive legal consensus but also powerful evidence of custom by virtue of the practice of states entering into and undertaking obligations pursuant to such agreements.<sup>273</sup> Treaties have long been considered generators of customary law, especially where their provisions are intended to be generalizable to non-state parties<sup>274</sup> as prohibitions on modern international offenses tend to be.<sup>275</sup> Thus instead of having to cull an international consensus from the multitude of definitions proffered by various international law scholars, today Justice Story could simply look to the definition of piracy in the United Nations Convention on the Law of the Sea (“UNCLOS”), which has been ratified by nearly every nation in the world.<sup>276</sup> Story actually presaged such a resource in *Smith* when he lamented the indeterminacy of offenses against the law of nations, noting that “[o]ffences . . . against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognised by the common consent of na-

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<sup>271</sup> See *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 255–76 (S.D.N.Y. 2009); see also Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 *Hastings L.J.* 61, 61–65 (2008); Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 *Harv. Int’l L.J.* 271, 272–75 (2009).

<sup>272</sup> See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 140 (2d Cir. 2010) (critiquing the district court’s “improper methodology for discerning norms of customary international law”); *id.* at 149–53 (Leval, J., concurring in the judgment) (disagreeing with the majority’s methodology).

<sup>273</sup> *Id.* at 137–38 (majority); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 256 (2d Cir. 2003); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 273 (E.D.N.Y. 2007); see also Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 *Va. J. Int’l L.* 149, 169–70 (2006).

<sup>274</sup> *North Sea Continental Shelf (F.R.G. v. Den. & Neth.)*, 1969 I.C.J. 3, 41 (Feb. 20) (explaining that generalizable treaty provisions are “indeed one of the recognized methods by which new rules of customary international law may be formed”); see also *Restatement (Third) of Foreign Relations Law of The United States* § 102(3) (1987) (“International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.”).

<sup>275</sup> See *infra* notes 373–77 and accompanying text.

<sup>276</sup> *United Nations Convention on the Law of the Sea* art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397.

tions.”<sup>277</sup> Today such a code exists in the form of multilateral treaties.

Unfortunately, some modern courts have failed to recognize this resource. For example, a recent decision involving application of the current U.S. statute outlawing “piracy as defined by the law of nations”<sup>278</sup> to activity off the coast of Somalia explicitly and bizarrely refused to use the widely-accepted UNCLOS definition to elaborate the definition in *Smith*, instead holding that because there was no domestic case on point between 1820 and 2010, “piracy as defined by the law of nations” is still restricted to *Smith*’s survey of seventeenth- and eighteenth-century scholars’ views.<sup>279</sup> Fortunately, another decision in the same court took the better view and found that the definition of piracy in the statute embraced an evolving law of nations reflected in widely ratified treaties like UNCLOS.<sup>280</sup>

The subject matter of international law has also changed since the early piracy cases. Back then, the principal offenses against the law of nations continued to reflect Blackstone’s catalogue, which was limited to “three kinds[:] 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy.”<sup>281</sup> International law’s subject matter thus dealt primarily with nations’ relations with each other, and acts outside the territorial control of any nation that threatened them all.<sup>282</sup> By contrast, today international law deals with how a nation treats its own citizens within its own

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<sup>277</sup> United States v. *Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820).

<sup>278</sup> 18 U.S.C. § 1651 (2006).

<sup>279</sup> United States v. *Said*, No. 2:10cr57, 2010 WL 3893761, at \*8–9 (E.D. Va. Aug. 17, 2010) (memorandum and opinion order on Defendants’ Joint Motion to Dismiss). *Smith* also did not purport to provide an exhaustive definition. It merely held that the conduct at issue in that case, robbery on the high seas, was piracy. 18 U.S. (5 Wheat.) at 161–62.

<sup>280</sup> United States v. *Hasan*, No. 2:10cr56, 2010 U.S. Dist. LEXIS 115746, at \*120 (E.D. Va. Oct. 29, 2010) (“UNCLOS . . . reflects the definitive modern definition of general piracy under customary international law.”).

<sup>281</sup> Blackstone, *supra* note 221, at \*68.

<sup>282</sup> See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 749 (2004) (Scalia, J., concurring in part) (“That portion of the general common law known as the law of nations was [at the founding] understood to refer to the accepted practices of nations in their dealings with one another . . . and with actors on the high seas hostile to all nations and beyond all their territorial jurisdictions (pirates).”).

territory<sup>283</sup> and offenses that might occur entirely within a nation's territorial control not directly involving relations with other nations at all.<sup>284</sup>

A third international legal development is jurisdictional. In marked departure from the strict territoriality at the founding, international law now authorizes extraterritorial jurisdiction in a variety of situations. Under modern international law, states may exercise jurisdiction not only over acts that occur within their territories but also over acts abroad that have, or are intended to have, effects within their territories—or what is called objective territoriality.<sup>285</sup> States may also assert jurisdiction over acts by their nationals abroad—or active personality jurisdiction—as well as over acts against their nationals in some circumstances—or passive personality jurisdiction.<sup>286</sup> In addition, states may claim jurisdiction over acts abroad that threaten “the security of the state or other offenses threatening the integrity of governmental functions,” like espionage or counterfeiting the state's currency<sup>287</sup>—what is often referred to as the protective principle.<sup>288</sup> Finally, the category of universal jurisdiction offenses has expanded beyond piracy to include other offenses against the law of nations.<sup>289</sup> It is this last category that has been the subject of heated debate in suits brought by foreigners under the ATS and in criminal terrorism cases.

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<sup>283</sup> See *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 249 (2d Cir. 2003) (“[O]ffenses that may be purely intra-national in their execution, such as official torture, extrajudicial killings, and genocide, do violate customary international law because the ‘nations of the world’ have demonstrated that such wrongs are of ‘mutual . . . concern’ and capable of impairing international peace and security.” (internal citation omitted)); see also International Covenant on Civil and Political Rights arts. 6–27, Dec. 19, 1966, 999 U.N.T.S. 171; Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

<sup>284</sup> See *Flores*, 414 F.3d at 249.

<sup>285</sup> Restatement (Third) of Foreign Relations Law of the United States § 402(1)(c) (1987).

<sup>286</sup> *Id.* § 402(3), cmt. g.

<sup>287</sup> *Id.* § 402(3), cmt. f.

<sup>288</sup> *Id.*

<sup>289</sup> For a catalogue of current universal jurisdiction offenses, see Colangelo, *supra* note 12, app. at 189–99.

*1. The Resurgence of the Presumption*

In light of these international legal developments, it is important to appreciate exactly what is at stake in selecting the appropriate canon of construction for geographically silent U.S. statutes: strict application of the presumption against extraterritoriality would necessarily wipe out all international law bases of extraterritorial jurisdiction. Thus any criminal statute outlawing, or civil statute creating relief for, violations of international law that is silent on geographic scope would be construed to apply only inside U.S. territory. Hence arguments that courts should apply the presumption to limit the ATS to U.S. territory since the statute provides in its entirety that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>290</sup>

The U.S. government has in fact taken this position in recent ATS litigation,<sup>291</sup> as have defendants.<sup>292</sup> The government argued specifically that “[t]he presumption against extraterritorial legislation . . . at the time the ATS was adopted. . . applied with respect to statutes adopted by Congress to enforce the laws of nations.”<sup>293</sup> To make this argument, the government relied on none other than *United States v. Palmer*,<sup>294</sup> a case wrongly decided under this Article’s thesis.<sup>295</sup>

Yet on the current state of the law there is force to claims that the presumption against extraterritoriality should apply to the ATS. Indeed, such claims are right now stronger than ever in light of the Supreme Court’s recent reinvigoration of the presumption in

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<sup>290</sup> 28 U.S.C. § 1350 (2006).

<sup>291</sup> Brief for the United States as Amicus Curiae in Support of Petitioners at 12, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919) (“When construing a federal statute, there is a strong presumption that Congress does not intend to extend U.S. law over conduct that occurs in foreign countries.” (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991))); see also John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 *Vand. J. Transnat’l L.* 1, 6–7 (2009).

<sup>292</sup> See *Lev v. Arab Bank, PLC*, No. 08 CV 3251 (NG)(VVP), 2010 U.S. Dist. LEXIS 16887, at \*23 (E.D.N.Y. Jan. 29, 2010).

<sup>293</sup> Brief for the United States as Amicus Curiae in Support of Petitioners at 12, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919).

<sup>294</sup> *Id.*

<sup>295</sup> See *supra* Section III.B.

*Morrison v. National Australia Bank*.<sup>296</sup> There, the Court fiercely and uncompromisingly rejected lower courts' transformation of the presumption against extraterritoriality in the securities context into a series of tests resembling international law principles of jurisdiction.<sup>297</sup> For forty years, lower courts had been using these tests to extend U.S. securities laws abroad. Under the "effects test," courts looked to "whether the wrongful conduct had a substantial effect in the United States or upon United States citizens."<sup>298</sup> This matches up with the objective territoriality basis of jurisdiction in international law.<sup>299</sup> And under the "conduct test," courts looked to "whether the wrongful conduct occurred in the United States."<sup>300</sup> This matches up with the subjective territoriality basis in international law.<sup>301</sup>

The conduct test was the more apposite in *Morrison*, which involved alleged fraudulent conduct in the United States affecting shares of a foreign bank purchased by foreign plaintiffs on a foreign exchange.<sup>302</sup> The Court's application of the presumption against extraterritoriality abolished the conduct and effects tests and replaced them with a narrow localization rule reminiscent of the traditional approach to conflict of laws.<sup>303</sup> The Court held that because the Exchange Act contains no "clear" or "affirmative indication" that it applies extraterritorially, it does not.<sup>304</sup> Rather, for claims relating to securities not registered on a U.S. exchange, the Act applies only to an actual purchase or sale in the United

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<sup>296</sup> 130 S. Ct. 2869 (2010).

<sup>297</sup> *Id.* at 2873.

<sup>298</sup> SEC v. Berger, 322 F.3d 187, 192–93 (2d Cir. 2003).

<sup>299</sup> See Restatement (Third) of Foreign Relations Law of the United States § 402(1)(c) (1987).

<sup>300</sup> *Berger*, 322 F.3d at 192–93.

<sup>301</sup> See Restatement (Third) of Foreign Relations Law of the United States § 402(1)(a) (1987).

<sup>302</sup> *Morrison*, 130 S. Ct. at 2869, 2875–76.

<sup>303</sup> *Id.* at 2879–81. Lea Brilmayer has aptly labeled this the "focus" step of the Court's analysis. Brilmayer, *supra* note 105, at 5. After *Morrison*, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which authorizes the SEC to pursue conduct in the United States that harms investors outside the United States. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(c)(1), 124 Stat. 1376, 1864 (2010).

<sup>304</sup> *Morrison*, 130 S. Ct. at 2883.

States—as opposed to fraudulent conduct in the United States that predicates a purchase or sale abroad.<sup>305</sup>

After *Morrison*, courts and litigants now must answer the following question, crucial to maintaining a cause of action for foreign conduct where U.S. statutes are silent on geographic reach: if the presumption against extraterritoriality applies so vigorously in the securities context, why does it not also apply with equal vigor in other contexts? For example, why does it not apply with the same force to the ATS? Both statutes have equally general terms. The Exchange Act language at issue in *Morrison* was “the purchase or sale of any security,”<sup>306</sup> which the Court construed to mean “the purchase or sale of any . . . security *in the United States*.”<sup>307</sup> Similarly, the ATS creates jurisdiction for “any civil action . . . for a tort.”<sup>308</sup> Why should courts construe this general language any differently than the language in *Morrison*, under which the ATS would be construed to mean “any civil action for a tort *in the United States*”?<sup>309</sup>

Moreover, according to the Supreme Court, the legislative history of the ATS reveals a territorial focus: to provide redress for offenses committed against aliens in the United States.<sup>310</sup> In the pre-constitutional period, the central government’s inability to

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<sup>305</sup> Id. at 2884–86.

<sup>306</sup> Id. at 2881.

<sup>307</sup> Id. at 2888 (emphasis added).

<sup>308</sup> 28 U.S.C. § 1350 (2006).

<sup>309</sup> The Exchange Act’s language may well be more indicative of extraterritorial application, since it prohibits fraud “in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.” 15 U.S.C. § 78j(b) (2006).

<sup>310</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715–18 (2004). Attorney General William Bradford’s 1795 opinion discusses the possibility of suit against U.S. citizens for “join[ing] . . . a French fleet in attacking the settlement [in Africa], and plundering or destroying the property of British subjects on that coast.” *Breach of Neutrality*, 1 Op. Att’y Gen. 57, 58 (1795). It is not clear, however, how courts will read the opinion. The Second Circuit recently observed, for example, that “Attorney General Bradford circumscribes his opinion, appearing to conclude that the Company could *not* bring suit for the actions taken by the Americans in a foreign country, but rather, could sue only for the actions taken by the Americans on the ‘high seas.’” *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 142 n.44 (2d Cir. 2010) (quoting the opinion’s language that “as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts . . . . But crimes committed on the high seas are within the jurisdiction of the district and circuit courts of the United States . . . .” *Breach of Neutrality*, 1 Op. Att’y Gen. at 58).

provide such redress and the decentralized jurisdiction of the states over such issues was a source of international discomfort and potential friction.<sup>311</sup> One incident in particular involving an insult to the Secretary of the French Legion in Philadelphia appears to have played a key role in sparking the statute.<sup>312</sup> Thus both the generality of the statute's language and its legislative history as courts presently read it<sup>313</sup> easily could point toward applying the presumption against extraterritoriality to the ATS.

Lastly, the Court was unmoved in *Morrison* by the argument that, because Congress had taken no action legislatively to limit the geographic reach of the Exchange Act during the forty years courts had been construing it extraterritorially, Congress had tacitly approved the expansive construction courts had given it.<sup>314</sup> The ATS lay largely dormant for nearly 200 years until it was famously re-booted by the Second Circuit in 1980 in *Filartiga v. Pena-Irala*.<sup>315</sup> *Filartiga* applied it to allow suit by Paraguayan plaintiffs against a Paraguayan defendant for torture committed in Paraguay,<sup>316</sup> and a flood of extraterritorial ATS claims followed. If the Supreme Court was willing to casually overturn forty years of extraterritoriality case law in the securities context, there is little reason to think the Court would hesitate to overturn thirty years of case law in the ATS context.

Accordingly, unless one can come up with a principled reason for treating one context differently than the other, entertaining causes of action for foreign harms under the ATS is in open tension with *Morrison*'s robust revitalization of the presumption against extraterritoriality. The ATS's coverage therefore is now conceivably susceptible to judicial trimming all the way back to U.S. borders. The distinguishing principle this Article advances is

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<sup>311</sup> *Sosa*, 542 U.S. at 715–20.

<sup>312</sup> *Id.* at 716–17.

<sup>313</sup> *Id.* at 712–20.

<sup>314</sup> See *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869, 2890 (2010) (Stevens, J., concurring) (“Congress invited an expansive role for judicial elaboration when it crafted such an open-ended statute . . . . And both Congress and the Commission subsequently affirmed that role when they left intact the relevant statutory and regulatory language, respectively, throughout all the years that followed.”); see also *id.* (noting “the tacit approval of Congress and the Commission”).

<sup>315</sup> 630 F.2d 876, 887 (2d Cir. 1980).

<sup>316</sup> *Id.* at 878.



that the ATS, unlike the Exchange Act, applies international substantive law, and therefore should also apply international jurisdictional law.<sup>317</sup> Because international jurisdictional law has evolved to authorize extraterritoriality, so too should the ATS. The reasoning is, at bottom, the same as with the early piracy cases: there is no or minimal concern about conflicts of laws since the ATS implements an international substantive norm agreed upon by other nations.<sup>318</sup>

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<sup>317</sup> For an even more fundamental distinction, see Dodge, *supra* note 168, at 37 (arguing that because the ATS is a jurisdictional statute, the international law sought to be applied should be treated the same way foreign law is treated in a conflict-of-laws case, and no prescriptive jurisdiction limitations apply at all). My thoughts on the benefits and limitations of this view are set out immediately below, *infra* note 318.

<sup>318</sup> For this conflict-of-laws point in the specific context of the ATS, see *id.* at 45–46 (noting that the presumption is inapplicable to the ATS because “the United States applies not its own law but rules of customary international law binding on all nations”). I agree that where international law provides liability, U.S. courts basically exercise “the same kind of jurisdiction that courts exercise in conflict-of-laws cases when they apply law that is not made by their own sovereign to parties over whom they have personal jurisdiction.” *Id.* at 37. The heuristic value of the analogy runs out, however, where international law does not itself provide for liability or courts resort to federal common-law rules. It may be that in conflict-of-laws cases U.S. law nominally determines whether the action based on foreign law may be brought and what form it takes. *Id.* at 39. But that is a conceptual device in the conflict-of-laws discipline designed to preserve the forum’s sovereignty by not formally applying foreign law of its own force but rather crafting local law to allow the foreign cause of action. See Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 *Am. J. Int’l L.* 280, 281 (1982). Yet, however one conceptualizes the applicable law, the fact remains that U.S. courts would not impose liability in a case alleging a foreign cause of action under foreign law if no liability existed under that foreign law. See *Day & Zimmerman, Inc. v. Chaloner*, 423 U.S. 3, 3–5 (1975) (*per curiam*) (explaining that under the applicable choice of law rule, where the harm occurred in Cambodia, Cambodian substantive law requiring fault to be proved controlled, as opposed to the U.S. forum’s rule of strict liability), *cited in Sosa*, 542 U.S. at 706. The same should be true of international law under the ATS.

I am also inclined to think that analogizing to conflict of laws for any international law violation would render the doctrine of universal jurisdiction empty in important respects, since the overwhelming majority of international law violations do not give rise to universal jurisdiction. My concern is that wholesale analogy to conflict of laws in the way Dodge proposes would therefore make all international law violations subject to universal jurisdiction by any state—not just those typically deemed universal jurisdiction violations—thereby gutting the concept of universal jurisdiction. Dodge argues that universal jurisdiction nonetheless would survive, because it relates to “statutes passed to enforce” international law as opposed to direct application of international law by courts. Dodge, *supra* note 168, at 43 (“When a court applies customary international law directly, rather than a statute incorporating that law, no basis for jurisdiction to prescribe is necessary.”). Yet, as he acknowledges, some legal

And there is no or minimal concern about jurisdictional overreach because other nations similarly have agreed upon expansive jurisdiction over the violations in question.<sup>319</sup>

A significant consequence of this thesis for the ATS is that it supports the view that international law, not federal common law, supplies the operative rule of decision in ATS cases.<sup>320</sup> If this were not so, the presumption against extraterritoriality should apply based on the presumption's shared rationale with the *Charming Betsy* canon: avoiding international discord. Unlike the application of international law, extraterritorial application of purely federal common-law rules could potentially conflict with foreign nations' laws within their own territories. Further, U.S. jurisdiction over foreign activity would be smaller over offenses against only U.S. municipal law, as opposed to over offenses against international

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systems provide for direct incorporation of international law, while others do not. *Id.* But the question of whether legislation is needed to incorporate international law into a domestic rule of decision is a matter of a state's internal law, not international law itself. See Ian Brownlie, *Principles of Public International Law* 31–33 (5th ed. 1998). And if that is right, then international law should not treat states differently by placing precincts on one type of domestic implementation of its norms (via statute applied by courts) versus another (via direct judicial application). Finally, allowing U.S. courts to entertain suits brought for any international law violation, even those for which international law itself does not impose individual liability, is in tension with the Supreme Court's warnings in *Sosa* that the ATS's "jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time," 542 U.S. at 724, as opposed to those that "'are principally incident to whole states or nations,' and not individuals seeking relief in court." *Id.* at 720 (quoting Blackstone, *supra* note 221, at \*68).

<sup>319</sup> Again, courts would need to take account of international jurisdictional law, which protects against "unreasonable interference with the sovereign authority of other nations," *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004), which heeds *Sosa*'s statement that "craft[ing] remedies [under the ATS] for the violation of new norms of international law would raise risks of adverse foreign policy consequences, [and therefore] . . . should be undertaken, if at all, with great caution." *Sosa*, 542 U.S. at 727–28.

<sup>320</sup> For an excellent articulation and defense of this view, see Keitner, *supra* note 271, at 73–83. I should note that I am not taking a stance here on how best to conceptualize the rule of decision, for example, whether it is international law itself or federal common law reflecting international law. The relevant point for my purposes is that international law provides the operative rule of decision, whether one conceptualizes the court's application of that rule as an application of international law itself or of federal common law incorporating or reflecting international law. For an insightful analysis of the possibilities here, see Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 *Notre Dame L. Rev.* 1931, 1935–38 (2010).

law incorporated into U.S. law, which might be subject to universal jurisdiction.<sup>321</sup>

Thus if courts were to use federal common-law rules of, say, secondary liability for foreign human rights abuses,<sup>322</sup> those rules could conflict with foreign rules operative within foreign territory, thereby provoking international discord. As the Second Circuit recently put it, “Unilaterally recognizing new norms of customary international law—that is, norms that have not been universally accepted by the rest of the civilized world—would potentially create friction in our relations with foreign nations and, therefore, would contravene the international comity the statute was enacted to promote.”<sup>323</sup> Consequently, the presumption against extraterritoriality should kick in. However, if courts use international law rules of secondary liability,<sup>324</sup> those rules by nature have been accepted by other nations, thereby eliminating or substantially reducing the potential for conflicts of laws and resulting international friction. Similarly, while the United States cannot extend uniquely U.S. laws to activity abroad without certain specifically-recognized U.S. connections under jurisdictional principles of international law, the United States can extend—via laws like the ATS—international

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<sup>321</sup> Michael Ramsey makes this point in a recent article evaluating the reach of the ATS under the *Charming Betsy* canon. He explains that

U.S. courts cannot, consistent with international law, use purely domestic U.S. law—such as U.S. tort law—to impose aiding and abetting liability (contrary to what many plaintiffs and commentators have argued and what some judges have concluded). . . . [And] even if the investor’s conduct arguably violates international law, U.S. courts cannot prescribe a remedy unless it is within the subset of international law violations subject to universal jurisdiction.

Ramsey, *supra* note 271, at 273. Because Ramsey evaluates the ATS only under the *Charming Betsy* canon, he finds limits only with respect to non-U.S. defendants since, under the customary international law *Charming Betsy* uses to construe statutes, the United States can regulate conduct by its own nationals or entities abroad. But if my thesis is correct, then the presumption against extraterritoriality would also eliminate the extraterritorial application of U.S. domestic doctrines to any activity abroad, whether committed by foreign or U.S. defendants.

<sup>322</sup> See, e.g., *Khulumani v. Barclay Nat’l Bank*, 504 F.3d 254, 284–91 (2d Cir. 2007) (Hall, J., concurring); *Doe I v. Unocal Corp.*, 395 F.3d 932, 964–78 (9th Cir. 2002) (Reinhardt, J., concurring).

<sup>323</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 140–41 (2d Cir. 2010).

<sup>324</sup> See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258–59 (2d Cir. 2009) (explaining that “the scope of liability for ATS violations should be derived from international law” and using “international law to find the standard for accessory liability”).

rules of liability to universal jurisdiction offenses without any U.S. connection at all.<sup>325</sup>

Of course, taken to the extreme this whole line of argument might be read to suggest that the ATS is essentially a dead letter because the international norms sought to be enforced under the statute generally impose criminal, not civil, liability,<sup>326</sup> and the ATS's distinctiveness in providing a civil remedy may give rise to distinctive frictions with foreign nations.<sup>327</sup> The Supreme Court and the statute's history and language halt that slippery slope, however. The Court made clear in *Sosa v. Alvarez-Machain* that the ATS is not a dead letter or mere "jurisdictional convenience to be placed on the shelf for use by a future Congress . . . to make some element of the law of nations actionable for the benefit of foreigners."<sup>328</sup> To be sure, the Court viewed favorably lower court decisions applying the ATS to suits alleging serious human rights abuses prohibited under international criminal law.<sup>329</sup> Furthermore, as a historical matter, the law of nations at the time the ATS was enacted "linked" criminal sanctions and civil remedies,<sup>330</sup> requiring nations to redress injuries by their nationals either through criminal prose-

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<sup>325</sup> Ramsey, *supra* note 271, at 273, 283–84, 297–300.

<sup>326</sup> See *Kiobel*, 621 F.3d at 151–53 (Leval, J., concurring in the judgment).

<sup>327</sup> For example, as Hannah Buxbaum rightly observes,

even if a transnational case involves a shared substantive norm, using domestic law as the vehicle for its application carries with it associated norms that are not shared. Some of these are procedural. For instance, litigation before a U.S. court will involve processes for the discovery of evidence, or the examination of witnesses, that might differ substantially from such processes in other countries. This problem surfaces in all U.S. civil litigation involving international elements, including public law cases brought under the Alien Tort Claims Act.

Buxbaum, *supra* note 39, at 296.

I agree that while these remain significant and valid objections, there are signs of long-term convergence. *Id.* at 296–97. U.S. courts also have at their disposal other mechanisms to dismiss cases based on these concerns, such as flexible doctrines of personal jurisdiction, see *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987), and *forum non conveniens*, see *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 & n.6 (1981).

<sup>328</sup> 542 U.S. 692, 719 (2004).

<sup>329</sup> *Id.* at 732 (noting that the Court's approach is "consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court" and citing specifically *Filaritiga's* statement that "[f]or purposes of civil liability, the torturer has become—like the pirate and the slave trader before him—*hostis humani generis*, an enemy of all mankind").

<sup>330</sup> *Id.* at 723–24.

cution, extradition, or civil redress.<sup>331</sup> Because of jurisdictional rules at the time, “[i]n certain instances, a civil remedy was the only available means of redress.”<sup>332</sup> Finally, requiring international law specifically to impose civil liability would ignore the text of the ATS itself, which expressly provides “jurisdiction of any *civil* action . . . for a tort only.”<sup>333</sup> Read sympathetically in light of precedent and history, the question of civil liability is thus not something courts necessarily need to determine; the ATS itself resolves that issue. The statute does not, however, resolve the choice of law between federal common-law rules and international law. It is here that courts do have to make a determination and, under *Charming Betsy*, should be careful about conflicts with foreign law and jurisdictional overreaching.

The much-publicized South African apartheid litigation offers a good illustration. Large classes of South African plaintiffs brought suit under the ATS alleging a variety of multinational corporations, including both U.S. and non-U.S. entities, aided and abetted international law violations by the South African government during the apartheid era.<sup>334</sup> The case worked its way up to the U.S. Court of Appeals for the Second Circuit on the issue of whether aiding and abetting liability was even actionable under the ATS to begin with. The Second Circuit held that “a plaintiff may plead a theory of aiding and abetting liability” under the statute and remanded to the district court.<sup>335</sup> On remand, the U.S. District Court for the Southern District of New York had to decide, among other things, whether the statute applied extraterritorially, and what law—U.S. municipal law (that is, federal common law) or international law—provided the applicable rule of decision in ATS cases.

On the first issue, the district court found that the presumption against extraterritoriality did not apply because

[t]he AT[S] does not by its own terms regulate conduct; rather it applies universal norms that forbid conduct regardless of territorial demarcations or sovereign prerogatives. Therefore, unlike

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<sup>331</sup> Bellia & Clark, *supra* note 24, at 9.

<sup>332</sup> *Id.*

<sup>333</sup> 28 U.S.C. § 1350 (2006) (emphasis added).

<sup>334</sup> *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 241–43 (S.D.N.Y. 2009).

<sup>335</sup> *Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254, 260 (2d Cir. 2007).

the application of specific rules formulated by American legislators or jurists, the adjudication of tort claims stemming from acts committed abroad will not generate conflicting legal obligations, and there is a substantially reduced likelihood that adjudication will legitimately offend the sovereignty of foreign nations.<sup>336</sup>

In short, and in line with this Article's thesis, the court reasoned that because the ATS acts as a vehicle for the enforcement of universally applicable international norms, there is no conflict of laws and no jurisdictional overreaching. This feature therefore erased core concerns behind the presumption against extraterritoriality, rendering it inapplicable to the ATS.

This feature also guided the court's resolution of the choice-of-law question on whether international law or federal common law governed aiding and abetting liability under the ATS. As one might suspect, the court held that international law provided the applicable law, reiterating that, "As the AT[S] is merely a jurisdictional vehicle for the enforcement of universal norms, the contours of secondary liability must stem from international sources."<sup>337</sup> Indeed, in the court's view, to look beyond international law "constitutes impermissible judicial policing."<sup>338</sup>

So far, the court's analysis comports nicely with this Article's thesis. Because international law supplies the applicable law, the presumption against extraterritoriality does not apply. The reason is that application of international substantive law generates no conflicts with foreign law and application of international jurisdictional law creates no jurisdictional overreaching.

Unfortunately, the court did not heed its own rule. Addressing the applicable law on corporate alter ego and agency later in the opinion, the court hedged on its insistence that international law provides the applicable law for the ATS. It began by stating that "[a]lthough the AT[S] requires this Court to apply customary international law whenever possible, it is necessary to rely on federal common law in limited instances in order to fill gaps."<sup>339</sup> Once that

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<sup>336</sup> *S. African Apartheid Litig.*, 617 F. Supp. 2d at 246–47.

<sup>337</sup> *Id.* at 256.

<sup>338</sup> *Id.* at 256 & n.139.

<sup>339</sup> *Id.* at 270.

move is made, however, rationales favoring the presumption against extraterritoriality rush back into the picture.

As to alter ego, the court simply concluded that U.S. corporate veil-piercing doctrines applied to foreign subsidiaries.<sup>340</sup> With respect to agency, the court candidly acknowledged that “the international law of agency has not developed precise standards for this court to apply,” and “[t]herefore, I will apply federal common law principles concerning agency.”<sup>341</sup> The court even applied these federal common-law doctrines to relationships between non-U.S. subsidiary and parent entities acting outside the United States.<sup>342</sup> This application of uniquely U.S. law under the ATS flatly contradicted the court’s prior descriptions of the ATS as “merely a jurisdictional vehicle for the enforcement of universal norms”<sup>343</sup> and the court’s resulting assuagement that “[t]herefore, unlike the application of specific rules formulated by American legislators or jurists,” applying the ATS to foreign conduct would not create conflicts of laws or U.S. jurisdictional overreaching.<sup>344</sup>

But federal common-law rules of the sort the court applied are paradigmatically “specific rules formulated by American . . . jurists.”<sup>345</sup> Application of these rules therefore *could* conflict with foreign laws, leading to international discord. In addition, and especially when applied to non-U.S. entities outside the United

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<sup>340</sup> Id. at 270–71.

<sup>341</sup> Id. at 271.

<sup>342</sup> Id. at 275 (applying U.S. agency principles to Daimler, noting that “Daimler allegedly oversaw all operations at the plant producing Mercedes cars in South Africa, and management in Germany was aware of and directly involved in the activities material to the Complaint”).

<sup>343</sup> Id. at 256.

<sup>344</sup> Id. at 247. I am also not convinced that international law is relevant only for the conduct-regulating rule but not for determining who can be liable. See Wuerth, *supra* note 320, at 1961 (“The effort . . . to distinguish ‘conduct-regulating’ norms on the one hand (to which international law would apply), from the type of defendant involved on the other hand (to which domestic law would apply), is not fully convincing. For example, international law seems indisputably relevant to the question of whether private actors as a group can be held liable—no one appears to argue that corporations can be held directly liable for conduct such as torture that is only actionable when engaged in by state actors. So, in broad terms at least, international law determines the kind of defendant to whom liability can be attributed. Similarly, if international criminal law and tribunals did impose sanctions on corporations as they do on private individuals, it is hard to see why this would not work in favor of imposing ATS liability on corporations.” (footnotes omitted)).

<sup>345</sup> *S. African Apartheid Litig.*, 617 F. Supp. 2d at 247.

States, the extraterritorial application of federal common law could produce jurisdictional overreaching beyond the limits set by international law, potentially creating another source of friction with foreign nations.<sup>346</sup>

Taken in combination and buttressed by the Supreme Court's muscular reinvigoration of the presumption against extraterritoriality in *Morrison*, these concerns set up a clear division for ATS cases that highlights this Article's central thesis. If courts apply international law under the ATS, the relevant canon of construction regarding extraterritoriality is *Charming Betsy*. As the district court in the apartheid litigation observed, application of international law reduces the potential for both conflicts with foreign law and jurisdictional overreaching. As the court failed to appreciate later in that same opinion, however, if courts apply uniquely U.S. law—such as federal common law on corporate veil piercing or agency—concerns about conflicts with foreign law and jurisdictional overreaching rematerialize and risk international discord, justifying the presumption against extraterritoriality for the ATS. Indeed, by using uniquely federal common-law rules as the applicable law the ATS becomes indistinguishable from the Exchange Act, and *Morrison*'s reinvigorated presumption would appear to control.

## 2. *Charming Betsy and Extraterritoriality*

Another important consequence of the thesis given current ongoing litigation in lower courts is that if international law supplies the applicable law in ATS cases, conduct by foreigners against foreigners abroad that is subject to universal jurisdiction is actionable under the statute. But if the conduct does not qualify for universal jurisdiction, applying the ATS could violate jurisdictional principles of international law and run afoul of *Charming Betsy*. Professor Michael Ramsey has identified this as a limitation on investor-liability claims of the sort alleged in the apartheid litigation.<sup>347</sup> He

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<sup>346</sup> It should also be noted that the Second Circuit recently found that “the liability of corporations for the actions of their employees or agents is not a question of remedy. Corporate liability imposes responsibility for the actions of a culpable individual on a wholly new defendant—the corporation. . . . [C]orporate liability is akin to accessorial liability . . . .” *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 147–48 (2d Cir. 2010).

<sup>347</sup> Ramsey, *supra* note 271, at 305, 318–20.



emphasizes that “international consensus on misconduct *is not sufficient* to impose U.S. liability on non-U.S. defendants for non-U.S. conduct. Rather, under principles of prescriptive jurisdiction, a plaintiff should be required to show both that international law proscribes the conduct *and* that international law grants universal jurisdiction to redress the conduct.”<sup>348</sup> Ramsey disputes the existence of universal jurisdiction over secondary investor liability under international law, an issue I want to put aside as already having garnered attention in the literature,<sup>349</sup> but he clearly thinks—and I agree—that U.S. courts can extend the ATS to foreign actors abroad for universal jurisdiction offenses under international law.<sup>350</sup>

I focus here instead on another growing area of ATS litigation that has not attracted such attention in the literature<sup>351</sup> but that promises to supply an increasing stream of suits: terrorism. Like the piracy cases of old,<sup>352</sup> and now also of new,<sup>353</sup> courts are struggling with the scope and definition of this category of offense. Somewhat ironically given the post-9/11 “war on terror,” while courts have been accused of too loosely deriving international rules of corporate liability for human rights abuses, and in turn too broadly expanding the scope of U.S. jurisdiction in relation to these offenses,<sup>354</sup> courts have skeptically and restrictively interpreted U.S. jurisdiction over acts of terrorism. Yet these offenses promise to form the basis of an increasing number of ATS claims, not least because it appears that one offense in particular—financing terrorism—may be one of the lone offenses giving rise to corporate liability under the ATS going forward, at least according to the Second Circuit’s recent decision in *Kiobel v. Royal Dutch Petroleum Co.*<sup>355</sup> Before explaining why, I want to disagree with, and offer a methodologically sounder alternative to, decisions re-

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<sup>348</sup> Id. at 319.

<sup>349</sup> Id.

<sup>350</sup> Id.

<sup>351</sup> See Steven R. Swanson, Terrorism, Piracy, and the Alien Tort Statute, 40 Rutgers L.J. 159, 161 (2008).

<sup>352</sup> See *United States v. Klintock*, 18 U.S. (5 Wheat.) 144 (1820); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818).

<sup>353</sup> *United States v. Said*, No. 2:10cr57, 2010 WL 389361 (E.D. Va. Aug. 17, 2010) (memorandum and opinion order on Defendants’ Joint Motion to Dismiss).

<sup>354</sup> See generally Bellinger, *supra* note 291; Ramsey, *supra* note 271.

<sup>355</sup> 621 F.3d 111, 149 (2d Cir. 2010).

strictively interpreting U.S. jurisdiction over terrorist offenses abroad.

*a. Acts of Terrorism*

The main culprit is a 2003 decision by the Second Circuit, *United States v. Yousef*.<sup>356</sup> Just as Chief Justice Marshall tried in *Klintock* to atrophy his decision in *Palmer* to extend U.S. laws against piracy to the full extent of international law, lower courts are right now trying to atrophy *Yousef* in order to extend U.S. laws against terrorism to the full extent of international law: namely, universally. The ultimate success of these attempts holds important implications for the reach of both criminal and civil statutes over terrorist acts abroad. As to the latter in particular, a number of ATS cases involving claims against foreign institutions for financing terrorist activity are gaining traction in the lower courts. Whether courts successfully can eschew *Yousef's* universal jurisdiction holding and methodology will decide whether the cases will move forward. Let me propose a way.

In *Yousef*, the Second Circuit considered whether Ramzi Yousef, one of the 1993 World Trade Center bombers, could be prosecuted under U.S. law for planting and exploding a bomb on a Philippines commercial airliner flying from the Philippines to Japan.<sup>357</sup> The explosion killed a Japanese citizen and seriously injured other passengers,<sup>358</sup> but no evidence suggested U.S. citizens were onboard the flight or were targets of the bomb.<sup>359</sup> The relevant count charged Yousef under U.S. law implementing the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation,<sup>360</sup> codified principally at 18 U.S.C. § 32(b).<sup>361</sup> The statute has an explicitly extraterritorial scope, so the court did not apply the presumption against extraterritoriality.<sup>362</sup> With respect to the international law analysis, the Southern Dis-

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<sup>356</sup> 327 F.3d 56 (2d Cir. 2003).

<sup>357</sup> *Id.* at 81, 85.

<sup>358</sup> *Id.* at 81.

<sup>359</sup> *Id.* at 97.

<sup>360</sup> Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177 [hereinafter Montreal Convention].

<sup>361</sup> *Yousef*, 327 F.3d at 89–90.

<sup>362</sup> *Id.* at 88.

trict of New York held application of U.S. law proper on the theory that Yousef's acts constituted terrorism subject to universal jurisdiction under customary international law.<sup>363</sup>

On appeal, Yousef challenged the district court's holding, arguing that "terrorism" could not be subject to universal jurisdiction because it has no commonly agreed-upon definition under international law.<sup>364</sup> The Second Circuit took up this argument and plunged into a critique of how courts should discern international law and, under such standards, why "terrorism" does not qualify as a universal jurisdiction offense.<sup>365</sup> The danger in the court's analysis of the offense at issue—plane bombing—was ultimately avoided in *Yousef* because the court was able to resort to the positive law of the Convention and its domestic implementing legislation instead of custom. But *Yousef's* holding and methodology has bled into other areas,<sup>366</sup> and the court's analysis poses significant hurdles for future courts faced with different facts or law under *Charming Betsy* and threatens to block full implementation of U.S. jurisdiction over terrorist acts abroad under international law.

The Second Circuit began by chiding the district court's reliance on the Restatement as a source for identifying what crimes are subject to universal jurisdiction.<sup>367</sup> The panel was clearly correct that, notwithstanding Story's opinion in *Smith*, the writings of scholars are not a primary source for discerning the content of international law.<sup>368</sup> But the Second Circuit then ignored, in its own universal jurisdiction analysis, the most obvious and germane primary source before it: the Montreal Convention. The Convention proscribes plane bombing in terms essentially identical to 18 U.S.C. § 32(b)<sup>369</sup> and provides the treaty-based equivalent of universal jurisdiction over this specific crime.<sup>370</sup> The Convention then goes further, com-

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<sup>363</sup> United States v. Yousef, 927 F. Supp. 673, 681–82 (S.D.N.Y. 1996).

<sup>364</sup> *Yousef*, 327 F.3d at 97, 103.

<sup>365</sup> *Id.* at 98–108.

<sup>366</sup> See, e.g., *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 280 (E.D.N.Y. 2007).

<sup>367</sup> *Yousef*, 327 F.3d at 99–103.

<sup>368</sup> Statute of the International Court of Justice, June 26, 1945, art. 38(d), 59 Stat. 1031 (describing "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for determination of rules of law").

<sup>369</sup> See 18 U.S.C. § 32(b)(3) (2006); Montreal Convention, *supra* note 360, art. 1(1)(c).

<sup>370</sup> Montreal Convention, *supra* note 360, art. 5 ("Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences

manding states parties to exercise jurisdiction where the offender is found in their territories and they do not extradite, irrespective of any other jurisdictional link.<sup>371</sup> This international obligation applies regardless of whether the crime occurred in the territory of a state party or a non-state party.<sup>372</sup>

Through these expansive jurisdictional provisions, this extremely widely ratified treaty<sup>373</sup> effectively generalized its prohibitions to every state in the world. The only other way to view its provisions would be to say that states parties agreed to apply the treaty prohibitions retroactively to individuals for conduct committed in a non-state party just because a state party happened to get hold of the offender at some later point. But that reading runs directly against fundamental notions of due process and legality accepted by the world's major legal systems by applying a law to an individual that did not govern his conduct *when he engaged in it* (in the non-state party).<sup>374</sup>

The better view is that the overwhelming majority of states created, not only as a matter of positive law, but also through widespread acceptance and implementation of the treaty's generalizable rules, a customary norm against plane bombing. And, like piracy, perpetrators of this crime can be prosecuted by any state that gains custody over them. In short, the Montreal Convention is quintessentially what the Second Circuit recently called in the ATS context a "law-making" treaty,<sup>375</sup> or treaty of customary "norm-creating character."<sup>376</sup> Incidentally, resort to treaties as generators

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mentioned in Article 1, paragraph 1 (a), (b) and (c) . . . in the case where the alleged offender is present in its territory and it does not extradite him . . ."). This basis of jurisdiction is also reflected in the U.S. Code. See 18 U.S.C. § 32(b)(4) (providing jurisdiction where "an offender is afterwards found in the United States").

<sup>371</sup> Montreal Convention, *supra* note 360, art. 7 ("The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.").

<sup>372</sup> *Id.*

<sup>373</sup> At the time of this writing, the Convention has 189 states parties, and therefore has been ratified by almost every nation in the world. See Office of the Legal Adviser, U.S. Dep't of State, *Treaties in Force 324–25* (Jan. 1, 2010), available at <http://www.state.gov/documents/organization/143863.pdf> [hereinafter *Treaties in Force*].

<sup>374</sup> These due process concerns are discussed *infra* Part IV.

<sup>375</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 138 (2d Cir. 2010).

<sup>376</sup> *Id.* at 139.

of customary law in this respect is also a far more reliable resource for discerning state consent than collecting the various writings of international law scholars, as the Supreme Court had done in *Smith*.<sup>377</sup>

Using this methodology, there was never any need in *Yousef* to address whether “terrorism” is a universal crime under international law or what that term even means. The plain and simple solution to the universal jurisdiction question is that anyone who bombs civilian aircraft or, even more specifically, “unlawfully and intentionally . . . places or causes to be placed on an aircraft in service . . . a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or . . . is likely to endanger its safety in flight”<sup>378</sup> commits a universal crime under international law. Accordingly, the United States can prosecute that individual under international law even though the crime was committed by a foreigner against foreigners and occurred on a foreign-flag aircraft traveling between two foreign destinations. In fact, the Montreal Convention not only provides for this treaty-based version of universal jurisdiction, it also required the United States to prosecute *Yousef* because the government did not extradite him to another state party with jurisdiction.<sup>379</sup> The Second Circuit ironically relied on the positive law of the treaty and its implementing legislation in this regard to uphold the conviction,<sup>380</sup> while ignoring the treaty’s jurisgenerative force for the customary law of universal jurisdiction.

But reliance on the positive law of the treaty may not always be available. It becomes more difficult, for example, if the crime were to occur in a non-state party since, as a matter of positive law, treaties do not bind non-parties.<sup>381</sup> What if instead *Yousef* had bombed

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<sup>377</sup> See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61, 163 n.8 (1820); cf. *United States v. Yousef*, 327 F.3d 56, 100–03 (2d Cir. 2003) (describing sources of international law and pointing out that “scholars do not *make* law”).

<sup>378</sup> Montreal Convention, *supra* note 360, art. 1(1)(c).

<sup>379</sup> *Yousef*, 327 F.3d at 108–09 & n.43.

<sup>380</sup> *Id.* at 108–10.

<sup>381</sup> Article 34 of the Vienna Convention on the Law of Treaties provides that “a treaty does not create either obligations or rights for a third State without its consent.” Article 35 provides that treaties are only binding on non-parties where the non-party “State expressly accepts that obligation in writing.” Vienna Convention on the Law of Treaties arts. 34, 35, May 23, 1969, 1155 U.N.T.S. 331; see also *Yousef*, 327 F.3d at 96 (explaining that a treaty is “binding only on the States that accede to it”).

the plane in Russia, one of the few remaining nations not to have ratified the Montreal Convention?<sup>382</sup> As a matter of purely positive law, it is hard to extend the treaty's proscriptions into a state that has not agreed to it.<sup>383</sup> Again, the sounder analysis is that the United States has jurisdiction under customary law, evidenced in the treaty's substantive prohibitions and broad jurisdictional provisions consented to by the vast majority of states in the world, creating a generalizable prohibition on the specific act of plane bombing—not abstractly “terrorism”—and authorizing jurisdiction over perpetrators wherever they are found.

Another problem for *Yousef's* cramped reading is that U.S. statutes over international law violations may not always implement treaties, let alone ones that explicitly provide extraterritorial jurisdiction. Again, a prime example is the ATS.<sup>384</sup> Foreign victims of terrorist acts like those in *Yousef* who bring suit under the ATS would need to rely on customary international law, not treaty law.<sup>385</sup> While the Montreal Convention makes such acts “violation[s] of the law of nations”<sup>386</sup> subject to expansive jurisdiction, the treaty itself is quiet on civil liability.<sup>387</sup> Other equally-condemned acts of terrorism proscribed in widely ratified treaties and subject to expansive jurisdiction include hijacking,<sup>388</sup> bombing public places,<sup>389</sup> and hostage taking.<sup>390</sup> And, as noted already, a major source of recent ATS litigation has been claims against foreign in-

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<sup>382</sup> See Treaties in Force, *supra* note 373, at 324–25.

<sup>383</sup> See, e.g., *United States v. Hasan*, No. 2:10cr56, 2010 U.S. Dist. LEXIS 115746, at \*104 (E.D. Va. Oct. 29, 2010) (noting that failure to ratify UNCLOS would bar application against United States as treaty law).

<sup>384</sup> 28 U.S.C. § 1350 (2006).

<sup>385</sup> See *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 269 (E.D.N.Y. 2007) (“Neither the Almog nor the Afriat-Kurtzer plaintiffs assert that the torts they allege are in violation of a treaty of the United States; rather, they assert a violation of the law of nations.”).

<sup>386</sup> 28 U.S.C. § 1350.

<sup>387</sup> See Montreal Convention, *supra* note 360.

<sup>388</sup> Convention for the Suppression of Unlawful Seizure of Aircraft arts. 1, 4(2), 7, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter *Seizure of Aircraft Convention*].

<sup>389</sup> International Convention for the Suppression of Terrorist Bombings arts. 1, 2, 6(4), Dec. 15, 1997, 116 Stat. 721, 2149 U.N.T.S. 256 [hereinafter *Bombing Convention*].

<sup>390</sup> International Convention Against the Taking of Hostages arts. 1, 5(2), 8(1), Dec. 17, 1979, T.I.A.S. 11081, 1316 U.N.T.S. 205 [hereinafter *Hostage Convention*].

stitutions for financing terrorist activity abroad.<sup>391</sup> If, as *Yousef* would have it, none of this foreign terrorist activity is subject to universal jurisdiction under customary international law, then none of it is actionable under the ATS.

This has not escaped defense attorneys in ATS cases.<sup>392</sup> Lower courts adjudicating these types of terrorism-related claims have pushed back against *Yousef*'s restrictiveness and, along the lines of the critique of *Yousef* above, have relied on treaties to identify customary international law norms against specifically defined terrorist acts—not some abstract, protean crime of “terrorism.”<sup>393</sup> Courts have done so to show that the offenses meet the Supreme Court's test in *Sosa* for which torts in violation of the law of nations are actionable under the ATS.<sup>394</sup> According to *Sosa*, “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms” like piracy.<sup>395</sup>

Plane bombing and other specifically-defined acts of terrorism like those listed above rest on a norm of international character overwhelmingly recognized by the civilized world: the vast majority of nations have ratified treaties prohibiting the acts,<sup>396</sup> requiring municipal implementation of the prohibitions,<sup>397</sup> and authorizing the broad exercise of jurisdiction.<sup>398</sup> These modern terrorism offenses are also defined with specificity comparable to the eighteenth-century paradigms like piracy.

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<sup>391</sup> See *Lev v. Arab Bank, PLC*, No. 08 CV 3251 (NG) (VVP), 2010 U.S. Dist. LEXIS 16887, at \*15 (E.D.N.Y. Jan. 29, 2010); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, at \*261 (E.D.N.Y. 2007).

<sup>392</sup> See *Almog*, 471 F. Supp. 2d at 280 (describing ATS defendant's reliance on *Yousef* for this argument).

<sup>393</sup> See *id.* at 280–81.

<sup>394</sup> 542 U.S. 692, 725 (2004).

<sup>395</sup> *Id.*

<sup>396</sup> *Treaties in Force*, supra note 373, at 462–63. One hundred and sixty-four nations have ratified the International Convention for the Suppression of Terrorist Bombings. *Id.*

<sup>397</sup> Bombing Convention, supra note 389, art. 6; Hostage Convention, supra note 390, art. 2; Seizure of Aircraft Convention, supra note 388, art. 2.

<sup>398</sup> Bombing Convention, supra note 389, art. 6; Hostage Convention, supra note 390, art. 5; Seizure of Aircraft Convention, supra note 388, art. 4.

Indeed, thanks to treaties these terrorism offenses are *more* specifically defined. We saw already the untidiness of the definition of piracy under the law of nations in the early cases, and Justice Story's heroic efforts to cull as settled and precise a definition as possible from various writings of publicists: "whatever may be the diversity of definitions, in other respects," Story concluded, "all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy."<sup>399</sup> Compare that general definition with specifically detailed definitions of modern terrorism offenses elaborated in widely ratified multilateral treaties.<sup>400</sup> Again, the treaties are not themselves what ATS plaintiffs rely upon,<sup>401</sup> rather, they make up the best evidence of what constitutes an offense against the law of nations and the definition of that offense.<sup>402</sup>

*b. Corporate ATS Liability for Financing Terrorism*

In this connection, the International Convention for the Suppression of the Financing of Terrorism<sup>403</sup> provides a critically important resource for ATS suits going forward. The Second Circuit recently held that because international law does not directly impose liability on corporations for human rights abuses, no corporate liability exists under the ATS.<sup>404</sup> Yet with respect to financing terrorism, international law *does* authorize corporate liability. Applying the methodology above to an actual ATS case alleging financing terrorism reveals why.

In *Almog v. Arab Bank, PLC*, both U.S. and non-U.S. plaintiffs claimed that, among other things, Arab Bank financed terrorist acts in the Middle East by collecting funds and donations the Bank knew were being used to bankroll suicide bombings and other terrorist attacks and by administering payments to the families of "martyrs" who killed themselves in the bombings.<sup>405</sup> While U.S.

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<sup>399</sup> United States v. Smith, 18 U.S. (5 Wheat.) 153, 161–62 (1820).

<sup>400</sup> Bombing Convention, supra note 389, art. 2; Hostage Convention, supra note 390, art. 1; Seizure of Aircraft Convention, supra note 388, art. 1.

<sup>401</sup> See *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 269–70 (E.D.N.Y. 2007).

<sup>402</sup> Colangelo, supra note 273, at 169–72.

<sup>403</sup> International Convention for the Suppression of the Financing of Terrorism arts. 4, 5, G.A. Res. 54/109, U.N. Doc. A/RES/54/109 (Dec. 9, 1999) [hereinafter Financing Convention].

<sup>404</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 148–49 (2d Cir. 2010).

<sup>405</sup> 471 F. Supp. 2d. at 260–63.



plaintiffs brought suit under the Anti-Terrorism Act (“ATA”),<sup>406</sup> aliens used the aptly-named ATS.<sup>407</sup> Other recent ATS cases by foreigners mirror these claims.<sup>408</sup>

To discern whether financing the attacks met *Sosa*’s test, and like the customary international law analysis above (but unlike *Yousef*), the court looked directly to the jurisgenerative force of treaties.<sup>409</sup> The plaintiffs in *Almog* claimed three types of violation of the law of nations: (1) aiding and abetting genocide, (2) aiding and abetting crimes against humanity, and (3) aiding and abetting and directly financing terrorist attacks.<sup>410</sup> What makes the third category of terrorism violations attractive ATS claims is that, unlike genocide, plaintiffs need not prove genocidal “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”<sup>411</sup> And unlike crimes against humanity, plaintiffs need not show “a widespread or systematic attack.”<sup>412</sup> Yet despite these advantages, the third category of offenses ran straight into *Yousef*’s doctrinal blockade that “terrorism” is not a universal offense because it lacks a commonly agreed upon definition in international law. Unsurprisingly, and relying specifically on *Yousef*, this is precisely the argument defendant Arab Bank made in *Almog*.<sup>413</sup>

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<sup>406</sup> 18 U.S.C. §§ 2331, 2333–38 (2006); *Almog*, 471 F. Supp. 2d at 260.

<sup>407</sup> *Almog*, 471 F. Supp. 2d at 260.

<sup>408</sup> See *Lev v. Arab Bank, PLC*, No. 08 CV 3251 (NG) (VVP), 2010 U.S. Dist. LEXIS 16887, at \*16 (E.D.N.Y. Jan. 29, 2010) (“[T]he allegations of the complaint in this case largely mirror those of the *Almog* and *Afriat-Kurtzer* actions involved in the *Almog* decision, although the allegations in this case are limited to violations of the ATS and do not include violations of the Anti-Terrorism Act.” (internal quotation marks omitted)).

<sup>409</sup> *Almog*, 471 F. Supp. 2d at 273; see also *supra* notes 373–77 and accompanying text.

<sup>410</sup> *Almog*, 471 F. Supp. 2d at 264–65.

<sup>411</sup> Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277; see also *Almog*, 471 F. Supp. 2d at 276 (“The underlying norm [against financing terrorist attacks] thus differs from the genocide norm with respect to the purpose of the perpetrators . . .”).

<sup>412</sup> Rome Statute of the International Criminal Court art. 7, July 17, 1998, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90; see also *Almog*, 471 F. Supp. 2d at 275–76.

<sup>413</sup> *Almog*, 471 F. Supp. 2d at 280 (“[Defendant Arab Bank] argues that the underlying suicide bombings and other murderous acts alleged in Count Three, which it says are ‘commonly referred to as terrorism,’ cannot be a violation of the law of nations because there is no consensus on the meaning of ‘terrorism.’ In support of its argument, Arab Bank relies on *United States v. Yousef* . . .” (internal citation omitted)).

In response, the court resorted to treaties as generators of customary international law. It explained that, “in this case, there is no need to resolve any definitional disputes as to the scope of the word ‘terrorism,’ for the Conventions expressing the international norm provide their own specific descriptions of the conduct condemned.”<sup>414</sup> Because “[t]hese authoritative sources establish that the specific conduct alleged—organized, systematic suicide bombings and other murderous attacks on innocent civilians intended to intimidate or coerce a civilian population—are universally condemned,” the claims were actionable under the ATS.<sup>415</sup> The court made clear that treaties “themselves evidence state practice” necessary to form a customary norm.<sup>416</sup> That is, “treaties evidence the ‘customs and practices’ of the States that ratify them. This is so because ratification of a treaty that embodies specific norms of conduct evidences a State’s acceptance of the norms as legal obligations.”<sup>417</sup> And the treaties evidenced a specific definition of the offense: “Here, the international sources specifically articulate a universal standard that condemns the conduct alleged.”<sup>418</sup> Moreover, the Financing and Bombing Conventions require implementing legislation by states parties,<sup>419</sup> adding another layer of state practice.<sup>420</sup>

As to the precise claims against Arab Bank, both the Financing and Bombing Conventions also provide for secondary liability<sup>421</sup> (as

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<sup>414</sup> *Id.*

<sup>415</sup> *Id.* at 281; see also *id.* (“[R]egardless of whether there is universal agreement as to the precise scope of the word ‘terrorism,’ the conduct involved here is specifically condemned in the Conventions upon which this court relies.”).

<sup>416</sup> *Id.*

<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

<sup>419</sup> Financing Convention, *supra* note 403, arts. 4, 5.; Bombing Convention, *supra* note 389, art. 4.

<sup>420</sup> *Almog*, 471 F. Supp. 2d at 273.

<sup>421</sup> See Financing Convention, *supra* note 403, art. 2(5) (“Any person also commits an offence if that person: (a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article; (b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article; (c) Contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or (ii) Be made in the knowledge of the intention

do U.S. laws implementing these conventions).<sup>422</sup> Plaintiffs further alleged a primary violation of the law of nations based on the international prohibition in the Financing Convention, which prohibits “by any means, directly or indirectly, unlawfully and wilfully, provid[ing] or collect[ing] funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out” an act constituting an offense under the treaties listed in the Financing Convention’s annex,<sup>423</sup> which includes the Bombing Convention.<sup>424</sup> Plaintiffs thus could rely on

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of the group to commit an offence as set forth in paragraph 1 of this article.”); Bombing Convention, supra note 389, art. 2(3) (“Any person also commits an offence if that person: (a) Participates as an accomplice in an offence as set forth in paragraph 1 or 2 of the present article; or (b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 2 of the present article; or (c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.”).

<sup>422</sup> 18 U.S.C. §§ 2332f, 2339C (2006).

<sup>423</sup> Financing Convention, supra note 403, art. 2.

<sup>424</sup> Id. annex. After it prohibits financing specific terrorist acts as defined in other widely ratified treaties, the Financing Convention creates a catch-all receptacle for financing “terrorism” generally defined. This has met with some resistance by at least three of the thirty-seven Islamic states parties to the treaty. Article 2(1)(b) prohibits directly or indirectly, unlawfully and wilfully, provid[ing] or collect[ing] funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out

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(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Id. art. 2. Egypt, Jordan, and Syria made declarations concerning this provision that, to borrow from Egypt’s declaration, “acts of national resistance . . . including armed resistance against foreign occupation and aggression with a view to liberation and self-determination” do not qualify as acts of terrorism. See United Nations Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2005, Vol. 2, 165, 166, 169 (2006) (Declarations of Egypt, Jordan, and Syria). A large number of other states parties to the treaty objected to these declarations and regarded them as reservations that sought unilaterally to limit the scope of the convention contrary to its object and purpose. See id. at 170–83. (Objections of Austria, Belgium, Canada, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, the Netherlands, Norway, Portugal, Spain, Sweden, the United Kingdom, and the United States).

these conventions, not themselves as sources of private rights of action, but as powerful evidence of state practice and *opinio juris* regarding what the overwhelming majority of nations in the world define as specific terrorist offenses against the law of nations.<sup>425</sup>

Finally, although it was not before the court in *Almog*, the Financing Convention squarely answers the question courts now must ask in the wake of the Second Circuit's decision in *Kiobel*: does international law provide corporate liability for the offense? The Financing Convention, embodying customary international law, does. Article 5 commands

Each State Party, *in accordance with its domestic legal principles*, shall take the necessary measures to enable a *legal entity* located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.<sup>426</sup>

The Convention easily qualifies as what the court in *Kiobel* called a “law-making” or a “norm-creating” treaty.<sup>427</sup> Its provisions are intended to be generalizable to all states,<sup>428</sup> it is widely ratified and requires implementing legislation by states parties,<sup>429</sup> and the United Nations Security Council has even called upon all states to become parties.<sup>430</sup>

As this Article cautioned at the outset, the law regarding extra-territoriality contains many intricacies. This Part explored a number of them with respect to specific laws and in the context of specific cases. My overall purpose was to give fuller articulation and illustration to the unified approach and to reveal its implications for some of the more complicated and contentious statutory construction issues courts currently face. I hope ultimately to have

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<sup>425</sup> The court also noted that U.N. Security Council Resolutions reinforce this norm. *Almog*, 471 F. Supp. 2d at 279, 289 n.42; see also S.C. Res. 1566, U.N. Doc. S/RES/1566 (Oct. 8, 2004); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>426</sup> Financing Convention, *supra* note 403, art. 5(1) (emphasis added).

<sup>427</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 138–39 (2d Cir. 2010) (quoting *North Sea Continental Shelf (F.R.G. v. Den & Neth.)*, 1969 I.C.J. 3, 42 (Feb. 20)).

<sup>428</sup> Cf. *supra* notes 373–77 and accompanying text (applying this analysis to Montreal Convention).

<sup>429</sup> Financing Convention, *supra* note 403, arts. 4–5.

<sup>430</sup> S.C. Res. 1373, art. 3(d), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

shown that the approach better effectuates legislative intent than a blanket presumption against extraterritoriality by looking to the nature of the legislative source behind a law for the appropriate canon of construction, better avoids unintended discord with foreign nations by fully implementing international law when Congress uses multilateral sources to legislate, and holds significant implications for some of the more controversial and important extraterritoriality issues of the day.

#### IV. DUE PROCESS

The final piece of the extraterritoriality puzzle is the Fifth Amendment's Due Process Clause. It interlocks with constitutional sources and statutory construction to round out the unified approach with individual rights considerations. In the interstate context, Fourteenth Amendment due process has long required "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."<sup>431</sup> More recently, courts have found that in the international context, Fifth Amendment due process likewise blocks federal projections of U.S. law abroad that are "arbitrary or fundamentally unfair."<sup>432</sup> What precisely the Fifth Amendment demands under this standard varies across circuits<sup>433</sup> (the Supreme Court has yet to address the issue), but a leading test from the Ninth and Second Circuits requires that "[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or

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<sup>431</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)).

<sup>432</sup> See, e.g., *United States v. Clark*, 435 F.3d 1100, 1108–09 (9th Cir. 2006); *United States v. Yousef*, 327 F.3d 56, 111–12 (2d Cir. 2003); *United States v. Perez-Oviedo*, 281 F.3d 400, 402–03 (3d Cir. 2002); *United States v. Suerte*, 291 F.3d 366, 369–77 (5th Cir. 2002); *United States v. Cardales*, 168 F.3d 548, 552–53 (1st Cir. 1999).

<sup>433</sup> See Colangelo, *supra* note 12, at 162–66 (summarizing different circuits' approaches).

fundamentally unfair.”<sup>434</sup> Lower courts have used this nexus requirement in the civil context as well.<sup>435</sup> The implications for extra-territoriality cases of diverse stripes are self-evident.

Recall, for instance, that the defendant in *Yousef* bombed a Philippines flight en route from the Philippines to Japan, killing a Japanese citizen and injuring other passengers<sup>436</sup> but that no U.S. citizens were onboard or were targets of the bomb.<sup>437</sup> Unsurprisingly, Yousef claimed there was no U.S. nexus and, therefore, application of U.S. law to him violated his Fifth Amendment due process rights.<sup>438</sup> The Second Circuit acknowledged Yousef’s Fifth Amendment rights, but rejected his claim, finding that because the bombing was a “test-run” for a larger plot against U.S. aircraft, the nexus requirement was satisfied.<sup>439</sup> Thus, had the bombing not been a rehearsal for a plot against U.S. aircraft, Yousef presumably would have succeeded on his due process claim. The Fifth Amendment hurdle consequently would have blocked the United States from prosecuting a plane bomber in U.S. custody in direct contravention of U.S. obligations under the Montreal Convention.<sup>440</sup> Once again, *Yousef*’s precedential shadow looms long and is a cause for concern.

Defendants in civil suits have also advanced these due process claims. In *Goldberg v. UBS AG*, relatives of a non-U.S. victim killed in a terrorist bombing in Israel brought suit under the ATA, alleging UBS had, among other things, financed terrorism.<sup>441</sup> UBS resisted application of U.S. law on Fifth Amendment grounds, arguing that the conduct at issue had no nexus to the United States.<sup>442</sup> The district court took an even more elastic view of the nexus requirement than the Second Circuit had in *Yousef*, stretching it to touch the United States’s general interest in suppressing interna-

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<sup>434</sup> *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990) (internal citation omitted); see also *Yousef*, 327 F.3d at 111 (quoting *Davis*, 905 F.2d at 248–49).

<sup>435</sup> *Goldberg v. UBS AG*, 690 F. Supp. 2d 92, 105–06 (E.D.N.Y. 2010).

<sup>436</sup> *Yousef*, 327 F.3d at 79.

<sup>437</sup> *Id.* at 97.

<sup>438</sup> *Id.* at 111.

<sup>439</sup> *Id.* at 112.

<sup>440</sup> Montreal Convention, *supra* note 360, arts. 5, 7.

<sup>441</sup> 660 F. Supp. 2d 410, 414, 434 (E.D.N.Y. 2009).

<sup>442</sup> *Id.* at 431.

tional terrorism,<sup>443</sup> effectively nullifying the requirement for claims involving any terrorist act anywhere in the world. On reconsideration, the court tried to fortify this link with other independently anemic links, like the fact that UBS has offices in New York,<sup>444</sup> a contact far more relevant for establishing general personal jurisdiction for the forum's courts, as opposed to justifying application of the forum's substantive law to unrelated conduct taking place elsewhere.<sup>445</sup> The court also distended the already controversial passive personality link, which grants states jurisdiction over acts against their nationals abroad,<sup>446</sup> by extrapolating it to justify jurisdiction, not when the victim is a U.S. national, but when his family members are.<sup>447</sup>

The source of these doctrinal contortions is a failure properly to transition the due process test from the interstate context under the Fourteenth Amendment to the international context under the Fifth Amendment. In the interstate context, a test focused on a "contact or significant aggregation of contacts"<sup>448</sup> makes sense. It is designed to prevent jurisdictional overreaching within the federal system of states and to protect parties from "unfair surprise or frustration of legitimate expectations" resulting from the choice of a law they could not have anticipated would govern their conduct when they engaged in it.<sup>449</sup> On this latter rationale, the Supreme Court has emphasized that "[w]hen considering fairness in this context, an important element is the expectation of the parties."<sup>450</sup> For

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<sup>443</sup> *Id.*

<sup>444</sup> *Goldberg v. UBS AG*, 690 F. Supp. 2d 92, 107 (E.D.N.Y. 2010).

<sup>445</sup> It is true that the Supreme Court has considered the existence of general jurisdiction as a factor that, when combined with other links, might create a sufficient nexus, see *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 317–18 (1981), but the Court immediately qualified the use of general jurisdiction in this manner to the facts before it—specifically, where the defendant also knew that plaintiff's decedent was an employee in the forum and therefore could reasonably expect the application of forum law. *Id.* at 318 n.24 ("There is no element of unfair surprise or frustration of legitimate expectations as a result of Minnesota's choice of its law. Because Allstate was doing business in Minnesota and was undoubtedly aware that Mr. Hague was a Minnesota employee, it had to have anticipated that Minnesota law might apply to an accident in which Mr. Hague was involved.").

<sup>446</sup> *Goldberg*, 690 F. Supp. 2d at 109–10.

<sup>447</sup> *Id.* at 95 & n.7, 110.

<sup>448</sup> *Hague*, 449 U.S. at 313.

<sup>449</sup> *Id.* at 318 n.24.

<sup>450</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985).

example, “The application of an otherwise acceptable rule of law may result in unfairness to the litigants if, in engaging in the activity which is the subject of the litigation, they could not reasonably have anticipated that their actions would later be judged by this rule of law.”<sup>451</sup> By peeling back the language of the test to reveal these underlying state sovereignty and individual rights rationales, it becomes apparent why an interstate test focused on contacts does not translate identically to the international system.

In the U.S. interstate system each state has its own laws and, although states may apply other states’ laws, there must always be some contact justifying application of any given state’s law to any given person or thing.<sup>452</sup> Thus in the abstract, Texas courts may apply Texas or Nevada law to Armand’s gambling. But concretely, for Texas courts to apply Texas law, Armand’s gambling must have a constitutionally adequate contact with Texas; and for Texas courts to apply Nevada law, Armand’s conduct similarly must have a constitutionally adequate contact with Nevada. Otherwise, application of the law could be arbitrary or fundamentally unfair by disrespecting the sovereignty of the state whose law would otherwise apply and by defeating Armand’s reasonable expectations.<sup>453</sup>

In the international system, each nation also has its own laws. But as we know, those national laws may reflect or incorporate international law, which applies everywhere. As a result, where a nation properly applies through domestic legislative and judicial apparatus a universally applicable international law, there is a “false conflict” of laws.<sup>454</sup> That nation simply applies a law that by virtue of international law also applies within other nations and there is no conflict of laws. Concerns about disrespecting other nations’ sovereignties dissolve because those nations have already con-

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<sup>451</sup> *Hague*, 449 U.S. at 327 (Stevens, J., concurring); see also *Shutts*, 472 U.S. at 822 (“There is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control.”).

<sup>452</sup> See *Hague*, 449 U.S. at 312–13.

<sup>453</sup> See *Shutts*, 472 U.S. at 822.

<sup>454</sup> For an elaboration of this point and its implications, see Anthony J. Colangelo, Universal Jurisdiction as an International “False Conflict” of Laws, 30 *Mich. J. Int’l L.* 881, 882–85 (2009); see also Brilmayer & Norchi, *supra* note 1, at 1260; cf. *Shutts*, 472 U.S. at 816 (“There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit.”).



sented to that international law. In addition, and as an important aside from a U.S. perspective, it is far from clear that Fifth Amendment due process even cares about other nations' sovereignty interests since that concern in the U.S. interstate test stems not from the Due Process Clause but from the Full Faith and Credit Clause, which regulates neither international choice of law<sup>455</sup> nor the federal government in this context.<sup>456</sup>

We are left then with the bread and butter of due process: individual rights, and more specifically, shielding parties from "unfair surprise or frustration of legitimate expectations."<sup>457</sup> But here too the nature of the international legal system erases the due process objection where states properly implement international law. The defendant cannot claim lack of notice or unfair surprise if all U.S. law does is apply an international norm to which that individual already was subject. Moreover, international law contains jurisdictional rules about which nations may apply that norm, and some of these rules—like universal jurisdiction—require no nexus at all.<sup>458</sup> To better conceptualize the jurisdictional dynamic when a nation implements international law in this way, instead of analogizing to U.S. state courts extending state laws extraterritorially, the more apt analogy is to U.S. state courts applying a federal law to which the defendant is subject irrespective of where the conduct took place within the system of states.

Accordingly, if Texas has no nexus to Armand but applies its anti-gambling law to him for gambling in Las Vegas, Armand has a strong Fourteenth Amendment due process objection. But if the United States applies its anti-plane bombing law to Yousef, and that anti-plane bombing law implements an international law to which Yousef is already subject in any state, Yousef has no Fifth

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<sup>455</sup> *Hague*, 449 U.S. at 321 n.4 (Stevens, J., concurring) (explaining that "[t]he Full Faith and Credit Clause, of course, was inapplicable in *Home Ins. Co.* because the law of a foreign nation, rather than of a sister State, was at issue").

<sup>456</sup> U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."). The Clause does regulate the exercise of federal power in the context of recognition of judgments. See *Allen v. McCurry*, 449 U.S. 90, 95–96 (1980).

<sup>457</sup> *Hague*, 449 U.S. at 318 n.24.

<sup>458</sup> See *supra* notes 235–36 and accompanying text.

Amendment due process objection. Once again, shedding light on the proper relationship between international and national law dispels *Yousef's* precedential shadow. Because both plane-bombing and financing terrorism are universal crimes (as evidenced by the substantive and jurisdictional provisions of the widely ratified treaties prohibiting them),<sup>459</sup> the Second Circuit did not need to find a nexus in *Yousef*, and the court in *Goldberg* did not need to strain the general jurisdiction or passive personality contacts to manufacture a nexus in that case either. In both cases, no foreign sovereignty concerns or unfair surprises trigger due process precincts on the application of federal law. And in both cases, the source of Congress's lawmaking authority informs the due process analysis by revealing that when Congress implements international law through a multilateral source, a U.S. nexus may not be necessary.

At the same time, when Congress uses a unilateral source or materially deviates from international law when purporting to implement international law via a multilateral source, a nexus is needed. First, to the extent Fifth Amendment due process cares about other nations' sovereignties (and again, it is not clear that it does), that concern pops back into frame with unilateral sources. Unlike international law, other nations may not have consented to, say, unilateral projections of U.S. securities or antitrust laws within their territories,<sup>460</sup> and absent a U.S. nexus, the choice of U.S. law appears arbitrary. Next and more central to the due process inquiry, absent a nexus the defendant might have no reasonable expectation that a unilateral projection of U.S. law would apply to her extraterritorial conduct. For instance, if instead of bombing an airplane, *Yousef* had gambled in the Philippines, application of U.S. anti-gambling law to him could be unfair and violate due process.

The same goes for departures from international law when applying U.S. laws purporting to implement it. It is only a matter of time before foreign defendants start making these claims in ATS suits. As noted in Part III, the court in the South African apartheid litigation applied uniquely federal common-law rules of corporate

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<sup>459</sup> See *supra* notes 373–77 and accompanying text.

<sup>460</sup> See, e.g., *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) (questioning the propriety of applying U.S. antitrust laws when the alleged conduct and harm occur in foreign jurisdictions).

veil-piercing and agency to non-U.S. entities acting outside the United States.<sup>461</sup> Why would a German company operating in South Africa have any expectation that its conduct there would someday be subject to U.S. federal common-law rules of liability?<sup>462</sup> This would seem a clear case of “unfair surprise or frustration of legitimate expectations”<sup>463</sup> where “[t]he application of an otherwise acceptable rule of law may result in unfairness to the litigants if, in engaging in the activity which is the subject of the litigation, they could not reasonably have anticipated that their actions would later be judged by this rule of law.”<sup>464</sup>

### CONCLUSION

Extraterritoriality issues promise only to gain in frequency and importance. The current, piecemeal approach to the field has produced a rambling labyrinth of analytical bloat. The law is complex without subtlety, knotted without development, and often blunt without judgment. Courts are confronted with an increasingly intricate array of overlapping but doctrinally disconnected questions about legislative authority, statutory construction, and due process. And the fallout is manifest. The law offers disturbingly little predictive assurance on how any given statute will be construed on any given set of facts not already squarely addressed by precedent. Furthermore, statutes have been applied in ways that contradict legislative intent, threaten failure to fulfill U.S. obligations, and may catch defendants unfairly by surprise.

This Article has attempted to cleanly sort out the doctrinal strands and show how they can be woven together to create a coherent, workable, and attractive alternative. It unifies the extraterritoriality analysis by using the source of lawmaking power behind a statute to determine the appropriate canon of construction for that statute and to evaluate whether its application violates due process.

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<sup>461</sup> See *supra* notes 339–42.

<sup>462</sup> See *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 275 (S.D.N.Y. 2009) (applying U.S. agency principles to Daimler).

<sup>463</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 318 n.24 (1981).

<sup>464</sup> *Id.* at 327 (Stevens, J., concurring); see also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985) (“When considering fairness in this context, an important element is the expectation of the parties.”).

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