
ARTICLES

REPLACING THE PRESUMPTION AGAINST EXTRATERRITORIALITY

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The presumption against extraterritoriality tells courts to read a territorial limit into statutes that are ambiguous about their geographic reach. This canon of construction has deep roots in Anglo-American law, and the U.S. Supreme Court recently reaffirmed this principle of statutory interpretation in Morrison v. National Australia Bank and Kiobel v. Royal Dutch Petroleum. Yet as explained in this Article, none of the purported justifications for the presumption against extraterritoriality hold water. Older decisions look to international law or conflict-of-laws principles, but these bodies of law have changed such that they no longer support a territorial rule. Modern courts suggest that the presumption avoids conflicts with foreign states and approximates legislative attention, yet these same decisions show the presumption is poorly attuned to either of these laudable goals. And while

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separation of powers and due process are superficially served by this rule, they too crumble in the face of serious scrutiny.

Although courts continue to rely on this outmoded presumption, some scholars have noted the incongruity between its goals and its execution. These scholars have offered alternative rules such as a presumption against extrajurisdictionality or a dual-illegality rule. But these alternative proposals fall into the same trap as the presumption – they uncritically apply a single approach to all types of cases. Instead, different statute types call for different rules: the Charming Betsy doctrine for private civil litigation, a rule of lenity for criminal statutes, and Chevron deference for administrative cases. These rules, not a singular presumption, best support the public policy interests that are important in each of these classes of disputes, and they also suggest an approach to Alien Tort Statute litigation that could serve as an alternative to the Supreme Court’s recent decision in Kiobel.

INTRODUCTION

The presumption against extraterritoriality has been applied in U.S. courts for more than a century, receiving perhaps its most prominent endorsement from no less than Justice Oliver Wendell Holmes, Jr.: “[A]ll legislation is *prima facie* territorial.”¹ In the 1990s, Chief Justice Rehnquist reaffirmed this principle in its modern formulation: “[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”² And in 2013, Chief Justice Roberts quoted Justice Scalia for the proposition that: “When a statute gives no clear indication of an extraterritorial application, it has none.”³

As these Justices explained, and as its name suggests, the presumption against extraterritoriality instructs courts to construe geoambiguous statutes to apply only to the territory of the United States.⁴ The presumption against extraterritoriality has been cited in hundreds of reported decisions,⁵ and the

¹ *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) (quoting *Ex parte Blain*, (1879) 12 Ch.D. 522, 528 (Brett, L.J.) (Eng.)).

² *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

³ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010)).

⁴ See Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 114 (2010) (coining, to the Author’s knowledge, the term “geoambiguous” to refer to laws that are “silent about whether they apply to acts that occur outside of the United States”).

⁵ For example, a search in the “allfeds” database on Westlaw on December 2, 2013 for “(presumption /2 extraterritoriality) or (canon /2 extraterritoriality) or (presumption /2 territorial!)” returned 260 federal court decisions.

Supreme Court has continued to “wholeheartedly embrace” the presumption against extraterritoriality in transnational litigation in U.S. courts.⁶

Judicial and scholarly advocates point to a range of justifications for the presumption against extraterritoriality: it reflects international law and conflict-of-laws principles,⁷ it insulates U.S. foreign relations interests by minimizing conflicts with foreign laws,⁸ it approximates congressional intent,⁹ it maintains the separation of powers among the coordinate branches,¹⁰ and it protects due process rights of defendants.¹¹ Each of these goals is laudable, but the presumption against extraterritoriality is a crude tool to achieve these ends and at times it is counterproductive for its stated purposes.¹² For these reasons, the presumption against extraterritoriality merits reevaluation. Part I of this Article takes up that task.

The examination of the presumption and its purposes is important for a few reasons. The presumption against extraterritoriality is a widely cited judicial rule, and it affects topics from securities regulation¹³ to employment discrimination¹⁴ to piracy.¹⁵ These decisions have consequences for regulated individuals and entities, and for those protected by such laws. The question of extraterritoriality further connects with foreign relations issues that have consequences for the United States and for foreign states. Interpretative rules also have dynamic effects.¹⁶ The behavior of legislators, regulators, and prosecutors is colored by the background rules established by courts, so ideally those background rules will be grounded in a justified normative foundation. More generally, transnational litigation and policy are significant. Professor Harold Koh, for example, has noted a recent emphasis on issues of

⁶ *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 32 (2d Cir. 2010) (discussing *Morrison*, 130 S. Ct. at 2877).

⁷ *Infra* Part I.A.

⁸ *Infra* Part I.B.1.

⁹ *Infra* Part I.B.2.

¹⁰ *Infra* Part I.C.1.

¹¹ *Infra* Part I.C.2.

¹² *Infra* Part I.

¹³ *E.g.*, *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877-83 (2010) (applying the presumption to section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a-pp (2012)).

¹⁴ *E.g.*, *Aramco*, 499 U.S. 244, 248-59 (1991) (applying the presumption to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (2006)).

¹⁵ *E.g.*, *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630-35 (1818) (limiting the extraterritorial effect of a U.S. statute prohibiting piracy); *United States v. Hasan*, 747 F. Supp. 2d 599, 602-42 (E.D. Va. 2010) (discussing the history, doctrine, and theory related to the extraterritorial scope of piracy legislation).

¹⁶ *See generally* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003) (discussing inter alia dynamic effects and statutory interpretation).

extraterritoriality, which he attributes to an increase in transnational economic activity, the transnational interests of nation states, and the rise of transnational regulation.¹⁷ The presumption against extraterritoriality is one significant piece of this transnational legal landscape.

Part I of this Article marshals evidence that the presumption against extraterritoriality is ill-suited for its purported purposes. These specific criticisms also reveal a deeper concern with current approaches to extraterritoriality. Although courts may adopt truly transsubstantive rules without exceptions, courts must make judgments about both the content of the rule *and* the scope of its application for many areas of statutory interpretation and procedure. Decisions about a rule's application reflect choices about the nature of cases; like cases should be treated more alike than unlike ones. The presumption against extraterritoriality reflects a judgment of this kind: it assumes that cases meeting the definition of "extraterritorial"¹⁸ are enough alike to be treated similarly for purposes of determining prescriptive jurisdiction.¹⁹ Scholarly proposals to replace the presumption against extraterritoriality track this conclusion, suggesting alternative rules to apply in all extraterritorial cases.²⁰ And a wider literature about foreign relations law takes as a given that "foreign relations cases" – whatever that term means – should be treated as a unified category.²¹ But this conclusion is not required. Instead, at least with respect to the presumption against extraterritoriality, the relevant values may be best served by first considering other aspects of the case.

Part II of this Article applies this insight and the purposes identified in Part I to frame a new approach to extraterritoriality and related cases. Unlike the aforementioned alternatives, the approach in Part II treats statute type rather than territory as the first cut. Once statutes are divided into civil, criminal, and administrative, then social values are more easily pursued. Indeed, Part II shows that the relevant values are served by existing case-type-specific doctrines of statutory interpretation: the *Charming Betsy* doctrine for private civil litigation,²² the rule of lenity in criminal statutes,²³ and *Chevron* deference in administrative cases.²⁴ Part II explains that these rules, rather than the presumption, should govern extraterritorial cases in those three areas.

¹⁷ HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS 52 (2008).

¹⁸ See *infra* note 43 (discussing definitions of extraterritoriality).

¹⁹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1986) (defining prescriptive (or legislative) jurisdiction).

²⁰ See *infra* Part II.

²¹ This issue is discussed further below. See *infra* notes 205 & 276.

²² See *infra* Part II.A.

²³ See *infra* Part II.B.

²⁴ See *infra* Part II.C.

Having laid out these replacements, Part III looks to a statute that is highly salient in international litigation though not covered by these three categories. The Alien Tort Statute provides for federal court jurisdiction for international law torts,²⁵ and in recent years courts and scholars have debated its operation in extraterritorial cases. The Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum* applied the presumption against extraterritoriality to the Alien Tort Statute,²⁶ but not without criticism from dissenting Justices and the academy.²⁷ Part III asks whether the rules laid out for substantive statutes in Part II have something to say about this jurisdictional statute that raises similar structural and international concerns.²⁸

This Article concludes with comments about where extraterritoriality fits within existing theoretical approaches to foreign relations law, statutory interpretation, and procedure. In sum, this Article demonstrates that the presumption of extraterritoriality, while supposedly serving commendable goals, falls short. We need not, however, look far for alternative rules, as long as we acknowledge that the cases to which courts have applied the presumption demand more than a one-size-fits-all response.

I. THE PRESUMPTION AND ITS PURPOSES

The presumption against extraterritoriality is a judge-made rule of statutory interpretation. Over the years, courts and scholars have justified the presumption with respect to various interests and values.²⁹ This Part addresses each of the purported justifications for this rule. Before doing so, though, it is helpful to supplement the Introduction's brief comments about the presumption's operation.

The presumption against extraterritoriality instructs courts that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."³⁰ This rule is a tool of federal statutory interpretation. It is not a constitutional principle,³¹ and it does not

²⁵ 28 U.S.C. § 1350 (2012) ("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.").

²⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663-69 (2013).

²⁷ See *infra* notes 251-59 and accompanying text.

²⁸ See *infra* Part III.

²⁹ See generally Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 L. & POL'Y INT'L BUS. 1 (1992); Zachary D. Clopton, *Bowman Lives: The Extraterritorial Application of U.S. Criminal Law After Morrison v. National Australia Bank*, 67 N.Y.U. ANN. SURV. AM. L. 137 (2011); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85 (1998); John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351 (2010).

³⁰ *Aramco*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

³¹ See *infra* Part I.C.

govern the extraterritorial reach of the Constitution.³² It does not speak to the role of U.S. states in foreign affairs – it addresses only *federal* laws.³³ Nor does it address legislative authority, as courts have placed virtually no limits on the power of Congress to legislate outside the borders of the United States.³⁴ And, at least until 2013, the presumption has not been applied to common law causes of actions, but instead has been a tool to construe *statutes*.³⁵

Within these limits, courts apply the presumption to substantive federal statutes, both civil and criminal.³⁶ Some statutes are expressly extraterritorial, making the interpretation question a nonissue. For example, if you were to operate a stateless submersible vessel on the high seas with the intent to evade detection, you may be prosecuted under 18 U.S.C. § 2285(a).³⁷ Less obscure examples are available, but this editorial choice is meant to suggest that express extraterritoriality is far from routine; most statutes do not include

³² These issues are discussed elsewhere. *See, e.g.*, KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 95 (2009).

³³ For a discussion of the relationship between the related *Charming Betsy* canon and state law, see Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretative Role of International Law*, 86 GEO. L.J. 479, 533-36 (1997). The *Charming Betsy* canon is also discussed *infra* Part II.A.

³⁴ According to a leading textbook, “no reported federal court decision has held an extraterritorial application of substantive U.S. law unconstitutional.” GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 607 (Vicki Been et al. eds., 5th ed. 2011); *see also Aramco*, 499 U.S. at 248 (“Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.”); *Lauritzen v. Larsen*, 345 U.S. 571, 579 n.7 (1953) (noting that the Court always follows the dictates of Congress, assuming constitutionality). The Eleventh Circuit recently held, however, that the Offense Clause of the Constitution, U.S. CONST. art. I, § 8, cl. 10, did not authorize the extraterritorial application of the Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70503(a), 70506 (2006), though it did not rule on other potential constitutional bases for the law. *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1248-58 (11th Cir. 2012).

³⁵ *But see infra* Part III (discussing common law causes of action under the Alien Tort Statute).

³⁶ *See, e.g.*, Clopton, *supra* note 29 (discussing the application of the presumption in criminal cases).

³⁷ Section 2285(a) provides that:

Whoever knowingly operates, or attempts or conspires to operate, by any means, or embarks in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating or has navigated into, through, or from waters beyond the outer limit of the territorial sea of a single country or a lateral limit of that country’s territorial sea with an adjacent country, with the intent to evade detection, shall be fined under this title, imprisoned not more than 15 years, or both.

18 U.S.C. § 2285(a) (2012). For a catalog of U.S. criminal laws with extraterritorial reach, see CHARLES DOYLE, CONG. RESEARCH SERV., 7-5700, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW (2012).

express language on territorial scope, leaving courts to decide the ambiguous statute's reach. The presumption against extraterritoriality tries to aid in this judgment.

Courts implement the presumption by addressing two questions. First, is there a "contrary intent" of Congress that would justify overcoming the presumption against extraterritoriality? At various times, judges have examined the text of statutes, related statutory provisions, the statutes' purposes, legislative history, and the governmental interest to determine whether Congress admitted any such contrary intent.³⁸ Although the Supreme Court insists the presumption is not a clear statement rule,³⁹ recent cases have approached this bright-line requirement.⁴⁰

A second interpretative issue is, in some sense, antecedent to the application of the presumption. The previous question asked whether Congress intended a statute to apply extraterritorially, but nothing in the canonical statement of the presumption tells courts what qualifies as an extraterritorial case. To put it another way, if a case has some connection to the United States and some connection to a foreign state, courts must determine whether the case is "extraterritorial" (and thus subject to the presumption) or not (thus rendering the presumption irrelevant).⁴¹ Justice Scalia colorfully wrote that the presumption against extraterritoriality is not a "craven watchdog . . . retreat[ing] to its kennel whenever *some* domestic activity is involved in the case."⁴² Not all extraterritorial connections, therefore, invoke the presumption, and not all domestic connections defeat it. Courts and scholars have offered manifold formulations of which connections are sufficient, and in many cases the answer is not entirely clear.⁴³

³⁸ Dodge, *supra* note 29, at 110-12, 123-24. For a taxonomy of these sources in criminal cases, see Clopton, *supra* note 29.

³⁹ See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010) ("But we do not say, as the concurrence seems to think, that the presumption against extraterritoriality is a 'clear statement rule' . . .").

⁴⁰ See *id.* at 2891 (Stevens, J., concurring) (characterizing the majority as "transform[ing] the presumption from a flexible rule of thumb into something more like a clear statement rule"); *Aramco*, 499 U.S. 244, 258 (1991) ("Congress' awareness of the need to make a *clear statement* that a statute applies overseas . . ." (emphasis added)); *id.* at 261-66 (Marshall, J., dissenting) (criticizing the majority's clear-statement approach).

⁴¹ See *Libman v. The Queen*, [1985] 2 S.C.R. 178, para. 63 (Can.) (referring to such a case as "both here and there").

⁴² *Morrison*, 130 S. Ct. at 2884.

⁴³ In *Morrison*, Justice Scalia looked to the "focus" of the statute, while Justice Stevens relied on the Second Circuit's conduct-or-effects approach. Compare *id.* at 2884-86 (majority opinion), with *id.* at 2888-95 (Stevens, J., concurring in the judgment). Canadian courts look for a real and substantial connection to Canada. *Libman*, [1985] 2 S.C.R. at para. 74. Australian courts have not settled on a rule, though a recent decision mentioned more than half a dozen alternatives. *Lipohar v The Queen*, [1999] 200 CLR 485 (Austl.). See generally Zachary D. Clopton, *Extraterritoriality and Extranationality: A Comparative*

Having briefly outlined the presumption against extraterritoriality, the remainder of this Part addresses its purported bases drawn from case law and scholarly treatments: international law, foreign law, congressional attention, separation of powers, and due process.

A. *Historical Justifications*

The presumption against extraterritoriality has its historical roots in the emphasis on territorial sovereignty in international law. This focus on territoriality supported a presumption against extraterritoriality directly, and led to a conflict-of-laws approach that also supported a territorial presumption.

Territorial sovereignty was an important principle in nineteenth-century international law, and on issues from personal jurisdiction⁴⁴ to foreign sovereign immunity⁴⁵ to choice of law,⁴⁶ it had a profound effect on U.S. law. In *Pennoyer v. Neff*, a case likely familiar to any current or former student of Civil Procedure, the Court relied on international law principles to conclude that “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory” and that “no State can exercise direct jurisdiction and authority over persons or property without its territory.”⁴⁷

This international law emphasis on territorial sovereignty has been cited as a motivating principle behind the presumption against extraterritoriality.⁴⁸ Proponents of this view rely on the famed decision in *The Apollon* case, citing fondly its admonition that “[t]he laws of no nation can justly extend beyond its own territories.”⁴⁹ Indirectly, this territorial view of international law supported a territorial principle in conflict of laws – specifically, the “vested rights” approach – which was the basis of Justice Holmes’s original articulation of the presumption in *American Banana*.⁵⁰

Study, 23 DUKE J. COMP. & INT’L L. 217 (2013) (discussing the American, Canadian, and Australian approaches). For criticism of the indeterminacy of *Morrison*’s rule, see Lea Brilmayer, *The New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. L. REV. 655, 669-72 (2011); John H. Knox, *The Unpredictable Presumption Against Extraterritoriality*, 40 SW. L. REV. 635 (2011) (arguing that the presumption does not approximate legislative intent).

⁴⁴ E.g., *Pennoyer v. Neff*, 95 U.S. 714 (1877).

⁴⁵ E.g., *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

⁴⁶ E.g., *The Apollon*, 22 U.S. (9 Wheat.) 362 (1824).

⁴⁷ *Pennoyer*, 95 U.S. at 722.

⁴⁸ For additional discussion of this justification, compare Born, *supra* note 29, at 59-71, with Dodge, *supra* note 29, at 113-14.

⁴⁹ *The Apollon*, 22 U.S. at 370.

⁵⁰ *Am. Banana v. United Fruit Co.*, 213 U.S. 347, 356-59 (1909). Under the vested-rights approach, “the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.” *Id.* at 356. For further discussion of the vested-rights approach, see, for example, RESTATEMENT (FIRST) CONFLICT OF LAWS (1934); JOSEPH

The emphasis on territoriality was drawn from international law at the time, but even in the era of *Pennoyer* and *American Banana*, territoriality did not tell the whole story. States could and did regulate extraterritorial conduct under certain conditions. The quotation from *The Apollon* about territoriality comes with a qualification – in full, the Court said “[t]he laws of no nation can justly extend beyond its own territories, *except so far as regards its own citizens*.”⁵¹ Justice Story also acknowledged the nonexclusivity of territoriality in his *Commentaries on the Conflict of Laws*: “[T]he laws of a nation have no direct, binding force, or effect, except upon persons within its territories; yet every nation has a right to bind its own subjects by its own laws in every other place.”⁵² Today, the case for extraterritorial jurisdiction is even clearer. The modern international law of prescriptive jurisdiction⁵³ permits legislative authority with respect to (among others) nationality, effects, and, at times, universal jurisdiction.⁵⁴ International law may be the basis for a canon of interpretation, perhaps most importantly because international law reflects the consent of states to which it applies – reflecting the notion of sovereign equality in the international system. But because international law does not (and perhaps never did) rely on territory as the sole basis of prescriptive jurisdiction, it cannot be said to support a presumption against extraterritoriality.⁵⁵

H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 307 (1935). For further information on conflict of laws more generally, see, for example, R. LEA BRILMAYER ET AL., CONFLICT OF LAWS: CASES AND MATERIALS (6th ed. 2011).

⁵¹ *The Apollon*, 22 U.S. at 370 (emphasis added).

⁵² JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 22 (Boston, Hilliard, Gray & Co. 1834).

⁵³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1986) (defining prescriptive (or legislative) jurisdiction as the power “to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court”). For further discussion of the international law of prescriptive jurisdiction, see *infra* Part II.A.

⁵⁴ *E.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 404 (1986) (discussing international law bases of jurisdiction).

⁵⁵ The same can be said for conflict of laws. As noted above, the presumption against extraterritoriality was based on the vested-rights approach to conflicts. *Supra* note 50. But vested rights’ primacy was a casualty of the “conflicts revolution.” See, *e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 707-10 (2004); RESTATEMENT (SECOND) CONFLICT OF LAWS ch. 7 intro. note (1971) (discussing the change from the “place of wrong” rule to the “most significant relationship” test for torts); BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAW 74-76 (1963); Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 305-06 (2011); Arthur Taylor von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 928-41 (1975) (discussing evolution of conflict-of-laws thinking). By displacing the consensus around vested rights, the conflicts revolution allowed courts to account for

Substantive (rather than jurisdictional) international law also challenges the presumption. Responding to an influx of Haitians traveling by boat to the United States, the President directed the Coast Guard to intercept such vessels and return the passengers to Haiti without determining whether they qualified as refugees. A legal challenge asked the Supreme Court to determine whether procedural protections for putative refugees in the Immigration and Nationality Act (INA) applied beyond the United States' territorial waters.⁵⁶ In *Sale v. Haitian Centers Council*, the Supreme Court used the presumption against extraterritoriality to conclude that the INA did not afford such protections extraterritorially.⁵⁷ In dissent, Justice Blackmun observed that reliance on the presumption sanctioned conduct that violated substantive international law – the United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968.⁵⁸ This is not to say that U.S. courts should enforce the Protocol directly, but it is noteworthy that a rule purportedly effectuating international law (the presumption against extraterritoriality) ran counter to a substantive international law commitment. Both substantive and jurisdictional international law, therefore, counsel against a strict territorial presumption.

B. *Modern Justifications*

The presumption against extraterritoriality rose in an era in which territoriality was more central to international law and conflict of laws than it is today, not to mention a time in which the nature, scope, and quantity of extraterritorial regulation was significantly different. Courts looking at these developments could have changed the presumption. But instead their response has been to change the justifications for the rule. Courts in recent years have put less emphasis on international law and vested rights in extraterritorial cases, instead focusing primarily on two other justifications: the desire to avoid conflicts with foreign laws and legislative attention.⁵⁹ This Section addresses these themes in turn.

factors, such as forum-state interest, that go beyond mere territorial connections. *See, e.g.,* CURRIE, *supra*, at 74-76. For further discussion of conflict of laws and the presumption, see BORN, *supra* note 29, at 71-74; DODGE, *supra* note 29, at 114-15.

⁵⁶ *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (interpreting 8 U.S.C. § 1253(h) (2012)).

⁵⁷ *Id.* at 173-74.

⁵⁸ *Id.* at 188 (discussing the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223 (Jan. 31, 1967)).

⁵⁹ *See, e.g.,* Clopton, *supra* note 29, at 151-55 (discussing justifications and observing that foreign-law conflicts and legislative attention receive the most consideration from modern courts); Dodge, *supra* note 29, at 112-23 (same).

1. Foreign Conflicts

U.S. courts often justify the presumption against extraterritoriality as avoiding foreign conflicts.⁶⁰ Importantly, this justification refers to *foreign* law, not international law, meaning that it is concerned about conflicts with the laws of individual foreign states. One could imagine, for example, situations where complying with U.S. laws would put foreign parties in violation of their country's domestic laws.⁶¹

In the most general sense, the presumption against extraterritoriality reduces conflicts with foreign laws in that *any* rule that disposes of *any* cases in U.S. courts could have the effect of disposing of *some* cases that may present conflicts with foreign laws. But it proves too much to say that any dismissal-oriented rule is justified by foreign conflicts. If the risk of foreign conflicts really justifies the presumption, there should be congruence between the rule and its purported purpose.

First, the presumption against extraterritoriality is overinclusive with respect to foreign conflict avoidance. For one thing, courts do not routinely consider the intensity of the potential conflict when applying the presumption. Indeed, the Supreme Court has applied the presumption against extraterritoriality where there was definitively no conflict with foreign laws. In this connection, I am not referring to the Court affirmatively declaring “no conflict” – though such a case exists.⁶² Rather, I refer here to *Smith v. United States*.⁶³ In *Smith*, the spouse of a carpenter killed while working on a National Science Foundation project brought suit under the Federal Tort Claims Act. The interesting wrinkle was that the suit arose from events in Antarctica. Antarctica is not a foreign sovereign, and there is no domestic law of Antarctica.⁶⁴ In other words, there is no foreign law with which to conflict. Despite this fact, the Court applied the presumption against extraterritoriality to dismiss the

⁶⁰ *E.g.*, *Aramco*, 499 U.S. 244, 248 (1991) (discussing the desire to avoid unintended clashes with American laws and foreign nations); *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 20-22 (1963) (characterizing the decision as avoiding conflict with the laws of Honduras); *United States v. Bowman*, 260 U.S. 94, 102 (1922) (expressing concern with doing offense to the sovereignty of Brazil). Others have further justified this discussion. *See* Born, *supra* note 29, at 76-79; Dodge, *supra* note 29, at 115-17; Knox, *supra* note 29, at 379-83. This Section assumes that avoiding conflicts is desirable, a proposition that scholars like Professor Dodge dispute. *See* Dodge, *supra* note 29, at 117.

⁶¹ The *Rogers* case discussed this issue in the context of discovery obligations. *See generally* *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197 (1958).

⁶² *Sale*, 509 U.S. at 173-74 (stating that the presumption applies even though there was no risk that the statute could conflict with foreign law).

⁶³ *Smith v. United States*, 507 U.S. 197, 199 (1993).

⁶⁴ The Court of Appeals for the District of Columbia further discussed Antarctica and extraterritoriality in a 1993 decision. *See* *Envtl. Def. Fund v. Massey*, 986 F.2d 528, 529 (D.C. Cir. 1993).

suit.⁶⁵ In a similar vein, Professor John Knox noted disapprovingly that U.S. courts have used the presumption to avoid applying statutes to areas within the exclusive control of the United States (for example, military bases or vessels).⁶⁶ Not only would such application present no risk of foreign conflict (since there would be no foreign law with which to conflict), but these situations also may create new conflicts by establishing “under-regulated zones” for which the United States is internationally responsible.⁶⁷

At the same time, the presumption against extraterritoriality is also an underinclusive conflict-prevention device because it fails to account for nonterritorial bases of jurisdiction. Even if a U.S. court was applying U.S. law territorially, it could conflict with a foreign law asserting a nonterritorial basis. For example, territoriality and nationality could lead to conflicts; a conflict could arise when one party is a foreign national and her state has exercised nationality jurisdiction. The presumption against extraterritoriality says nothing of these conflicts.

The foreign-conflicts justification is further undermined because the presumption against extraterritoriality, on its face, ignores available conflict-related information. Most obviously, courts could inquire into the content of foreign law in order to assess the presence of a conflict. Justice Souter took this approach in his comity analysis in *Hartford Fire*,⁶⁸ as would any practitioner of interest-analysis brands of conflict of laws.⁶⁹ But this inquiry is not part of the presumption against extraterritoriality; the presumption is applied entirely from the perspective of the forum state. Further, although Chief Justice Rehnquist explained that the foreign-conflicts concern sought to avoid “international discord,”⁷⁰ the presumption is devoid of any attention to the views of foreign states or the U.S. diplomatic corps.⁷¹

⁶⁵ *Id.* at 530-37.

⁶⁶ Knox, *supra* note 29, at 379-83, 390-92.

⁶⁷ *Id.* at 380.

⁶⁸ *Hartford Fire Ins. v. California*, 509 U.S. 764, 798-99 (1993) (“[I]nternational comity would not counsel against exercising jurisdiction in the circumstances alleged here.”).

⁶⁹ See generally *supra* note 55.

⁷⁰ *Aramco*, 499 U.S. 244, 248 (1991).

⁷¹ See *Republic of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004) (suggesting that the views of the executive may carry some weight in sovereign immunity cases). In some foreign sovereign immunity cases, the executive branch files a statement of interest with a court. See 28 U.S.C. § 517 (2012). It is also notable that the Supreme Court’s recent endorsement of the “focus test” for extraterritoriality was coupled with an invocation of the foreign-conflicts justification. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2884-85 (2010) (justifying the focus test with reference to “[t]he probability of incompatibility with the applicable laws of other countries”). Yet, when given the opportunity to announce a rule to define cases as “extraterritorial,” the Court selected a rule that exclusively relates to the forum state; the Court inquired into the focus of the domestic statute without any consideration of foreign laws or interests. *Id.* at 2884 (looking only at the “focus” of the Exchange Act to determine if it applies extraterritorially).

In sum, although the presumption against extraterritoriality may result in the dismissal of some cases in which there may be conflicts with foreign laws, the rule is both under- and overinclusive in this regard. Foreign conflicts alone, therefore, would be a thin reed on which to base such a robust rule.

2. Congressional Attention

The second modern justification for the presumption is congressional attention. According to the Supreme Court, the presumption against extraterritoriality is a useful rule of thumb because “Congress is primarily concerned with domestic conditions.”⁷² At least one leading scholar suggested that this notion is the *only* plausible justification for the presumption against extraterritoriality.⁷³ Genuflections to this domestic-concern argument can be found in judicial opinions not only from U.S. courts but also from various other countries that apply a territorial presumption.⁷⁴

The Supreme Court has not explained why it believes Congress’s attention is primarily territorial. Chief Justice Rehnquist claimed it is “commonsense.”⁷⁵ Why? In many circumstances, Congress may be agnostic: as Professor Lea Brilmayer put it, “in the vast majority of cases, legislatures have no actual intent on territorial reach.”⁷⁶ In many situations, common sense suggests the opposite assumption; one could easily imagine situations in which Congress would legislate with foreign conduct in mind. In Justice Blackmun’s view, the logic of the presumption “has *less* force – perhaps, indeed, no force at all – when a statute on its face relates to foreign affairs.”⁷⁷ On topics from drug trafficking⁷⁸ to bribery of foreign officials⁷⁹ to genocide,⁸⁰ it would be odd to think that Congress was not at least considering foreign conduct.

⁷² *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949); *see also Morrison*, 130 S. Ct. at 2877 (same); *id.* at 2892 (Stevens, J., concurring) (same); *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993) (same); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 585 (1992) (Stevens, J., concurring) (same); *Aramco*, 499 U.S. at 248 (same).

⁷³ Dodge, *supra* note 29, at 90, 117-19.

⁷⁴ *E.g.*, *Libman v. The Queen*, [1985] 2 S.C.R. 178, 183 (Can.) (“States ordinarily have little interest in prohibiting activities that occur abroad . . .”); *R. v. Martin*, [1956] 2 All E.R. 86, 92-93 (Eng.) (declining to apply English criminal law outside the territory of the state).

⁷⁵ *Smith*, 507 U.S. at 204 n.5 (noting that the presumption against extraterritoriality reflects the “commonsense notion that Congress generally legislates with domestic concerns in mind”).

⁷⁶ Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 393 (1980) (emphasis omitted).

⁷⁷ *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 207 (1993) (Blackmun, J., dissenting).

⁷⁸ *See United States v. Plummer*, 221 F.3d 1298, 1304-06 (11th Cir. 2000) (inferring extraterritorial intent in the drug smuggling statute and collecting cases doing the same).

⁷⁹ Indeed, the Foreign Corrupt Practices Act is expressly extraterritorial. 15 U.S.C. §

Congressional responses to the Supreme Court also undermine this domestic assumption. In *Arabian American Oil* (“*Aramco*”), the Supreme Court assumed Congress was concerned with domestic conditions when it passed Title VII, and therefore the Court applied the presumption against extraterritoriality to that statute.⁸¹ Within the year, Congress amended Title VII to have extraterritorial effect.⁸² Similarly, after the Supreme Court rejected the extraterritorial application of securities law in 2010,⁸³ Congress overruled the Court’s decision one month later.⁸⁴ Even the famed piracy case *United States v. Palmer*,⁸⁵ relied on by modern adherents to the presumption,⁸⁶ was overruled by Congress a year after it was decided.⁸⁷ Apparently, the presumption against

78dd-1(g)(1) (2012) (prohibiting certain conduct “outside the United States”).

⁸⁰ The current criminal genocide statute, 18 U.S.C. § 1091(d) (2012), applies extraterritorially, but it did not do so prior to 2007. *See* Act of Dec. 21, 2007, Pub. L. No. 110-151, sec. 2, § 1091(d), 121 Stat. 1821, 1821-22 (2007) (amending the statute).

⁸¹ 499 U.S. 244, 248, 255-59 (1991).

⁸² Act of Nov. 21, 1991, Pub. L. No. 10-166, sec. 109, §§ 701(f), 702, 101(8), 102, 105 Stat. 1071, 1077-78. Indeed, Members of Congress waited less than one month to introduce legislation to overrule this decision. *E.g.*, Extraterritorial Employment Protection Amendments of 1991, H.R. 1741, 102d Cong. (1991) (amending the Civil Rights Act to apply the law in some instances to United States citizens employed in foreign nations); American Employees Equity Act of 1991, H.R. 1694, 102d Cong. § 2(d) (1991) (amending the Civil Rights Act to ensure that Title VII applies to some United States citizens employed in foreign nations). Further, as Gary Born notes, Congress also acted to amend the Age Discrimination in Employment Act in the face of lower court decisions rejecting its extraterritorial application. *See* Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2012); Born, *supra* note 29, at 75 n.376.

⁸³ *Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2883 (2010) (concluding that because “there is no affirmative indication in the Exchange Act that 10(b) applies extraterritorially,” the presumptions against extraterritoriality applies).

⁸⁴ The Dodd-Frank Wall Street Reform and Consumer Protection Act amended the Securities Exchange Acts to expressly provide for the extraterritorial enforcement of certain securities laws by SEC. Dodd-Frank Act, Pub. L. No. 111-203, sec. 929P(b)(1)-(2), §§ 22, 27, 124 Stat. 1376, 1864-65 (2010) (codified at 15 U.S.C. § 77v(c) (2012) & 15 U.S.C. § 78aa(b)).

⁸⁵ *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818) (discussing the application of the U.S. piracy statute outside the United States).

⁸⁶ *E.g.*, *Small v. United States*, 544 U.S. 385, 388 (2005) (arguing that “any person” does not necessarily include persons outside the jurisdiction (citing *Palmer*, 16 U.S. at 631)); *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953) (interpreting *Palmer* to indicate that laws should not apply the presumption of extraterritoriality when the legislature did not specifically endorse international application).

⁸⁷ *See* *United States v. Hasan*, 747 F. Supp. 2d 599, 612-13 (E.D. Va. 2010) (citing Act of Mar. 3, 1819, ch. 77, 3 Stat. 510; ALFRED P. RUBIN, *THE LAW OF PIRACY* 158-59 (2d ed. 1998)). Notably, among these three cases in which Congress expressly rejected the Supreme Court’s assumption that it was only concerned with domestic conditions – specifically with respect to employment discrimination, securities fraud, and piracy – two of them relate to

extraterritoriality, which supposedly manifests legislative intent, does not always hit Congress's mark.

The congressional-attention justification also faces a conceptual problem – it is unclear what exactly courts mean when they say Congress is concerned with domestic conditions. Does this refer to domestic conduct, domestic effects, or any discernible domestic connection? In *Morrison*, Justice Scalia offered one answer to this question: apply the presumption to the facts of a case when the activity that comprises the “focus” of the relevant statute occurs outside the territory of the United States.⁸⁸ In the parlance of this justification, when Congress is legislating about fraudulent securities transactions, it is assumed to be primarily concerned with *domestic* fraudulent securities transactions; when Congress is legislating about employment discrimination, it is primarily concerned with *domestic* employment discrimination.⁸⁹ Perhaps these are reasonable assumptions, but would it not also be reasonable to presume that Congress is worried about American companies engaged in securities fraud or employment discrimination wherever they are located, or that Congress is concerned about domestic effects from fraud or discrimination no matter where it originated?⁹⁰ The fact that there are so many different ways to conceptualize domestic concern – not to mention the fact that different conceptions might make more sense for different types of legislation – undercuts this assumption as a sound basis for the presumption against extraterritoriality. And, as suggested throughout this Part, there is no reason – common sense or otherwise – to think that territory is the right background rule against which Congress may legislate.

C. *Other Justifications*

Early judicial references to the presumption against extraterritoriality focused on international law and vested rights, while more recent decisions relied on foreign conflicts and congressional attention. As explained in the previous Sections, neither the historical nor modern justifications support the rule. But maybe this judicial window dressing adorns a rule that is truly justified on other grounds. In particular, perhaps the presumption against extraterritoriality reflects important structural considerations: the relationship among the branches of government (the separation of powers) or the relationship between the state and the people (due process). This Section addresses each of these justifications, but again concludes that they do not support the rule as currently constituted.

subjects that are not obviously connected with foreign affairs.

⁸⁸ *Morrison*, 130 S. Ct. at 2883-85.

⁸⁹ *Id.* at 2884 (discussing the securities law at issue in that case and Title VII as at issue in *Aramco*, 499 U.S. 244 (1991)).

⁹⁰ *See, e.g.*, Brilmayer, *supra* note 43 (criticizing the focus rule with respect to legislative intent); Knox, *supra*, note 44 (same).

1. Separation of Powers

Although courts do not typically rely on separation of powers to justify the presumption against extraterritoriality, there is at least a superficial logic to this view.⁹¹ Chief Justice Marshall, in *United States v. Palmer*, worried about the judiciary interfering in “delicate” foreign affairs questions,⁹² and Professor Bradley, in defending the presumption, argued that the presumption protects against “judicial activism.”⁹³ On this theory, the courts are wise to stay out of foreign affairs, and a presumption against extraterritoriality ostensibly helps achieve this goal because it requires a clear expression of *congressional* intent to reach beyond the borders of the United States.

The separation of powers justification of the presumption fails for a few reasons, even putting aside charges that the courts should not abdicate their role in foreign affairs.⁹⁴ Beginning with the judicial-activism critique, critics worry that courts might extend extraterritorially those statutes that Congress intended to be territorial. But, by this logic, courts also would engage in judicial activism when they constrain *territorially* those statutes that Congress intended to be *extraterritorial*.⁹⁵ The presumption against extraterritoriality is supposed to be used only when congressional intent is unclear, so by definition it is ambiguous whether applying the statute territorially or extraterritorially would be the “activist” position.⁹⁶ This theoretical objection is made more serious in practice. Because the courts have required a fairly strong showing of congressional intent to overcome the presumption,⁹⁷ there will be cases where courts override strong, but less than “clear,” evidence of congressional intent. Professor Brilmayer, in her scathing critique of *Morrison*, argues that Justice

⁹¹ For a discussion of the separation of powers justification, see Dodge, *supra* note 29, at 120-22. See also *Kiobel*, 133 S. Ct. at 1664-65 (discussing deference to the legislative and executive branches).

⁹² *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 633 (1818).

⁹³ Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 550 (1997).

⁹⁴ See *infra* Part II.C (discussing this critique with respect to *Chevron* deference and foreign affairs).

⁹⁵ Professor Dodge makes this point in his critique of Professor Bradley as well. See Dodge, *supra* note 29, at 120-22.

⁹⁶ One could argue that the over-regulating activist is worse than the under-regulating activist. Indeed, Professor Bradley makes this argument with respect to the *Charming Betsy* canon. Bradley, *supra* note 33, at 532-33. But we need some reason to jump to this conclusion. An argument based on international law, foreign conflict, or due process may justify erring on the side of under-regulation, but as explained throughout this Part, the presumption against extraterritoriality is not a good match for those values. And it is not clear that over- or underenforcement is always more dangerous.

⁹⁷ See *supra* notes 39-40 (discussing the almost-clear-statement approach of recent decisions).

Scalia's opinion did just that – “marginalize[d] Congress and then showcase[d] judicial creativity.”⁹⁸

The executive's place in the separation of powers also challenges the presumption.⁹⁹ It is commonplace to remark on the executive's central role in foreign affairs; the Supreme Court famously commented in *Curtiss-Wright* about “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”¹⁰⁰ But judges repeatedly have ignored the views of the executive branch in favor of the presumption against extraterritoriality. In *Aramco*, the Supreme Court rejected the opinion of the Equal Employment Opportunity Commission (EEOC) when it held that Title VII should not be applied extraterritorially,¹⁰¹ and recently the Ninth Circuit relied on *Morrison* to reject the Department of Labor's interpretation that a federal worker's compensation statute had an extraterritorial effect.¹⁰² In these decisions, the courts rejected the position of the executive branch directly. They also may have rejected the position of the legislative branch indirectly if Congress intended to delegate the interpretive task to the executive.¹⁰³ In short, if the presumption is intended to respect the decisions of the political branches – legislative and executive – it needs work.

2. Due Process

Much like separation of powers, courts do not typically justify the presumption with reference to due process, but it may be that this individual-rights interest supports the rule after all. Due process is central to any discussion of choice of law and, at times, litigants have raised Fifth Amendment challenges to extraterritorial suits.¹⁰⁴

⁹⁸ Brilmayer, *supra* note 43, at 656.

⁹⁹ For further discussion of administrative deference and the presumption, see *infra* Part II.C.

¹⁰⁰ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

¹⁰¹ *Aramco*, 499 U.S. 244, 256-58 (1991).

¹⁰² *Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 846 (9th Cir. 2012) (rejecting the position of the Director of the Department of Labor's Office of Workers' Compensation Programs regarding the Longshore and Harbor Workers' Compensation Act).

¹⁰³ See *infra* Part II.C (discussing the implied-delegation assumption in administrative cases).

¹⁰⁴ See Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1103 n.432 (2011) [hereinafter Colangelo, *Unified Approach*] (collecting cases in which a defendant has raised a due process challenge). For further discussion of due process, see Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121 (2007); A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379 (1997).

The question is what due process means here. In interstate cases, courts have acknowledged that due process concerns arise when defendants (civil or criminal) are subject to laws that create “unfair surprise or frustration of legitimate expectations.”¹⁰⁵ The same must be true in extraterritorial cases; notice is a necessary component of extraterritorial due process.

Tracking an observation made with respect to foreign conflicts above, at a crude level, any rule that results in the dismissal of some cases has the potential to protect some defendants to whom notice was not reasonably available. But also as was observed above, we should expect better alignment between the due process interests and the presumption if due process is in fact a basis for the rule. And, like the other bases described in this Part, that alignment is absent.

First, there are significant classes of cases where extraterritorial defendants would be the beneficiaries of fair notice.¹⁰⁶ Professor Colangelo identifies one such class of cases – statutes implementing substantive international law.¹⁰⁷ Colangelo cites, for example, domestic laws implementing the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.¹⁰⁸ A defendant in another signatory state should not be surprised that the United States also implemented the Montreal Convention’s provisions. In this way, Colangelo reasonably suggests that statutes implementing international law create “false conflicts” and no due process problem.¹⁰⁹

A similar point arises for cases in which U.S. and foreign laws regulate the same conduct in the same way. Could a defendant in Canada, a country with

¹⁰⁵ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 318 n.24 (1981). Professor Colangelo refers to this as the “bread and butter of due process” in extraterritorial cases. See Colangelo, *Unified Approach*, *supra* note 104, at 1107. In the interstate context, the notice issue is connected with issues of state sovereignty, in part due to full faith and credit obligations. See Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1113-18 (2009) (“[I]t is . . . difficult to separate principles of fairness to individuals from those of appropriate solicitude for the policy decisions of states.”); see also *Allstate*, 449 U.S. at 320-32 (Stevens, J., concurring) (differentiating between obligations arising from due process versus full faith and credit). This Part, though, seeks to tease out the individual-rights interest from these other considerations.

¹⁰⁶ Whether particular notice should satisfy due process is not relevant to the issue of the whether the presumption is in sync with due process concerns generally.

¹⁰⁷ Colangelo, *Unified Approach*, *supra* note 104, at 1103-09 (discussing due process issues).

¹⁰⁸ *Id.* at 1092-93 (citing Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, *codified principally* at 18 U.S.C. § 32(b) (2012)); see *United States v. Yousef*, 327 F.3d 56, 111-12 (2d Cir. 2003) (discussing the Montreal Convention and due process).

¹⁰⁹ Colangelo, *Unified Approach*, *supra* note 104, at 1106. See generally Anthony J. Colangelo, *Universal Jurisdiction as an International “False Conflict” of Laws*, 30 MICH. J. INT’L L. 881 (2009).

laws against murder, really argue that she did not know that murder was illegal under U.S. law?¹¹⁰ As the Third Circuit wrote: “Inasmuch as the trafficking of narcotics is condemned universally by law-abiding nations, we see no reason to conclude that it is ‘fundamentally unfair’ for Congress to provide for the punishment of persons apprehended with narcotics on the high seas.”¹¹¹ Accounting for the laws of other states is not an unchartered path; not only is this conflicts analysis central to choice-of-law questions of all stripes, it is also exactly the inquiry that underlies the “dual criminality” requirement that governs many international extradition agreements.¹¹² Yet the presumption does not account for the degree of overlap among domestic laws.

An additional problem with the presumption-as-due-process theory is that territory is not the only reasonable basis for notice. Nationals of the forum state, for example, may have notice of their home country’s laws when they travel abroad. And it would be reasonable to expect a defendant intentionally directing conduct at the United States and causing effects within it to have understood that she could be subject to the United States’ laws. The international law of prescriptive jurisdiction suggests these and other predictable bases for notice.¹¹³ Lastly, the presence of a statute in the United States Code is not the only way that notice could be given.¹¹⁴ If a federal agency enforcing a regulatory statute publicizes its extraterritorial effect or engages in a notorious pattern of extraterritorial enforcement, then extraterritorial actors operating in the space of the regulation should be on notice.¹¹⁵

At the same time, the presumption also misses some cases where notice could be an issue. Here the details of how the presumption is applied are relevant. Recall Justice Scalia’s colorful explanation that no territorial activity avoids the presumption – “the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.”¹¹⁶ On this basis, the inverse is also true – not all extraterritorial activity is sufficient to invoke the presumption. The *Morrison* decision says that only the “focus” of the statute matters. So, if a

¹¹⁰ Chief Judge Frank Easterbrook wrote: “It is not as if murder were forbidden by U.S. law but required (or even tolerated) by Mexican law.” *United States v. Leija-Sanchez*, 602 F.3d 797, 799 (7th Cir. 2010).

¹¹¹ *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993).

¹¹² See Meyer, *supra* note 4, at 119 (discussing this extradition mainstay as the basis for an alternative to the presumption against extraterritoriality).

¹¹³ See *infra* Part II.A (discussing the international law of prescriptive jurisdiction).

¹¹⁴ See *infra* Part II.B (discussing notice in this context).

¹¹⁵ Moreover, sophisticated defendants (for example, multinational corporations operating in various jurisdictions) are aware of the prospect of extraterritorial regulation. For example, American firms with large international operations surely are aware of the expressly extraterritorial Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (2012).

¹¹⁶ *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010).

particular set of events has a fleeting connection to the United States, but that connection happens to fall within the focus of the statute, then the statute would apply. This rule, not calibrated at all to the “legitimate expectations” of the defendant, cannot be said to track notice.¹¹⁷ And by applying such a rule, the Court has acknowledged the disconnection between the presumption and due process.¹¹⁸

D. Summary

This Part has reviewed a series of justifications for the presumption against extraterritoriality: international law, vested rights, foreign conflicts, legislative attention, separation of powers, and due process. One by one, each of these justifications fell. Either the presumption failed to promote the stated reason, or the match between the rule and purported purpose was simply too loose to be credited. The presumption against extraterritoriality is a normative canon.¹¹⁹ Because it is unsupported by these normative goals, it should be abandoned.

¹¹⁷ Certainly the degree of connection to the United States would be a better proxy for due process than the focus of the statute. *See generally* Clopton, *supra* note 43 (comparing the American and Canadian approaches to this issue).

¹¹⁸ A final potential justification not addressed here is predictability. In *Morrison*, Justice Scalia expressly justified the presumption, in part, as “preserving a stable background against which Congress can legislate with predictable effects.” *Morrison*, 130 S. Ct. at 2881. At best, the argument for predictability justifies a single, clear, and unflinching rule – but it says nothing about which single, clear, and unflinching rule should be selected, and therefore it does not justify any particular default rule. So this justification, standing alone, cannot support the presumption against extraterritoriality with a normative justification – one this Part finds lacking. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 275-79 (1994) (discussing this justification and rejecting the presumption); Dodge, *supra* note 29, at 122-23 (same). Moreover, the actual work of the presumption undermines the claim that it is in fact a predictable rule. Eskridge, for example, observes that the *Aramco* decision likely contradicted the reasonable expectations of a legislator drafting the statute. ESKRIDGE, JR., *supra*, at 281-85. *Morrison* also arguably represented an unpredictable result, overturning the conventional wisdom of conduct and effects in favor of Justice Scalia’s new “focus” rule. As Justice Stevens wrote:

The Second Circuit refined its test over several decades and dozens of cases, with the tacit approval of Congress and the [SEC] and with the general assent of its sister Circuits. That history is a reason we should give additional weight to the Second Circuit’s “judge-made” doctrine, not a reason to denigrate it. “The longstanding acceptance by the courts, coupled with Congress’ failure to reject [its] reasonable interpretation of the wording of §10(b), . . . argues significantly in favor of acceptance of the [Second Circuit] rule by this Court.”

Morrison, 130 S. Ct. at 2890-91 (Stevens, J., concurring) (internal citation omitted). And, as scholars have readily pointed out, the application of *Morrison*’s new rule going forward is hardly predictable. *See supra* note 43.

¹¹⁹ *See, e.g.*, Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992) (“[N]ormative canons are principles, created in the federal system exclusively by judges, that do not purport to

Before turning to alternative rules, it is important to consider a different explanation – what if the problem is not the presumption against extraterritoriality, but instead the use of presumptions at all? The arguments put forward in this Part address the normative content of the presumption against extraterritoriality; they do not suggest that courts applying default rules cannot do so consistent with international law or separation of powers or due process, but instead they suggest that *this rule* does not achieve those normative goals.

For reasons of efficiency, due process, and separation of powers, clear rules are valuable.¹²⁰ Justice Scalia, for example, remarked that the presumption against extraterritoriality was important because it “preserv[ed] a stable background against which Congress can legislate”;¹²¹ notice to potential defendants is frustrated if interpretative rules are not clear;¹²² and judicial efficiency is preserved when presumptions are available.¹²³

But justifications for using canons generally does not mean that any canon will do. “[S]ubstantive canons are not policy neutral. They represent value choices by the Court.”¹²⁴ The Court has announced its value choices, but this Part suggests that the presumption against extraterritoriality does not effectuate them. In Part II, this Article uses the value choices laid out by courts and scholars to identify better substantive canons for extraterritorial and related cases.

II. REPLACEMENTS FOR THE PRESUMPTION

If the presumption against extraterritoriality is not justified, what if any rule should take its place? Scholars who have criticized the presumption also have offered rules to replace it. Professor Jeffrey Meyer argued for a “dual illegality rule,” applying U.S. law extraterritorially if the conduct is similarly regulated in the foreign state.¹²⁵ Gary Born called for an international law presumption.¹²⁶ Professor John Knox suggested a presumption against extrajurisdictionality, relying on the international law of prescriptive

describe accurately what Congress actually intended or what the words of a statute mean, but rather direct courts to construe any ambiguity in a particular way in order to further some policy objective.”).

¹²⁰ See *supra* note 118 (discussing predictability).

¹²¹ *Morrison*, 130 S. Ct. at 2881.

¹²² See *supra* Part I.C.2.

¹²³ *Coleman v. Thompson*, 501 U.S. 722, 737 (1991) (“[C]onclusive presumptions . . . [are] designed to avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases.”).

¹²⁴ William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595-96 (1992).

¹²⁵ See Meyer, *supra* note 4.

¹²⁶ See Born, *supra* note 29.

jurisdiction and congressional signaling.¹²⁷ Professor Jonathan Turley proposed a presumption *in favor of* extraterritoriality.¹²⁸

While each of these replacement rules has its merits, the desire for transsubstantivity¹²⁹ obscures the better approach. As this Part shows, the differences among classes of statutes – here divided into civil, criminal, and administrative – are significant, indeed more significant, than the differences between territorial and extraterritorial cases.¹³⁰ As a result, the rules governing extraterritorial cases should reflect not just those values drawn from transnational relations generally, but also the particular characteristics of civil, criminal, and administrative law and the existing rules in each of those spheres. At least on its face, the presumption against extraterritoriality – and the transsubstantive alternatives mentioned above – apply to statutes in all three classes. The forthcoming sections explain why civil, criminal, and administrative statutes deserve separate treatment, and each section offers an alternative approach to extraterritoriality drawn from existing jurisprudence in that area.¹³¹

A. *Civil Cases*

The natural place to begin is civil litigation. Although courts have invoked the presumption in criminal cases too,¹³² the Supreme Court has primarily addressed this rule in civil statutes and the scholarship just mentioned almost

¹²⁷ See Knox, *supra* note 29.

¹²⁸ See Jonathan Turley, “*When in Rome*”: *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598 (1990).

¹²⁹ See Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975) (discussing “trans-substantive” procedural rules).

¹³⁰ This is not to say that no topic is amenable to transsubstantive rules. Procedural rules typically do not vary in civil and administrative cases, and there are some core procedural practices that apply in criminal and civil courtrooms. With respect to statutory interpretation, some background rules are just as applicable to criminal and civil statutes – the commonsense advice that “a word is known by the company it keeps” and that “words grouped in a list should be given related meaning” should guide courts in civil and criminal matters. See *S.D. Warren v. Me. Bd. of Env’tl. Prot.*, 547 U.S. 370, 378 (2006) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995); *Dole v. Steelworkers*, 494 U.S. 26, 36 (1990) (internal quotation marks omitted)). And as explained below, there are some constitutional canons that trump *Chevron* deference, and thus guide courts interpreting statutes in administrative law cases just as they would civil and criminal ones. See *infra* Part II.C.

¹³¹ Professor Anthony Colangelo’s “unified approach” also rejects transsubstantivity, but it divides statutes into international law enforcing and noninternational law enforcing, see Colangelo, *Unified Approach*, *supra* note 104, rather than applying the civil-criminal-administrative distinction discussed here.

¹³² See *infra* Part II.B (providing a discussion of the criminal jurisprudence). See generally Clopton, *supra* note 29.

exclusively focused on the civil side.¹³³ The reasons for this Article's civil-criminal-administrative division is more fully explored in the following sections, but in order to highlight differences we need to start with one of the three categories.

Part I explained all of the reasons that the presumption against extraterritoriality is not a good fit for civil statutes. Those reasons also point to the first of our alternative rules. Part I began with international law, and it is to international law that we turn here. Rather than relying on "territoriality" to define the acceptable reach of a statute, courts should look to the content of international law. And, in other cases, the Supreme Court has instructed courts to do just that.

Named for an 1804 Supreme Court decision,¹³⁴ the *Charming Betsy* canon tells courts to adopt reasonable constructions of ambiguous statutes *consistent with the requirements of international law*.¹³⁵ International law is not always self-executing,¹³⁶ but this canon incorporates it into statutory interpretation. As Chief Justice John Marshall wrote in the *Charming Betsy* case, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."¹³⁷ U.S. courts have applied the *Charming Betsy* canon for two centuries,¹³⁸ and the Supreme Court has called this canon "beyond debate."¹³⁹

¹³³ See *supra* notes 125, 126, 129, 128 & 131 and accompanying text.

¹³⁴ See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Amusingly, the *Charming Betsy* case was not the first U.S. Supreme Court decision to announce what has become known as the *Charming Betsy* canon; the same principle was announced three years earlier in *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) ("[T]he laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law."). For further discussion of the *Charming Betsy* canon, see Bradley, *supra* note 33; Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185 (1993); Note, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215 (2008).

¹³⁵ See, e.g., *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 21-22 (1963).

¹³⁶ Although the Supreme Court famously characterized international law as "part of our law" in *The Paquete Habana*, 175 U.S. 677, 700 (1900), not all international law is directly enforceable in U.S. courts. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) (1986) ("Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary implementation."). See generally Michael A. McKenzie, *Treaty Enforcement in U.S. Courts*, 34 HARV. INT'L L.J. 596 (1993).

¹³⁷ *Charming Betsy*, 6 U.S. at 118.

¹³⁸ For an excellent history of the canon and its use, see Bradley, *supra* note 33, at 485-95. In addition, there appears to be an equivalent international law canon in many other

Importantly for present purposes, the international law incorporated through the *Charming Betsy* canon includes substantive international law rules and the international law of prescriptive jurisdiction.¹⁴⁰ Prescriptive jurisdiction is the power of the state “to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things.”¹⁴¹ In this way, the international law of prescriptive jurisdiction (through the *Charming Betsy* canon) offers a separate framework to deal with the ambiguities alternatively addressed by the presumption against extraterritoriality. The *Restatement of Foreign Relations Law* helpfully lists the permissible “bases” of prescriptive jurisdiction under international law: (1) territoriality; (2) nationality; (3) objective territoriality, meaning that the conduct had effects within the state’s territory; (4) passive personality, meaning that the conduct is directed against the state or its vital interests; and (5) universal jurisdiction.¹⁴² This list of bases shows that the international law of prescriptive jurisdiction sweeps broader than a territorial principle, authorizing the application of domestic laws to extraterritorial nationals and to extraterritorial conduct with particular nonterritorial connections to the forum state. By applying the *Charming Betsy*

jurisdictions, including Canada, Australia, and England. *Polites v Commonwealth* (1945) 70 CLR 60, 68 (Austl.) (“[T]here is a general rule of construction of statutes according to which, unless the contrary intention is clear, it is to be presumed that they do not violate any recognized rule of international law.”); *Daniels v. White & The Queen*, [1968] S.C.R. 517, 541 (Can.) (Pigeon, J.) (“Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law.”); *Triquet v. Bath*, (1764) 97 Eng. Rep. 936, 938; 3 Burr. 1478 (“[T]he law of nations, in its full extent was part of the law of England.”).

¹³⁹ *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). *But see* Turley, *supra* note 134, at 262-70 (calling for “decanonization”).

¹⁴⁰ For example, the Supreme Court invoked the canon in connection with prescriptive jurisdiction in *Hartford Fire Insurance v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting), and *McCulloch*, 372 U.S. at 21-22, while it was substantive international law at issue in *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (construing a statute in keeping with a substantive executive agreement), and in the original *Charming Betsy* case, 6 U.S. (2 Cranch) 64 (1804) (discussing the law of nations with respect to neutrals’ rights). *See* Steinhardt, *supra* note 134, at 1152-62 (cataloging the use of substantive international law in *Charming Betsy* cases). *But see* Turley, *supra* note 134, at 215-17 (rejecting this use of *Charming Betsy*).

¹⁴¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1986). This section of the *Restatement* contrasts prescriptive jurisdiction with adjudicatory and enforcement jurisdiction. *Id.* The *Restatement* also includes a version of the *Charming Betsy* doctrine. *See id.* § 114 (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”). For more definitive treatments of the international law of prescriptive jurisdiction than this Article, see MALCOLM N. SHAW, *INTERNATIONAL LAW* 572-622 (5th ed. 2003); Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978).

¹⁴² RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1986).

canon to prescriptive jurisdiction, courts can interpret geoambiguous statutes to apply only as far as international law permits.

With respect to those values discussed in Part I, an approach based on prescriptive jurisdiction fares much better than the presumption against extraterritoriality. The international law justification is straightforward. As explained above, international law fits poorly with the presumption against extraterritoriality,¹⁴³ but *Charming Betsy* self-evidently conforms to international law norms – it looks to extant international law to answer the statutory-reach question.¹⁴⁴ This international law approach also avoids conflicts with foreign law; as Rosalyn Higgins wrote, “[t]here is no more important way to avoid conflict than by providing clear norms as to which state can exercise authority over whom, and in what circumstances.”¹⁴⁵ Not only does the *Charming Betsy* canon incorporate such clear norms, it derives those norms from *international law*, which reflects the will of the community of states.¹⁴⁶ Further, this international law approach may reduce conflicts by eliminating some “under-regulated zones” within the exclusive control of the United States but outside its territory.¹⁴⁷

Separation of powers also supports the *Charming Betsy* approach to prescriptive jurisdiction.¹⁴⁸ To begin with, it is important to observe that the *Charming Betsy* canon looks to international law only when a statute is ambiguous, meaning that the legislature is free to violate international law if it chooses.¹⁴⁹ From a separation of powers perspective, this allowance is a natural

¹⁴³ See *supra* Part I.A.

¹⁴⁴ See Bradley, *supra* note 33, at 497-504 (discussing the related “internationalist conception” of *Charming Betsy*).

¹⁴⁵ ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 56 (1994).

¹⁴⁶ Treaty law obviously requires state consent, and customary international law only takes on its legal status if it is imbued with *opinio juris*: the understanding that actions are required by a legal obligation. See BLACK’S LAW DICTIONARY 1201 (9th ed. 2009) (defining *opinio juris* as “[t]he principle that for conduct or a practice to become a rule of customary international law, it must be shown that nations believe that international law (rather than moral obligation) mandates the conduct or practice”); see also Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, 1060 (identifying as a source of law “international custom, as evidence of a general practice accepted as law”); North Sea Continental Shelf, Judgment (Ger./Neth. & Ger./Den.), 1969 I.C.J. 4, para. 77 (Febr. 20) (“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”).

¹⁴⁷ See *supra* note 67 and accompanying text.

¹⁴⁸ Indeed, Professor Bradley suggests that the canon is best understood as reflecting the separation of powers. Bradley, *supra* note 33, at 524-31.

¹⁴⁹ *E.g.*, Hartford Fire Ins. v. California, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (“Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.”).

outgrowth of the legislature's responsibility to make law and the courts' deference to the political branches with respect to international affairs.¹⁵⁰ When the statute is truly ambiguous, courts are in a different position – they are without guidance from the legislature on the international law question. And in these circumstances, the separation of powers counsels modesty. Courts should avoid accidental breaches of international law; in other words, if the United States is going to adopt a law that extends beyond its internationally recognized prescriptive jurisdiction, then the law should pass through the normal lawmaking process that involves Congress and the President.¹⁵¹ Professor Bradley also suggests a second-order separation of powers justification for this canon – by defaulting against violations of international law, the *Charming Betsy* canon reduces the frequency with which Congress unintentionally (via the courts) interferes with the executive's conduct of diplomacy.¹⁵² Not only does the canon protect Congress's lawmaking prerogatives, it also allows the executive to remain the “one voice” in foreign affairs until Congress explicitly reshapes the law.¹⁵³

This case for a prescriptive-jurisdictional approach to statutory ambiguity has focused on international law's list of permissible bases, but admittedly international law includes an additional requirement. According to the *Restatement*, “[e]ven when one of the bases for jurisdiction . . . is present, a state may not exercise jurisdiction to prescribe law with respect to a person or

¹⁵⁰ See Steinhardt, *supra* note 134, at 1165-73.

¹⁵¹ See Bradley, *supra* note 33, at 524-29 (discussing these and other separation of powers arguments in favor of *Charming Betsy*); Knox, *supra* note 29, at 386-88 (discussing the idea that courts should avoid accidental breaches of international law). Analogously, bicameralism and presentment are understood as bulwarks of federalism (protecting the states from the federal government), even though they regulate the intrafederal separation of powers. See generally Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001). Although it is true that courts take a position on a foreign affairs issue when they interpret a statute in keeping with international law, this approach places limits on courts' authority (interpreting an ambiguous and amendable domestic statute) and mission (interpreting the contents, rather than the policy merit, of international law). See Bradley, *supra* note 33, at 531-32 (offering a similar response to the claim that the *Charming Betsy* canon does not remove the courts from the foreign affairs debates).

¹⁵² See Bradley, *supra* note 33, at 526 (“[B]y requiring Congress to decide expressly whether and how to violate international law, the canon reduces the number of occasions in which Congress unintentionally interferes with the diplomatic prerogatives of the President.”).

¹⁵³ One justification not discussed so far is legislative intent. There are arguments on both sides of the question whether Congress has a preference against violating international law. Compare *id.* at 495-97 (collecting sources making this argument), with *id.* at 517-19 (rejecting the argument). Yet even Bradley, who originally dismisses this argument, ultimately concludes that “[i]t seems likely that, at least in a weak sense, the political branches . . . still care about international law.” *Id.* at 533.

activity having connections with another state when the exercise of such jurisdiction is unreasonable.”¹⁵⁴ This reasonableness limit necessarily adds uncertainty to the international law inquiry, which in theory is undesirable,¹⁵⁵ but there are reasons to countenance reasonableness here. First, many of the justifications for a *Charming Betsy* rule are based on its incorporation of international law, and like the eggshell plaintiff,¹⁵⁶ one must take international law as one finds it. If international law today includes a reasonableness limit, so be it. Second, there is a normative case for this rule as well – assuming the courts can divide exercises of jurisdiction between reasonable and unreasonable, then it would be preferable to decline jurisdiction where unreasonable (and where Congress has not indicated otherwise).¹⁵⁷ “Reasonableness” is also an improvement over “international comity,” which seems to lack any moorings in law or policy.¹⁵⁸

So far this Section has addressed the international law of prescriptive jurisdiction, but the *Charming Betsy* canon also looks to substantive

¹⁵⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1986).

¹⁵⁵ Justice Scalia prizes predictability with respect to the presumption against extraterritoriality. See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881 (2010) (“Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.”). Yet he also is a staunch defender of the reasonableness analysis with respect to prescriptive jurisdiction and the *Charming Betsy* canon. *Hartford Fire Ins. v. California*, 509 U.S. 764, 818-21 (1993) (Scalia, J., dissenting) (advocating for section 403 of the *Restatement* and its reasonableness inquiry).

¹⁵⁶ *E.g.*, *Dulieu v. White & Sons*, [1901] 2 K.B. 669, 679 (“If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer’s claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.”); *Vosburg v. Putney*, 50 N.W. 403, 404 (Wis. 1891).

¹⁵⁷ Courts should be encouraged to take a modest role with respect to this inquiry, relying on the political branches where possible. In addition, the substantive international law discussed shortly provides one potential source for the reasonableness inquiry, and *Charming Betsy* incorporates it as well.

¹⁵⁸ See, *e.g.*, Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 33 (2010) (“At bottom, the comity doctrine is a mess because courts do not know when it applies. Even when it does apply, courts have not been given concrete direction how to apply it, especially when faced with governmental submissions and conflicting governmental submissions.”); Michael D. Ramsey, *Escaping “International Comity,”* 83 IOWA L. REV. 893, 893 (1998) (“[International comity] is an expression of unexplained authority, imprecise meaning and uncertain application. Its use confuses inquiries that ought to be clear and distinct, and submerges issues that should be carefully and forthrightly considered. Its invocation has produced a series of international cases explicable only by reference to ill-defined judicial intuitions.”).

international law.¹⁵⁹ Substantive international law issues could arise with respect to geoambiguous statutes. For example, Justice Blackmun in *Sale v. Haitian Centers Council, Inc.* worried that a principle of geographic reach (the presumption against extraterritoriality) was prioritized over international refugee law.¹⁶⁰ In such cases, the *Charming Betsy* canon requires the interpretation of the ambiguous statute to conform to substantive international law principles as well, including international law rules derived from non-self-executing treaties and customary law rules that are not enforceable directly in U.S. courts.¹⁶¹

For many of the reasons just articulated, this approach to substantive international law dovetails with the justifications discussed in Part I. The connection to international law is once again self-evident. And some foreign conflicts could be avoided, because this approach reduces violations of international law that would be natural sources of such conflicts. Here again, this approach is admittedly a normative canon – that is, it relies (at least in part) on policy preferences¹⁶² – but the preference in favor of compliance with international law is long standing, well tailored to courts, and reasonable.¹⁶³ Structurally, the separation of powers arguments mentioned above also support the substantive law version of *Charming Betsy*: Congress can break substantive international law with unambiguous text, but courts should wait for Congress to make those choices rather than guessing about legislative intent.¹⁶⁴ Therefore, an all-inclusive *Charming Betsy* rule in civil cases makes a good substitute for the unjustified presumption against extraterritoriality.

For the reasons explained here, rather than applying the presumption against extraterritoriality in civil cases, the important formal, functional, and normative interests are better served by the *Charming Betsy* canon: unless a

¹⁵⁹ See *supra* note 140.

¹⁶⁰ See *supra* note 58 and accompanying text. One also could imagine executive agreements regulating U.S. government conduct overseas coming into contact with geoambiguous statutes, see *Weinberger v. Rossi*, 456 U.S. 25 (1982) (discussing one such executive agreement), or treaties with “national treatment” provisions requiring the application of geoambiguous statutes beyond where the traditional prescriptive-jurisdiction analysis might lead.

¹⁶¹ See *supra* notes 136 & 140. Perhaps these substantive commitments also will aid the courts in assessing reasonableness under *Restatement* section 403. For further discussion of the *Charming Betsy* canon and non-self-executing treaties, see Rebecca Crootof, Note, *Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon*, 120 *YALE L.J.* 1784 (2011).

¹⁶² See *supra* note 119.

¹⁶³ See *supra* notes 144-53 and accompanying text (discussing reasons to support a *Charming Betsy* view); see also Bradley, *supra* note 33, at 532-33 (justifying this canon); Steinhardt, *supra* note 134 (making the normative case).

¹⁶⁴ See *supra* notes 148-51 and accompanying text. Also as described above, this approach will avoid unintentional interference with executive foreign policy and diplomacy. See *supra* note 152 and accompanying text.

contrary intent appears, U.S. civil statutes shall be construed consistent with (substantive and jurisdictional) international law.

B. *Criminal Cases*

The denaturing of a transsubstantive approach begins when we turn to criminal statutes. As mentioned above, U.S. courts apply the presumption against extraterritoriality to civil *and* criminal statutes.¹⁶⁵ Courts deciding extraterritorial criminal cases routinely cite civil decisions articulating the presumption, and these courts repeatedly assert that the presumption against extraterritoriality is the right interpretative principle for extraterritorial criminal prosecutions.¹⁶⁶ But just because courts have applied the same presumption in civil and criminal cases does not mean that is the best approach.¹⁶⁷ As this Section marches through the differences between civil and criminal extraterritorial cases, the justification for a different rule for extraterritorial criminal cases will become apparent.

The most salient difference between criminal and civil cases is the liberty interest at stake. Criminal cases implicate liberty interests of defendants in a way that civil cases simply do not.¹⁶⁸ There is an “instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.”¹⁶⁹ Criminal law reflects this distaste in manifold ways. For example, U.S. courts employ all sorts of procedural protections in criminal cases;¹⁷⁰ they

¹⁶⁵ See Clopton, *supra* note 29, at 165-72. The Supreme Court most prominently addressed extraterritoriality in criminal law in *United States v. Bowman*, 260 U.S. 94 (1922).

¹⁶⁶ See Clopton, *supra* note 29, at 165-72 (collecting cases). Courts in Canada and Australia also apply the presumption against extraterritoriality in criminal cases. See Clopton, *supra* note 43, at 227-35.

¹⁶⁷ As it turns out, courts do not in fact treat civil and criminal cases identically. As explored in greater detail in a prior article, lower courts in criminal cases suggest that civil precedents apply, but these criminal decisions are much more likely to find ways to permit the extraterritorial prosecution to go forward. See Clopton, *supra* note 29, at 165-72. The details of how the courts achieve these outcomes are not relevant here. The important points are that, in theory, the same presumption applies in civil and criminal cases and, in practice, courts are more likely to permit a criminal case through the presumption’s filter than one would expect based on the law as described.

¹⁶⁸ This is not to say that a massive money judgment or a civil injunction would not impinge a defendant’s liberty, but that such an impingement is in a different class than incarceration (or capital punishment).

¹⁶⁹ *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, reprinted in HENRY J. FRIENDLY, *BENCHMARKS* 196, 209 (1967)).

¹⁷⁰ As Professor Carol Steiker explained, significant procedural differences exist between criminal and civil cases:

Deeply embedded in Anglo-American law, and in many other legal systems, is a sharp procedural divide between criminal and civil cases. In criminal cases, the U.S. Constitution requires a long list of costly, thumb-on-the-scale procedural protections

apply a void-for-vagueness doctrine to criminal laws;¹⁷¹ and the right to counsel is more robust in criminal law.¹⁷² With respect to statutory construction, courts have adopted a rule of lenity for criminal cases absent from civil analogs.¹⁷³ The rule of lenity tells courts to resolve ambiguities in

that are not required, and thus very rarely employed, in civil cases. This list includes not merely the protection against double jeopardy and the prohibition of ex post facto laws . . . but also the burden of proof beyond a reasonable doubt, the free provision of legal counsel, the exclusion of unconstitutionally seized evidence, the privilege against self-incrimination, and numerous other requirements.

Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 777-78 (1997) (footnotes omitted). *But see* JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* 4 (2008) (explaining that the reasonable doubt standard was introduced in English criminal law to encourage *more* convictions).

¹⁷¹ See generally Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279 (2003). The vagueness rule implicates the Due Process Clauses of the Fifth and Fourteenth Amendments. *Id.* at 280 n.1. The Supreme Court first articulated a void-for-vagueness doctrine in *United States v. Reese*, 92 U.S. 214 (1875). Originally, the void-for-vagueness doctrine was justified on the basis of notice and separation of powers, although more recently the courts have justified the doctrine as preventing arbitrary and discriminatory law enforcement (by executive and judicial actors). See Goldsmith, *supra*, at 283-94; see also *Screws v. United States*, 325 U.S. 91, 149-53 (1945) (Roberts, J., dissenting) (articulating this new justification in the Supreme Court for the first time). See generally *Kolender v. Lawson*, 461 U.S. 352 (1983) (articulating the current rationales for the doctrine). These doctrinal justifications track the logic of the lenity requirement discussed in detail later in this Section. Admittedly, the void-for-vagueness doctrine may be applicable to some civil statutes imposing civil penalties. See, e.g., *FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2320 (2012) (holding that the FCC standards as applied were impermissibly vague); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048-51 (1991) (invalidating the statute as vague). But this doctrine is most prominent, and indeed most strictly enforced, in criminal cases. See Goldsmith, *supra*, at 281 (“The [Supreme] Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.” (citing *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982))).

¹⁷² Compare U.S. CONST. amend. VI (including a right to counsel in criminal cases), with U.S. CONST. amend. VII (including no such right in civil cases).

¹⁷³ The rule of lenity may be applied in civil cases, though, if they call for the construction of a criminal statute. *E.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004) (construing a criminal DUI statute in the context of an immigration proceeding); *FCC v. ABC*, 347 U.S. 284, 296 (1954) (“It is true . . . that these are not criminal cases, but it is a criminal statute that we must interpret.”). For further discussion of lenity, see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345; Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57 (1998). For perhaps its earliest invocation by the U.S. Supreme Court, see *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820), and for perhaps its most famous, see

criminal statutes in favor of defendants. The gravity of a criminal prosecution and its potential liberty-depriving consequences, therefore, point to clear-statement requirements for criminal law. And with respect to the cases addressed in this Article, such an approach would manifest itself in a lenity approach to extraterritoriality: Congress should have to say explicitly if criminal laws are to be applied extraterritorially.¹⁷⁴

Separation of powers concerns also reveal a criminal-civil distinction that supports the rule of lenity in extraterritorial criminal cases. The rule of lenity has been justified historically based on legislative supremacy – the notion that, in criminal cases more than civil ones, the legislature should make the relevant policy choices to which the loss of liberty attaches.¹⁷⁵ More recently, the rule of lenity has been linked to nondelegation; Congress cannot delegate criminal lawmaking to courts, and so courts must strictly construe criminal statutes to avoid impermissibly making law of their own.¹⁷⁶ These arguments hold in extraterritorial cases. Indeed, they may be stronger in the area of international relations, where separation of powers concerns are salient and where issues of international sovereignty may be implicated when legislation reaches beyond the state’s borders. So even if one were dubious of the separation of powers account of lenity in the normal course, it is given added weight when addressing criminal cases with potential international relations consequences; and even if one were dubious about legislative supremacy in foreign affairs, it

McBoyle v. United States, 283 U.S. 25, 26 (1931).

¹⁷⁴ Going one step further than a pure liberty-based account, Professor Eskridge suggests that the rule of lenity responds to bias in the political process against criminal defendants and in favor of disproportionality in criminal penalties. ESKRIDGE, JR., *supra* note 118, at 295 (“[C]riminal defendants are poorly represented in the political process, while state and federal prosecutors (the losers in rule of lenity cases) are unusually well represented.”). This logic applies here as well.

¹⁷⁵ The Supreme Court justifies the rule of lenity by legislative supremacy (separation of powers) and notice (due process):

First, “a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.” Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.

United States v. Bass, 404 U.S. 336, 348 (1971) (citation omitted); *see also* Eskridge, Jr. & Frickey, *supra* note 124, at 600 (suggesting that lenity also functions as a constitutional avoidance doctrine); Kahan, *supra* note 173, at 419 (identifying, and ultimately rejecting, a nondelegation conception of the rule of lenity); Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 *FORDHAM L. REV.* 885, 887 (2004) (justifying the rule of lenity based on accountability and disclosure).

¹⁷⁶ *See, e.g.*, Kahan, *supra* note 173, at 350. This understanding also places a limit on Congress: Congress cannot delegate criminal law policy choices even if it would prefer to do so. *Id.* For a different approach in administrative civil cases, *see infra* Part II.C.

is given added weight when addressing criminal cases with significant liberty interests at stake.

Separation of powers constraints *on the executive* support extraterritorial lenity in criminal cases as well. In criminal law, the executive is a litigant, and one with extreme power. The judicial and legislative branches must check the executive's authority as law enforcer.¹⁷⁷ A separation of powers approach to criminal extraterritoriality, therefore, is one in which democratically elected legislatures must decide the scope of criminal laws, but also an approach in which Congress and the courts hem in the executive's criminal enforcement. Territoriality draws a narrow but workable line, and the executive must involve Congress should it want to reach beyond that limit.

Due process also justifies a different approach in criminal cases. Notice is the other historical justification for the rule of lenity,¹⁷⁸ and again the liberty interests in criminal cases make this due process concern more acute. Part I questioned the idea that potential malefactors scour the United States Code before acting.¹⁷⁹ But this fiction is central to centuries of criminal law, and one

¹⁷⁷ See, e.g., *United States v. Kozminski*, 487 U.S. 931, 952 (1988) (discussing that the rule of lenity protects against "selective or arbitrary enforcement"); see also *supra* note 171 (highlighting how the void-for-vagueness doctrine seeks to prevent arbitrary and discriminatory law enforcement). As Justice Robert Jackson stated, "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America." Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 18 (1940). Prosecutorial discretion has the capacity to be dangerous. See generally Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1523-37 (1981). Recognizing these dangers, the executive often tries to limit its use. For example, rather than deferring to individual prosecutors, it is the express policy of the United States Justice Department to charge "the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction." Memorandum from Eric H. Holder, Jr., U.S. Attorney Gen., to All Fed. Prosecutors 2 (May 19, 2010), available at <http://www.justice.gov/oip/holder-memo-charging-sentencing.pdf> (quoting U.S. Dep't of Justice, U.S. Attorney's Manual § 9-27.300 (2d ed. 1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html).

¹⁷⁸ As Justice Holmes wrote, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle*, 283 U.S. at 27; see *supra* Part I.C.2 (discussing due process).

¹⁷⁹ *McBoyle*, 283 U.S. at 27 ("Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."); see also, e.g., Kahan, *supra* note 173, at 363-67 ("Taken literally, the 'fair notice' argument is implausible because the broad reading . . . would not have affected anyone who was honestly attempting to conform her behavior to what she believed the criminal law required.").

that should not be cast away like so much flotsam when incarceration (or worse) is at stake.¹⁸⁰

Two aspects of extraterritoriality provide reasons to think that the notice justification for lenity is particularly appealing in this context. First, critics of lenity-as-due-process disparage the rule because, in many circumstances, there would be no doubt that the conduct was prohibited (or at least socially undesirable). Are we really concerned that a defendant did not know that murder was wrong? As Professor Kahan puts it, the due process argument for the rule of lenity is strongest “when a court is applying a statute to conduct that sits on the boundary line between socially desirable and socially undesirable conduct. . . . [b]ut the situation is quite different when the underlying conduct is located not on the border but deep within the interior of what is socially undesirable.”¹⁸¹ This is a significant concern for using notice to justify a comprehensive rule of lenity, but extraterritoriality is narrower. Here, Kahan’s boundaries metaphor applies to *actual boundaries* – when conduct is deep within the interior of the forum state, there is little doubt its laws apply, but as that conduct moves out to the boundary line, the situation is quite different.¹⁸² This concern also explains why the tighter strictures of territoriality rather than the looser rules of prescriptive jurisdictionality might be appropriate in criminal cases. Although territoriality might be too narrow a limit to serve as a default rule for all cases, its long history and straightforward application make it an intuitive and bright-line basis for notice in criminal cases.¹⁸³

The second reason to consider extraterritorial lenity is the role of extradition. In multinational criminal cases, there are at least two relevant sets of laws, the substance of which might give us some indication about the notice available. Imagine two statutes. One criminalizes conduct that is illegal literally everywhere else; for sake of argument, say murder. The other is a

¹⁸⁰ United States v. R.L.C., 503 U.S. 291, 309 (1992) (Scalia, J., concurring in part and concurring in the judgment).

¹⁸¹ Kahan, *supra* note 173, at 400.

¹⁸² Kahan makes the same borders argument with respect to overdeterrence. *Id.* at 402. I would offer the same rejoinder as applied to extraterritoriality.

¹⁸³ Critics of the rule of lenity have argued that the rule is impossible to manage because one can find ambiguity in every statute. The famed Hart-Fuller debate about “vehicles in the park,” compare H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958), and H.L.A. Hart, *Book Review*, 78 HARV. L. REV. 1281, 1281-82 (1965) (reviewing LON L. FULLER, *THE MORALITY OF LAW* (1964)), with Lon L. Fuller, *Positivism and Fidelity to Law – a Reply to Professor Hart*, 71 HARV. L. REV. 630, 661-69 (1958), and the torrent of scholarship in its wake, see, e.g., Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1111 n.10 (2008) (collecting sources), raise this metalinguistic critique of so-called statutory ambiguity. If every statute could be said to be ambiguous, then lenity could swallow the entire corpus of criminal law. This concern is mitigated by the scope of the question – extraterritoriality is a single issue, and while an unbounded rule of lenity might be unruly, a bounded one is predictable in its application and results.

singularly American creation. Putting aside constitutional problems, assume that this statute criminalizes the burning of the American flag. Now imagine two defendants charged in U.S. courts, one for murder and one for flag burning, and in both cases the relevant conduct occurred outside the United States. If neither statute specified extraterritorial application and the courts applied the rule-of-lenity approach proposed here, U.S. courts would not be able to sanction either defendant. But extradition presents a potential backstop. Extradition treaties typically include a principle of dual criminality, permitting extradition only if the conduct is illegal in both states.¹⁸⁴ Turning back to the hypothetical defendants, the flag-burning defendant would go free, but the alleged murderer could be extradited to the conduct state.¹⁸⁵ Thus, the rule of lenity acts as a forum-selection mechanism for conduct illegal in both states – for which notice to the defendant is less of a concern. Meanwhile, the same rule acts as a shield for defendants for uniquely American offenses committed abroad – for which it is less plausible to assume the defendant had notice.¹⁸⁶

¹⁸⁴ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 476(1)(c) (1986) (explaining that most extradition agreements and laws only permit extradition “if the offense with which he is charged or of which he has been convicted is not punishable as a serious crime in both the requesting and the requested state”); John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1459 (1988) (“A maxim of international law, and a standard provision in nearly every United States extradition treaty, is that extradition will not take place unless the offense charged is a crime in both the demanding and the requested country. This is called the rule of ‘double criminality.’” (footnote omitted)); Meyer, *supra* note 4, at 167-69 (discussing the “dual criminality” rule (citing William V. Dunlap, *Dual Criminality in Penal Transfer Treaties*, 29 VA. J. INT’L L. 813, 829 (1989))).

¹⁸⁵ It is also the case that courts will not enforce the criminal laws of a foreign jurisdiction, meaning that, in the reverse scenario, the United States would neither prosecute nor extradite defendants under a unique foreign law. See generally William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT’L L.J. 161 (2002).

¹⁸⁶ This also explains what should be made of criminal cases arising outside of the territory of the United States but within its prescriptive jurisdiction grounded in some other basis. That said, this approach also raises the possibility of malefactors leaving the United States in order to commit these offenses. There are at least two potential responses to this concern. The first is to blame the lawmakers. The purpose of the rule of lenity, and indeed the purpose of many criminal procedural protections, is not to maximize convictions. Sometimes bad acts are not subject to criminal penalties. The rule of lenity acts to force Congress to make policy choices, and Congress can always expressly apply criminal statutes extraterritorially. More specifically, Congress could assign criminal liability where the defendant left the United States “with the intent to evade detection” or prosecution. See *supra* note 37 (quoting 18 U.S.C. § 2285(a) (2012)). Second, there may be ways to account for jurisdictional escape with current law. For example, perhaps the criminal conspiracy statutes would be sufficient. Or, perhaps this risk would justify defining “territoriality” to include conduct outside the United States that intentionally targets persons or property within it – a definition that could be adopted by the courts or Congress. See Clopton, *supra* note 43, at 42-44 (discussing the possibility of a legislative definition of territoriality).

As hinted at throughout this Section, the foreign relations justifications of international comity and concern with foreign conflicts also support a lenity approach to criminal extraterritoriality. Scholars have acknowledged that the “due process” interests protected by choice-of-law and personal-jurisdiction rules are dual purposed – they not only directly protect the individual defendant, but also manifest sovereignty considerations in transborder cases. Extraterritorial regulation threatens both the liberty of individual regulatees and the sovereignty of foreign states.¹⁸⁷ Lenity, therefore, also may avoid conflicts and promote international comity by avoiding unintended extensions of U.S. law. And again, because of the associated criminal penalties, the stakes for potential conflicts may be high. In the words of the *Restatement*: “[T]he exercise of criminal (as distinguished from civil) jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive.”¹⁸⁸

To conclude, rather than a transsubstantive presumption, a lenity-based rule in criminal cases protects defendants, sovereign states, and the separation of powers; unless a clear statement of legislative intent provides otherwise, U.S. criminal statutes shall apply only within the territorial limits of the United States.

C. *Administrative Cases*

With criminal and civil statutes out of the way, it may seem like this Part has covered the waterfront of potentially extraterritorial statutes. But, in light of the justifications of the presumption, not all civil statutes are created equal. In particular, the values that Part I outlines suggest a different approach in administrative cases. Notably, there is no consensus in the courts (or the scholarly community) about the relationship between administrative deference doctrines like *Chevron* and interpretative canons like the presumption against extraterritoriality.¹⁸⁹ As is explored more fully throughout this Section, these

¹⁸⁷ E.g., Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1113-18 (2009) (“[A] state that ignores due process guarantees through the heedless application of forum law is generally violating the rights not only of the defendants in question but of *another state*.”); Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1594-95 (1978) (“In the relatively rare case where a detailed analysis is required to resolve the question of a state’s legislative jurisdiction, the factors to be considered fall into two categories, each corresponding to one of the two aspects of the basic test for legislative jurisdiction under due process: factors concerned with fairness to the parties and those involving other interstate or international system values.” (footnote omitted)).

¹⁸⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 Reporters’ Notes n.8 (1986). The note goes on to say that “[i]t is generally accepted by enforcement agencies of the United States government that criminal jurisdiction over activity with substantial foreign elements should be exercised more sparingly than civil jurisdiction over the same activity.” *Id.*

¹⁸⁹ See *supra* notes 101-02 and accompanying text; see also Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1202-04 (2006).

cases merit separate treatment from private civil actions because in these cases Congress has delegated the authority to interpret the relevant statute to the executive and an executive agency has staked out an *ex ante* interpretation of the geoambiguous statute's reach.¹⁹⁰ This Section first considers why administrative extraterritorial cases merit different treatment (that is, some level of deference), and then it turns to the details of how *Chevron* deference in particular would fit in this context.¹⁹¹

Foreign-affairs deference has been a popular topic among legal scholars. A brief survey of some of that recent conversation is as follows. In a 2000 article, Professor Curtis Bradley argued for administrative deference in foreign-affairs law,¹⁹² specifically arguing that *Chevron* deference should trump foreign-affairs canons like the presumption against extraterritoriality and the *Charming Betsy* doctrine on the basis of expertise,¹⁹³ accountability,¹⁹⁴ uniformity,¹⁹⁵ flexibility,¹⁹⁶ and the separation of powers.¹⁹⁷ He also observed that *Chevron* is

¹⁹⁰ The term "agency" is used to encompass whatever executive actor issues the formal interpretation discussed here, and the term "administrative" is used to encompass the class of cases and statutes just described.

¹⁹¹ This Section does not propose deference in criminal law. The same reasons that justify treating criminal cases differently from civil cases support the decision to decline executive deference in criminal cases, not to mention the particular role occupied by the executive in criminal prosecutions. Typically, the courts do not give deference to the executive with respect to criminal law. *See, e.g., Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 490-91 (1996) (describing, and disagreeing with, the court's refusal to apply *Chevron* deference to the Justice Department's interpretation of criminal statutes). And, as discussed briefly below, the rule of lenity is a constitutionally inspired canon that may trump *Chevron* deference anyway. *See infra* note 236 (discussing Sunstein and constitutionally inspired canons). For a collection of cases addressing lenity and *Chevron*, see Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1, 38-47 (2006).

¹⁹² *See generally* Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000).

¹⁹³ *Id.* at 673-75. The expertise case, and its connection to *Chevron*, is discussed below. *See infra* notes 215-16 and accompanying text.

¹⁹⁴ Bradley, *supra* note 192, at 673-75. Accountability, as well, is covered later in this Section. *See infra* notes 214 and accompanying text.

¹⁹⁵ The argument for uniformity is that the "one voice" of the executive branch is preferable to the cacophony of the federal courts. Bradley, *supra* note 192, at 673-75. This is particularly salient given that the Supreme Court – presumably the "one voice" of the judiciary – has not spoken to the relationship between *Chevron* and the foreign affairs canons. *See* Posner & Sunstein, *supra* note 189, at 1202-04.

¹⁹⁶ Bradley, *supra* note 192, at 673-75. Bradley argues that the executive branch is more flexible than the courts when it comes to changing its position, and he rightly notes that

entrenched in the law,¹⁹⁸ and that because foreign-affairs law is traditionally suffused with executive deference, it is perhaps the best case scenario for administrative deference.¹⁹⁹ Professors Eric Posner and Cass Sunstein went further, calling for an entire regime of foreign-affairs deference.²⁰⁰ Professors Derek Jinks and Neal Katyal challenged Posner and Sunstein in the same issue of the *Yale Law Journal*.²⁰¹ Jinks and Katyal were concerned that Posner and Sunstein's proposal concentrated too much authority in the executive,²⁰² overstated the case for executive expertise,²⁰³ ignored the dynamic process of statutory interpretation (involving the courts and Congress in dialogue),²⁰⁴ and

Chevron deference permits agencies to change positions (though it does not credit the retroactive application of those changes). *Id.*

¹⁹⁷ *Id.* at 673-75. Bradley's separation of powers argument is that *Chevron* effectuates legislative intent to delegate responsibility to the executive. *Id.* Whether or not this assumption about congressional intent is accurate, this justification serves formal ends. *Marbury v. Madison* teaches that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). To avoid the formal objection to the court delegating judicial power to the executive, administrative deference is often understood as Congress delegating lawmaking authority to the executive. Congress, it is said, impliedly authorizes executive interpretations by directing statutes with ambiguities to the administrative state. *See, e.g.*, Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 25-28 (1983).

¹⁹⁸ This assumption is debatable as well. *See infra* note 207 and accompanying text (discussing Pearlstein on this point).

¹⁹⁹ Bradley, *supra* note 192, at 673-75.

²⁰⁰ Posner & Sunstein, *supra* note 189, at 1173. Posner and Sunstein have explained the differences between their proposal and Bradley's. *See id.* at 1177 n.14.

²⁰¹ Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1230 (2006).

²⁰² *Id.* at 1262-75. In particular, they worry about losing the disciplining effect of international law on executive conduct. *Id.* And, relatedly, they worry that Posner and Sunstein's proposal, under which the executive could run roughshod over international law based on any perceived ambiguity in any congressional enactment, will have the effect of discouraging congressional action in this area for fear of unintentionally opening such a door. *Id.* at 1275-79.

²⁰³ *Id.* at 1245-49. Specifically, they argue that *Chevron* is justified because the executive has superior expertise on certain administrative matters, but particularly in the context of foreign affairs, it is not clear that the executive uses that expertise when making these decisions. *Id.* For one potential response to this criticism, see the discussion of *Chevron* Step Two, *infra* notes 243-46 and accompanying text.

²⁰⁴ Jinks & Katyal, *supra* note 201, at 1253-56. Jinks and Katyal admit that Congress could respond to "erroneous" executive interpretations just as they respond to "erroneous" judicial decisions. They note, however, that the executive veto creates a formal hurdle to those responses, and they predict an asymmetry in which "errors" against the executive are much more likely to be remedied than "errors" in its favor – thus creating a ratchet toward more executive power. *Id.*

lacked meaningful limits – what is “foreign-affairs law”?²⁰⁵ They specifically rejected deference when the executive seeks to step around a self-executing treaty in the “executive-constraining zone.”²⁰⁶ Professor Deborah Pearlstein joined the critics of foreign-affairs deference because, as she argued, the “promise of *Chevron* is elusive”: it is unstable and declining;²⁰⁷ its functional logic is questionable;²⁰⁸ and it fails to answer the formal objection that the judiciary alone is responsible for interpreting the law.²⁰⁹

Limiting foreign-affairs deference to extraterritoriality minimizes some objections raised by critics without sacrificing the strengths pointed out by proponents. Extraterritoriality deference does not accord any special (and potentially undue) status to foreign-affairs questions; indeed, this approach is the opposite of foreign-affairs exceptionalism since it merely asks that geoambiguities in statutes assigned to administrative agencies get the same treatment as other types of statutory ambiguities. On this basis, it is simply of no moment whether foreign-affairs exceptionalism is justifiable.²¹⁰ The boundary problem that Jinks and Katyal identify is not an issue either. Executive aggrandizement is a legitimate concern when contemplating a vast

²⁰⁵ *Id.* at 1257-62. As Jack Goldsmith put it, “[a]n important challenge for U.S. foreign relations law is to rethink how its jurisdictional doctrines apply in a world in which ‘foreign relations’ is no longer a distinctive category.” Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1715 (1997). For further discussion of this line-drawing problem in the context of foreign affairs federalism, see Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139 (2001).

²⁰⁶ Jinks & Katyal, *supra* note 201, at 1256.

²⁰⁷ Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 810-17 (2011). In short, she suggests that authors writing about foreign affairs deference seem to assume that *Chevron* is stable and robust, while in fact it is neither. *Id.*

²⁰⁸ *Id.* at 817-21. Pearlstein rejects Posner and Sunstein because she rejects foreign affairs exceptionalism, and she is dubious that political accountability trumps values such as individual rights. *Id.*

²⁰⁹ *Id.* at 821-24. Pearlstein identified what she calls a “persistent formal dilemma,” the same *Marbury* problem noted above, *supra* note 207, and one that she believes is not resolved by foreign affairs deference proponents. In contrast to existing faithful-agent and instrumental theories of judicial power, Pearlstein argues for an equilibrium theory where the courts should adopt normative canons over *Chevron* to avoid a reduction of (or bar to) one branch’s role in the interbranch interpretive debate or to avoid an accretion of power in one branch over the others. Pearlstein, *supra* note 207, at 824-51. For example, she worries about allowing the executive branch to take the Authorization for Use of Military Force (AUMF) and use it to ignore international law. *Id.* at 801-07, 842-50. As discussed below, the extraterritoriality question swims in different waters from the AUMF – the issue here is narrowly tailored to the geographic reach of statutes, limited to cases of congressional silence, and bounded in various other ways.

²¹⁰ One might call this a transsubstantive rule for administrative cases.

regime of executive deference, but in the limited context of interpreting this small set of statutes only with respect to their geographic scope, the risk of overreach is simply not that substantial. And since many of these regulatory statutes target concentrated interests,²¹¹ it seems likely that those interests will have access to the executive's interpretative process (and any legislative process that might follow an adverse administrative determination).²¹²

Turning to the affirmative case for deference, the classic justifications for administrative deference are political accountability and agency expertise. Both feature in the original *Chevron* opinion,²¹³ and both have a place in the extraterritoriality context. With respect to democratic accountability, administrative agencies are at least indirectly responsible to the people as part of the executive branch. As such, the public policy choices of agencies, including choices with respect to the geographic reach of statutes, are subject to the democratic process. This political accountability highlights how administrative cases differ from civil or criminal ones, and it places extraterritorial administrative determinations in the same class as other administrative questions.²¹⁴

With respect to expertise, agencies interpret statutes within their zones of competence. In *Chevron*, it was the Environmental Protection Agency (EPA) that offered a definition of a "stationary source" under the Clean Air Act, and EPA has experience with air-quality issues.²¹⁵ If the Clean Air Act were ambiguous on geographic reach, an administrative definition of a term like "stationary source" could include a geographic element: "a stationary source is any [. . .] within the territory of the United States" or "a stationary source is

²¹¹ William Eskridge suggests that the presumption against extraterritoriality favors multinational corporations. ESKRIDGE, JR., *supra* note 118, at 275-79.

²¹² Recall that Jinks and Katyal worry about a ratchet, but these factors suggest that worry is less acute with respect to extraterritoriality. Jinks & Katyal, *supra* note 201, at 1255.

²¹³ As the Court explained in *Chevron*:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984).

²¹⁴ Admittedly, the public is not monitoring every single agency determination, but especially because these questions affect concentrated interests, *see supra* note 211, the case for accountability is at least plausible here.

²¹⁵ *Chevron*, 467 U.S. at 840.

any [. . .] anywhere in the world.”²¹⁶ EPA remains a repository of expertise on the environmental aspects of this issue, and EPA has access to the expertise of the State Department, foreign governments, and other sources that may provide additional knowledge of international law and foreign relations concerns relevant to the statute’s reach.

Separation of powers and due process also favor a deference regime. The structural case for deference is both formal and functional. Administrative deference is best understood not as a delegation of law-interpreting authority from the courts to the executive, but instead as a delegation of lawmaking authority from Congress to the executive.²¹⁷ This account responds to formal objections like Pearlstein’s, and it has functional consequences as well. The executive has experience in the substantive issues raised by these statutes *and* in the international-relations questions embedded in geoambiguity.²¹⁸ So, for example, when Congress declines to specify whether an environmental statute applies extraterritorially, there is a functional case for delegating that choice to an agency with environmental expertise and to a branch with international-relations competence.

Due process also supports a different approach in administrative cases. In short, the existence of an *ex ante* agency interpretation minimizes the potential notice problem. As mentioned earlier, putative lawbreakers likely do not sift through the U.S. Code to determine whether their extraterritorial conduct will be covered, and they likely do not scour the Code of Federal Regulations, the Federal Register, or agency adjudication reports either. But to the extent the fiction of notice is respected,²¹⁹ administrative notice should be sufficient. Moreover, formal interpretive statements do not fall out of the sky; the agency must have undertaken some formal process to produce them. This Section will return to the requirements of that process later, but for the moment it is only necessary to observe that, unlike in the private civil case, a branch of the U.S. government directed by Congress to consider the statute applied *some process* to the extraterritoriality question. The regulated entity will have some access to this process, and the process will be managed by an agency with some expertise in the subject matter and some democratic accountability.

The foregoing paragraphs have explained extraterritoriality deference generally, but why rely on *Chevron* as the vehicle for that deference? What about those who say that *Chevron* is unstable and narrowing?²²⁰ With respect to its scope, although the courts may have narrowed the situations to which *Chevron* applies, the extraterritoriality question is exactly the sort of statutory ambiguity for which the doctrine was designed – situations in which there is a

²¹⁶ For an example of a geoambiguous environmental statute, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581-89 (1992) (Stevens, J., concurring).

²¹⁷ See *supra* note 197.

²¹⁸ See *supra* notes 213-15 and accompanying text.

²¹⁹ See *supra* note 180.

²²⁰ See *supra* note 207.

reasonable basis for concluding that Congress delegated the issue to the enforcing branch, and for which an executive solution manifests accountability and expertise (on the substantive issue and on international affairs). With respect to *Chevron*'s stability, the easy answer would be that extraterritoriality should be accorded whatever deference that courts typically apply – whether that is *Chevron* or something else. And, because the case for foreign-affairs exceptionalism in extraterritoriality is not particularly strong, I likely would support relegating extraterritoriality to “normal” status in the prevailing interpretative regime. There are, however, particular features of the current approach that prove well suited for extraterritoriality, and it is to those features that this Article now turns.

In its original incarnation, *Chevron* deference is a two-step process. Step One asks whether Congress has clearly spoken to the issue; as with the presumption, the court “must give effect to the unambiguously expressed intent of Congress.”²²¹ If the statute is ambiguous (here, geoambiguous), then Step Two asks whether the agency’s proffered interpretation is “permissible.”²²² If the statute is ambiguous and the interpretation permissible, then the agency’s view holds. In cases following *Chevron*, the Court has limited the situations in which *Chevron* may apply, generally (though not entirely) limiting *Chevron* to cases where Congress has delegated lawmaking power to the executive and where the executive has exercised that power in interpreting the statute.²²³ This so-called Step Zero cabins the *Chevron* doctrine, for example, by excluding executive litigating positions from the stable of interpretation to which deference is due.²²⁴

The structure of *Chevron* links up with the values supposedly underlying the presumption against extraterritoriality. Step Zero ensures that notice and due process are protected; there is no notice benefit from an ex post litigating position, and Step Zero accordingly limits deference in those cases. Step One is also significant. Where Congress has answered the question unambiguously, the weighing of the underlying values is best left to Congress for substantive

²²¹ *Chevron*, 467 U.S. at 843.

²²² *Id.*

²²³ See, e.g., *Barnhart v. Walton*, 535 U.S. 212, 217-22 (2002) (discussing when *Chevron* applies); *United States v. Mead Corp.*, 533 U.S. 218, 221, 226-34 (2001) (denying *Chevron* deference where Congress did not intend the agency’s rules to exert force of law); *Christensen v. Harris Cnty.*, 529 U.S. 576, 586-88 (2000) (denying *Chevron* deference to the Department of Labor’s opinion letter); see also Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 838-52 (2001) (surveying the types of agency interpretations to which courts apply *Chevron* deference). See generally Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006) (discussing whether *Chevron* applies a separate “Step Zero” inquiry).

²²⁴ See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (“We have never applied [*Chevron* deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.”).

and structural reasons. But where Congress has left that weighing undone (Step One), and where Congress has delegated that weighing to the executive (Step Zero), the executive fills the void.

Another important aspect of the operation of *Chevron* is the existence of certain background rules that seem to trump its application.²²⁵ Two are important for present purposes: the doctrine of constitutional avoidance and the presumption against implied repeal.²²⁶ First, courts discount agency interpretations that create serious questions about a statute's constitutionality – the constitutional avoidance canon “trumps” the *Chevron* doctrine.²²⁷ This limitation should allay some concerns about executive overreach; and to the extent that the courts ever adopt *constitutional* limits on prescriptive jurisdiction,²²⁸ those limits would supersede contrary executive action. Second, the presumption against implied repeal of a federal statute²²⁹ seemingly trumps *Chevron* as well.²³⁰ Importantly, this same rule would seem to apply to self-executing treaties,²³¹ which resolves Jinks and Katyal's concern about the executive unilaterally breaching these core elements of international law. No

²²⁵ These background rules have, at times, been referred to as nondelegation canons. See John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223; Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

²²⁶ A third such rule is the antiretroactivity principle. See *Bowen*, 488 U.S. at 208 (“[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”). In the parlance of *Chevron*, these rules are “traditional tools of statutory construction” that render a statute unambiguous at Step One. See *Chevron*, 467 U.S. at 843 n.9.

²²⁷ See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-78 (1988) (refusing to construe a statute in a way that would raise First Amendment questions).

²²⁸ See *supra* note 104 (collecting sources examining due process and extraterritorial legislation).

²²⁹ See, e.g., *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 168 (1976) (“It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored.”).

²³⁰ The Ninth Circuit so held expressly in, among others, *Lujan-Armendariz v. Immigration and Naturalization Service*, 222 F.3d 728, 749 (9th Cir. 2000). The Supreme Court implied as much in *FCC v. NextWave Personal Communications*, 537 U.S. 293 (2003), rejecting the agency's interpretation of one statute (the Communications Act) because it conflicted with the plain language of another (the Bankruptcy Code). *Id.* at 304 (“[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” (quoting *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001))).

²³¹ Self-executing treaties, like statutes, are supreme U.S. law. For examples of courts requiring express abrogation of treaty provisions, see Turley, *supra* note 134, at 227-28.

such issue would exist if *Chevron* is applied in concert with this anti-implied-repeal rule.²³²

These trumping canons make *Chevron* a better fit for extraterritoriality, but they also invite the question: should the presumption against extraterritoriality trump *Chevron* too? Indeed, Cass Sunstein suggested that the presumption against extraterritoriality trumps *Chevron*,²³³ and Justice Scalia implied as much in *Aramco*.²³⁴ The most straightforward response is that, for the reasons stated in Part I, the presumption against extraterritoriality should be decanonized. In other words, even if *every* interpretative canon trumped *Chevron*, because there should be no generalizable presumption against extraterritoriality, it is meaningless to say it trumps *Chevron*.

Even without decanonization, though, there are reasons to think that the presumption against extraterritoriality should not trump *Chevron*. As mentioned above, courts trump *Chevron* with rules such as the constitutional avoidance canon, the antiretroactivity presumption, and the presumption against implied repeal.²³⁵ These rules are constitutionally inspired canons, reflecting the courts' important role in safeguarding constitutional values.²³⁶ The presumption against extraterritoriality has a different origin – it is not a constitutionally inspired rule, but instead it is a rule designed to promote policy goals and to approximate legislative intent. This type of canon, unlike its constitutionally inspired cousins, should not trump the considered judgment of an executive agency assigned to implement the statute. Separation of powers, a constitutionally inspired principle in its own right, also supports this view. Canons like the presumption against extraterritoriality reflect the courts' modesty with respect to the *legislative-judicial* division of authority; they do not help explain the *legislative-executive* division that is at play in *Chevron*.²³⁷ Given *Chevron*'s requirement that Congress has delegated (perhaps implicitly) authority to the executive, a modest judiciary should honor this delegation rather than trump it for judicially divined policy reasons.

²³² This rule is an element of Bradley's approach to foreign affairs *Chevron*, but because Posner and Sunstein promote a broader rule, it is not available to them to parry Jinks and Katyal. See Bradley, *supra* note 192, at 688-90.

²³³ Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2114-15 (1990); Sunstein, *supra* note 225, at 333.

²³⁴ 499 U.S. 244, 256-58 (1991) (rejecting EEOC's position).

²³⁵ See *supra* notes 225-30 and accompanying text (exploring background rules that trump *Chevron*'s application).

²³⁶ See, e.g., Eskridge, Jr. & Frickey, *supra* note 124, at 598. One could say the same about the presumption against preemption and the rule of lenity, and indeed Professor Sunstein says exactly that. Sunstein, *supra* note 225, at 331-32.

²³⁷ See *supra* note 197 (indicating *Chevron*'s effectuation of legislative deference to the executive).

The harder case, it turns out, is *Charming Betsy*.²³⁸ The reasons offered earlier in this Article for *Charming Betsy* in civil litigation also could be mustered to argue that *Charming Betsy* should trump *Chevron*.²³⁹ Squaring these two doctrines, though, depends on the type of international law on which *Charming Betsy* relies. Self-executing treaties and “executed” non-self-executing treaties are international law, but they do not need the protection of *Charming Betsy* because of the rule against implied repeal; *Chevron*, therefore, will not touch these elements of international law that are supreme U.S. law.²⁴⁰ The (constitutionally inspired) structural logic for this approach is straightforward: unless we require legislative action to revise or repeal a Senate-ratified treaty, the executive has an opening for an end run around the treaty-ratification process. Customary international law is also accorded *Charming Betsy* status, but for as much value as may be gained from enforcing customary norms in U.S. courts, it is undeniable that customary international law is different from self-executing-treaty law. There is no formal legislative role in customary international lawmaking, so allowing *Chevron* to trump customary law does not invite executive end runs around otherwise-necessary legislative action. And, perhaps for these structural reasons, there is no preference against implied repeal of customary international law. Non-self-executing treaties represent the hardest case: there is a structural senatorial role that demands some respect,²⁴¹ but they lack the enforceable status of self-executing treaties.²⁴² To my mind, the structural case wins out – the anti-implied-repeal rule should apply here as well – but I concede that this is a close case.

To recapitulate briefly, the *Charming Betsy* canon does not trump *Chevron*, but at least some types of international law (self-executing treaties and perhaps non-self-executing treaties) are shielded from *Chevron* by the presumption against implied repeal. This solution is structurally justified and presents a clear and manageable approach. Stopping here would be a reasonable solution and one this author would endorse over the status quo.

That being said, there is one more potential piece to puzzle – one that admittedly accepts some unpredictability in order to acquire some normative

²³⁸ For better or worse, “[s]ince *Erie*, the Supreme Court has never invoked the *Charming Betsy* canon to decide a case against the Executive.” *Al-Bihani v. Obama*, 619 F.3d 1, 36 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc).

²³⁹ See *supra* Part II.A.

²⁴⁰ See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

²⁴¹ U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur . . .”); see also Crootof, *supra* note 161.

²⁴² See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3); Crootof, *supra* note 161, at 1806-18.

benefits. In thinking generally about the relationship between normative canons and *Chevron*, Professor Kenneth Bamberger rejected categorical approaches in which canons trump *Chevron* or *Chevron* trumps canons. Instead, he favored a context-sensitive solution: normative canons should play a role in *Chevron* Step Two, where courts must assess whether the agency's interpretation is "permissible."²⁴³ Dramatically simplifying Bamberger's proposal, part of the permissibility inquiry of Step Two asks whether the agency considered the relevant normative canon and its underlying principles.²⁴⁴ Bamberger's Step Two is a natural home for *Charming Betsy* and international law. If an agency offers an interpretation that violates customary international law – which is within the power of Congress to authorize and without the power of the courts to enforce directly – the court could ask whether the agency considered and weighed the relevant international law norm.²⁴⁵ This approach has the benefits of maintaining the courts' role in foreign-affairs law and encouraging the agencies to use the expertise that justifies the deference in the first place. Though this proposal increases decisional costs, those costs seem worth paying.²⁴⁶ If not, though, the foregoing approach remains viable.

Because of the structural role of the executive and the benefits of its announced interpretations, this Article carves out from the default civil rule those statutes in which Congress has delegated authority to the executive: if a statute is silent or ambiguous with respect to its extraterritoriality, and if Congress has explicitly or implicitly delegated responsibility for that statute to an administrative agency, the agency's *ex ante* interpretation is valid if it is a permissible construction of the statute.

III. THE ALIEN TORT STATUTE

Part II of this Article offers replacements for the presumption against extraterritoriality in civil, criminal, and administrative cases to which that rule traditionally has been applied. This Part addresses a different class of cases – tort suits filed for violations of international law under the Alien Tort Statute (ATS), a jurisdictional statute that grants federal courts subject matter jurisdiction over those cases. Although there are good reasons to think that the presumption against extraterritoriality should not apply to ATS cases, the

²⁴³ Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 111-23 (2008).

²⁴⁴ *Id.* at 118-21.

²⁴⁵ It would be excessive to list all of the different indicia of proper consideration of international law. A few examples, though, might include solicitation of the views of the State Department; receipt and response to the views of foreign states (or foreign entities); a formal discussion of the international law issues at stake; or an acknowledgement that international law was considered.

²⁴⁶ See Bamberger, *supra* note 243, at 84-107 (making the case for this trade off generally); *supra* Part II.A (evaluating *Charming Betsy*).

Supreme Court has imported this statutory canon of interpretation into ATS jurisprudence. For that reason, and because some of the same underlying issues arise in ATS cases as in other extraterritorial litigation, it is useful to consider it here.

The ATS, part of the Judiciary Act of 1789, provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²⁴⁷ Since the 1970s, the ATS has been used by private parties and human rights organizations to pursue international law claims in U.S. courts.²⁴⁸ Recent cases have focused on the geographic reach of the ATS. In 2013, the Supreme Court applied the presumption against extraterritoriality to ATS cases in *Kiobel v. Royal Dutch Petroleum Co.*, concluding that the ATS applies only to extraterritorial cases that touch and concern the territory of the United States.²⁴⁹ Chief Justice Roberts justified the presumption against extraterritoriality in this case as avoiding “the danger of unwarranted judicial interference in the conduct of foreign policy.”²⁵⁰

The application of the presumption to an ATS case was not out of nowhere, but it did not have a long pedigree. Although at one time the United States government argued that the presumption against extraterritoriality should limit the ATS,²⁵¹ and an occasional judge adopted this view,²⁵² courts did not endorse the application of the presumption to the ATS before *Kiobel*. In *Sosa v. Alvarez-Machain*, for example, the Supreme Court was presented with the argument that the presumption limits the ATS, and not a single Justice endorsed it.²⁵³ And many extraterritorial ATS cases had been litigated in federal courts.²⁵⁴

²⁴⁷ 28 U.S.C. § 1350 (2012).

²⁴⁸ See generally Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587 (2002); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461 (1989); Anthony D’Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT’L L. 62 (1988); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT’L L. 687 (2002).

²⁴⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

²⁵⁰ *Id.* at 1664.

²⁵¹ See, e.g., Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 21 n.11, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491) [hereinafter U.S. Supplemental Brief] (acknowledging the United States’ change in position); Brief for the United States as Respondent Supporting Petitioner at 46-50, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 182581, at *46-50 (adopting this position).

²⁵² E.g., *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 808-11 (9th Cir. 2011) (Kleinfeld, J., dissenting); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 74-81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

²⁵³ See generally *Sosa*, 542 U.S. 692. As noted earlier, the United States government presented this position to the Supreme Court. See Brief for the United States as Respondent

There are sound doctrinal reasons that the presumption against extraterritoriality should not apply to ATS cases. Unlike the statutes to which the presumption has been applied, the ATS is a “strictly jurisdictional” statute.²⁵⁵ The presumption against extraterritoriality never had been applied to a jurisdictional statute prior to *Kiobel*.²⁵⁶ Moreover, the torts for which the ATS grants jurisdiction are common law causes of action, not statutory ones,²⁵⁷ and the presumption is explicitly a tool of divining congressional intent in substantive statutes.²⁵⁸ The ATS is simply not the type of statute to which the

Supporting Petitioner, *supra* note 251.

²⁵⁴ According to a recent Ninth Circuit decision:

[W]e [previously] considered an ATS claim based on torture that took place in the Philippines. We categorically rejected the argument that the ATS applies only to torts committed in this country. We said, “we are constrained by what § 1350 shows on its face: no limitations as to the citizenship of the defendant, or the locus of the injury.” In fact, the seminal and most widely respected applications of the statute relate to conduct that took place outside the United States. The D.C. Circuit has recently concluded that there is no bar to the ATS’s applicability to foreign conduct because the Supreme Court in *Sosa* did not disapprove these seminal decisions and Congress, in enacting the Torture Victim Protection Act, implicitly ratified such law suits.

Sarei, 671 F.3d at 744-45 (internal citations omitted).

²⁵⁵ *Sosa*, 542 U.S. at 713.

²⁵⁶ See William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 HARV. INT’L L.J. ONLINE 35, 45 (2010). As the D.C. Circuit explained:

As a jurisdictional statute, [the ATS] would apply extraterritorially only if Congress were to establish U.S. district courts in foreign countries. To say that a court is applying the ATS extraterritorially when it hears an action such as appellants have brought makes no more sense than saying that a court is applying 28 U.S.C. § 1331, the federal question statute, extraterritorially when it hears a TVPA claim brought by a U.S. citizen based on torture in a foreign country. Thus, the question here is not whether the ATS applies extraterritorially but is instead whether the common law causes of action that federal courts recognize in ATS lawsuits may extend to harm to aliens occurring in foreign countries.

Doe, 654 F.3d at 23; see also *Sarei*, 671 F.3d at 746 (“[T]he ATS is a jurisdictional statute; federal courts frequently exercise jurisdiction with regard to matters occurring out of the country”); *United States v. Corey*, 232 F.3d 1166, 1171 (9th Cir. 2000) (indicating, outside of the context of the ATS, that “jurisdictional statutes inherently present the question of how far Congress wishes U.S. law to extend. There is therefore no reason to presume that Congress did, or did not, mean to act extraterritorially”); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (“Common law courts of general jurisdiction regularly [have] adjudicate[d] transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred.”).

²⁵⁷ *Sosa*, 542 U.S. at 724 (indicating that the ATS was “enacted on the understanding that the common law would provide a cause of action”); *id.* at 732 (providing that causes of action under the ATS must be “claims under federal common law”).

²⁵⁸ For the same reasons, the presumption against extraterritoriality has no place in *Bivens* cases. In *Bivens*, the Supreme Court authorized a lawsuit against federal officials in their personal capacity arising out of violations of the Constitution. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). In many cases since,

presumption had been applied, not to mention the various historical arguments that would seem to undermine the presumption's role with respect to this statute.²⁵⁹ But the Supreme Court sees the issue differently, so if this Article seeks to replace the presumption in all its forms, the ATS must be addressed as well.

In shaping the common law causes of action in ATS cases, do any of the three frames from Part II work? In other words, are ATS cases similar enough to any of these three classes of cases to merit overlapping consideration? We can quickly dispense with two-thirds of Part II because the ATS is not a criminal statute nor has Congress delegated its management to the executive branch.²⁶⁰ But the *Charming Betsy* rule, and its use of international law as an interpretative guide, may have something to say about the ATS. Again, the

the courts have engaged in making federal common law to recognize constitutional torts against federal officials. See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (indicating that *Bivens* cases employed the Court's "common-law powers to create causes of action"). Particularly in the context of the war on terror, courts have considered *Bivens* claims for extraterritorial conduct by U.S. government officials and contractors. See James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 119-20 (2009) (discussing *Bivens* claims related to detention and extraordinary rendition); Carlos M. Vazquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 518-30 (2013) (examining *Bivens* in the context of national security). See generally *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc); *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012); *Ali v. Rumsfeld*, 649 F.3d 762, 769-74 (D.C. Cir. 2011); *Arar v. Ashcroft*, 585 F.3d 559, 569-81 (2d Cir. 2009) (en banc). *Bivens* cases, like ATS cases, call for courts to apply common law, so there is no substantive statute to which the presumption would apply (other than the jurisdictional grant).

²⁵⁹ See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1672 (2013) (Breyer, J., concurring in the judgment) ("The ATS, however, was enacted with 'foreign matters' in mind."); *Sarei*, 671 F.3d at 745; Dodge, *supra* note 256, at 45 ("As a historical matter, it is quite clear that the presumption against extraterritoriality was not understood to apply to the ATS.").

²⁶⁰ See Bradley, *supra* note 192, at 680-81. As pointed out by Professor Ingrid Wuerth, however, there is some support in *Sosa* and *Kiobel* for consideration of executive branch views in ATS cases. See Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601 (2013); see also *Kiobel*, 133 S. Ct. at 1671, 1674 (Breyer, J., concurring in the judgment); *Sosa*, 542 U.S. at 733 n.21 (noting cases in which there is "a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"). This approach is problematic for formal and functional reasons. Formally, even the most generous reader of congressional intent can find no delegation to the executive in the text or purpose of the ATS. 28 U.S.C. § 1350 (2012) ("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."). Functionally, many of the virtues of deference regimes like *Chevron* derive from the ex ante, public, non-case-specific "rulemaking" that precedes court deference. See *supra* Part II.C. None of that would be present here.

Charming Betsy canon is about *statutory* interpretation, so it is not a perfect fit for common law in ATS cases, but there are ways in which international law can help guide courts.

First, and most obviously, the ATS grants jurisdiction for law-of-nations torts, expressly invoking international law with respect to the substantive causes of action in these cases.²⁶¹ This connection is congressionally required and unambiguous,²⁶² and the Supreme Court has required not just any connection to international law, but one that exhibits “definite content and acceptance among civilized nations.”²⁶³

Less obviously, when adjudicating international law causes of action, courts should consult international jurisdictional law.²⁶⁴ As discussed with respect to civil statutes, international law of prescriptive jurisdiction demarcates the reach of a state’s law. Years before *Kiobel*, Professor Ramsey similarly argued that common law under the ATS should get the same treatment as statutory law – which would include prescriptive jurisdictional limits via *Charming Betsy*.²⁶⁵ Professor Dodge responded to Ramsey, calling this the “prescriptive jurisdiction fallacy” of the ATS; in his view, the courts are not subject to prescriptive jurisdictional rules because they are not making substantive law, only applying it.²⁶⁶ Dodge is right in the formal sense, but the law of prescriptive jurisdiction is not a complete non sequitor. There is, especially in the post-*Erie* world, something lawmaking-like in what federal courts do when they apply (recognize, create, discover) common law rules. Moreover, as

²⁶¹ 28 U.S.C. § 1350.

²⁶² Certainly there can be debates about what constitutes the law of nations, but there is no doubt that 28 U.S.C. § 1350 refers to whatever that phrase entails.

²⁶³ *Sosa*, 542 U.S. at 732.

²⁶⁴ In his concurring opinion in *Kiobel*, Justice Breyer sought inspiration from “international jurisdictional norms,” by which he meant the law of prescriptive jurisdiction. See *Kiobel*, 133 S. Ct. at 1671-78 (Breyer, J., concurring in the judgment). Justice Breyer looked to the *Restatement (Third) of Foreign Relations Law* for the position that the ATS should provide jurisdiction for law-of-nations tort claims based on conduct in the United States, against U.S. nationals, or where “the defendant’s conduct substantially and adversely affects an important American national interest.” *Id.* at 1671. This approach more closely tracks international law than the majority, but it too falls short. In spirit, it is notable that Justice Breyer subsumed the international law roots of these jurisdictional rules into an analysis of “American national interest.” *Id.* In substance, it is also notable that this opinion (added to the others) provided nine votes for a rejection of universal jurisdiction under the international law of prescriptive jurisdiction. See generally Kenneth Anderson, *Kiobel v. Royal Dutch Petroleum: The Alien Tort Statute’s Jurisdictional Universalism in Retreat*, 2013 SUP. CT. REV. 149.

²⁶⁵ Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT’L L.J. 271, 296-97 (2009).

²⁶⁶ Dodge, *supra* note 256, at 37. Dodge acknowledged that the international law of adjudicatory jurisdiction would be more appropriate, but he did not discuss its limits. See *infra* note 271.

courts grope for limits on the ATS – from *Sosa*'s call for “vigilant doorkeeping”²⁶⁷ to the various opinions in *Kiobel*²⁶⁸ – reliance on the international law of prescriptive jurisdiction may be a reasonable alternative. The international law of prescriptive jurisdiction provides coherent limits, and they are limits blessed by the international community and the United States.²⁶⁹ Rather than invoking the inapplicable and unjustified presumption against extraterritoriality in ATS cases, perhaps taking the international law of prescriptive jurisdiction slightly out of context is an option worth considering as courts seek to limit the ATS.²⁷⁰

In both this Part and the previous discussion of international jurisdictional law, the focus has been on prescriptive jurisdiction. And indeed, concerns about the reach of ATS cases have been voiced in the language of prescriptive jurisdiction – Justices Roberts and Breyer both issued opinions seeking to apply limits to the prescriptive reach of the causes of action under the ATS. However, it is not clear that these Justices truly are concerned with the content of ATS-enforceable norms, which the Court has limited to causes of action with such specificity and international acceptance that they should not upset foreign relations. Instead, the underlying concern may in fact have been whether a foreign court, rather than a U.S. court, should adjudicate law-of-

²⁶⁷ *Sosa*, 542 U.S. at 729 (arguing that, with respect to judicial recognition of “actionable international norms . . . the door is still ajar subject to vigilant doorkeeping”).

²⁶⁸ *Kiobel*, 133 S. Ct. 1659 (proposing limits on the ATS).

²⁶⁹ See Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031 (discussing the sources of international law). Some scholars have suggested that we have enough limits in current law: personal jurisdiction, the political question doctrine, the act of state doctrine, comity, and forum non conveniens. *E.g.*, Brief of Professors of Civil Procedure and Federal Courts as Amici Curiae on Reargument in Support of Petitioners at 1, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491); see also U.S. Supplemental Brief, *supra* note 251, at 22; Supplemental Brief of Yale Law School Center for Global Legal Challenges as Amicus Curiae in Support of the Petitioners at 14-17, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491) [hereinafter Yale Supplemental Brief]. But some of these limits are unpredictable, see *supra* note 158 (regarding comity), and none expressly incorporates international jurisdictional law.

²⁷⁰ One potential countervailing consideration is federalism. A narrow interpretation of the ATS may lead to an increase in international tort cases filed in state courts. See Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709 (2012). And applying federal “procedural common law” limits to federal court actions will not limit analogous state court cases. See Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 815 (2008). Even post-*Erie*, foreign affairs is an area in which federal common law is understood as appropriate, reflecting the elevated role of the federal government in foreign affairs vis-à-vis the states. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964) (discussing the need for “federal judge-made law” to deal with issues affecting international relations). Perhaps, therefore, a broad interpretation of the ATS is justified on vertical federalism grounds. This subject is beyond the scope of this Article, but one that calls out for further study. For a related argument in the context of *Bivens*, see Vazquez & Vladeck, *supra* note 258, at 524-30.

nations claims with limited connections to the United States. This concern is a closer match to “adjudicatory jurisdiction,” which defines whom courts can bring within their judicial process.²⁷¹ The international law of adjudicatory jurisdiction, therefore, may be an important source for limits in international law cases under the ATS. Notably, the international law of adjudicatory jurisdiction is not coextensive with the U.S. law of personal jurisdiction; for example, “tag service” satisfies personal jurisdiction in U.S. courts,²⁷² but is insufficient under international adjudicatory jurisdiction law.²⁷³ “General jurisdiction” also may be more limited under international law than U.S. law.²⁷⁴ Courts, therefore, could require ATS cases to comply with *both* U.S. rules on personal jurisdiction and international rules on adjudicatory jurisdiction. By applying international prescriptive and adjudicatory jurisdictional limits, U.S. courts will ensure that cases brought under the ATS have sufficient connection to the United States, and they will measure this connection through international jurisdictional rules.

CONCLUSION

The purpose of this Article has been twofold: to argue against the presumption against extraterritoriality and to identify existing rules to step up in its stead. Replacing the presumption with a *Charming Betsy* rule for civil cases, a rule of lenity for criminal cases, and *Chevron* deference for

²⁷¹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(b) (1986) (defining the jurisdiction to adjudicate as the power “to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings”); *id.* §§ 421-423 (setting out the rules for adjudicatory jurisdiction). Interestingly, numerous scholars arguing for expansive ATS liability acknowledge that the international law of adjudicatory jurisdiction is relevant, yet they do not focus on what limits it might place on these cases. See, e.g., Yale Supplemental Brief, *supra* note 269, at 6-9; Dodge, *supra* note 256, at 38-44. Other doctrines such as venue and abstention also may have a role to play here. See *supra* note 269.

²⁷² E.g., *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 628 (1990) (upholding California’s “tag” service of process).

²⁷³ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 cmt. e (1986) (“‘Tag’ jurisdiction, *i.e.*, jurisdiction based on service of process on a person only transitorily in the territory of the state, is not generally acceptable under international law.”). Interestingly, human rights advocates opposed attempts to codify an international law rejection of tag service during negotiations regarding the Hague Judgments Convention. KOH, *supra* note 17, at 151 (“Although drafts of the Hague Convention . . . initially sought to limit this form of jurisdiction, human rights advocates opposed that limitation as a threat to much of the transnational public law litigation brought against foreign human rights violators . . .”).

²⁷⁴ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (1986).

administrative cases better serves the principles that underlie the presumption, which are in themselves laudable goals for transnational legal rules.

Lurking behind these two purposes is a broader question: Is extraterritoriality special? The answer, it seems, is yes and no. From the perspective of pure statutory interpretation, the approach advocated in Part II of this Article – which applies extant rules of statutory interpretation to familiar situations – suggests that extraterritoriality is *not* special.²⁷⁵ Interpreting an ambiguous statute in light of background rules is commonplace for courts, and the substance of the rules suggested here are not unique to the question of a statute’s geographic reach. The foreign-affairs component of these cases does not elevate them into another category, nor is there an outsized role for the executive in these cases simply because they touch on issues outside the territory of the United States.²⁷⁶ To put it another way, civil, criminal, and administrative cases are more different from each other than territorial ambiguities are different from other types of statutory indeterminacies.

There are, however, at least a few ways that these cases are special. First, as was made clear in the discussion of *Charming Betsy*, cases implicating the geographic reach of U.S. statutes implicate international law. Customary international law and non-self-executing treaties do not create directly enforceable rights in U.S. courts, yet the *Charming Betsy* doctrine gives them a role to play – a role that is particularly significant in the case of geoambiguous statutes, since the law of prescriptive jurisdiction must be consulted in these cases. Counterintuitively, removing a rule supposedly inspired by international law (the presumption against extraterritoriality) could have the effect of making international law more central to U.S. courts’ work.

Second, the United States has a separate executive department assigned responsibility for diplomacy and foreign affairs. The State Department has a role to play in the administrative process, and the approach to *Chevron* Step Two discussed previously suggests that the executive might have to take an

²⁷⁵ The scholarly alternatives discussed at the start of Part II treat extraterritoriality as special on this metric, but for the reasons discussed here and above, that treatment is not justified.

²⁷⁶ Professor Daniel Abebe, for example, suggested that the level of executive deference in foreign affairs should be related to the level of “external constraints,” which can be approximated by the ability of other powerful states to balance the United States. The stronger the external constraints, the more deference by the courts; but if external constraints are weak, then the foreign affairs law (less deferentially) should constrain executive authority. Daniel Abebe, *The Global Determinants of U.S. Foreign Affairs Law*, 49 STAN. J. INT’L L. 1, 51-53 (2013). Assuming *arguendo* that Abebe’s sliding scale is appropriate, we still must define which “foreign affairs” questions deserve special treatment – the same problem facing Posner and Sunstein. See *supra* note 201-04 and accompanying text. For reasons explained in this Article, extraterritoriality questions, though “foreign,” do not.

institutional approach to determining the reach of geoambiguous statutes that differs from its approach to other types of statutory ambiguities.²⁷⁷

Last, the types of cases discussed in this Article are special because, to a large extent, the courts' decisions function not only as decisions about the meaning of statutes but also as an allocative mechanism.²⁷⁸ As mentioned in the context of criminal law, where conduct is illegal in multiple states, the rule of lenity combines with an extradition regime to form a principle for assigning criminal cases to appropriate jurisdictions. Similarly, where civil conduct is regulated in multiple states, international jurisdictional law acts to assign responsibility to different jurisdictions based on their connections to the case. This allocative function is different from the substantive questions in statutory interpretation. And, because the international system lacks the full-faith-and-credit rules of the United States,²⁷⁹ these allocative questions are particularly thorny. This is why it is important, where possible, to rely on international law to define the allocative rules. Because international law reflects the collective judgment and agreement of the states, it is international law (specifically the international jurisdictional law) that has the best chance of rationalizing the transnational legal system.

²⁷⁷ See *supra* Part II.C.

²⁷⁸ The allocative mechanism also has been referred to as "judicial equilibration." See Stephen B. Burbank, *Judicial Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 219-35 (2001) (discussing the promise of the since-abandoned Hague Convention on Jurisdiction and Foreign Judgments).

²⁷⁹ See U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (2012).