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**STATE LAW, U.S. POWER, FOREIGN DISPUTES:  
UNDERSTANDING THE EXTRATERRITORIAL EFFECTS  
OF STATE LAW IN THE WAKE OF *MORRISON V.*  
*NATIONAL AUSTRALIA BANK***

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INTRODUCTION .....	535
I. THE POTENTIAL SUBSTITUTION OF STATE LAW FOR FEDERAL LAW ..	541
A. <i>Morrison and the Restricted Reach of Federal Law        Abroad</i> .....	541
B. <i>The Potential Role of State Law</i> .....	548
II. STATE CHOICE-OF-LAW PRINCIPLES AND FOREIGN DISPUTES.....	551
A. <i>States and Extraterritoriality</i> .....	551
B. <i>The State-Law vs. Foreign-Law Choice</i> .....	554
III. MAKING SENSE OF THE FEDERAL LAW/STATE LAW DISPARITY .....	563
A. <i>Implications for the Presumption Against        Extraterritoriality</i> .....	564
B. <i>New Directions for State Choice-of-Law Principles</i> .....	570
CONCLUSION.....	575

INTRODUCTION

The recent case of *Morrison v. National Australia Bank Ltd.*<sup>1</sup> has attracted widespread attention and scholarly commentary<sup>2</sup> for the way in which it entrenches and expands the presumption against the extraterritorial application of U.S. law.<sup>3</sup> Less often remarked upon, however, is that *Morrison* and the

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<sup>1</sup> 130 S. Ct. 2869 (2010).

<sup>2</sup> See, e.g., Genevieve Beyea, *Morrison v. National Australia Bank and the Future of Extraterritorial Application of the U.S. Securities Laws*, 72 OHIO ST. L.J. 537, 551 (2011); Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1043 (2011); George T. Conway III et al., *Harmony and Dissonance in Extraterritorial Regulation*, 105 ASIL PROC. (forthcoming 2011); William S. Dodge, *Morrison's Effects Test*, 40 SW. L. REV. 687, 687-88 (2011); John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 396 (2010); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 142 (2010).

<sup>3</sup> *Morrison*, 130 S. Ct. at 2881.

presumption it reaffirms have created a sharp disparity between the potential applicability of federal and state law to disputes that involve contacts with foreign countries. Already, it is frequently the case – and as a result of the *Morrison* decision will likely be the case more often in future – that state law applies to such disputes where federal law does not. What accounts for this disparity, and how should it inform the way we think about extraterritorial regulation by the federal and state governments?

To think about this question more concretely, suppose that foreign investors attempt to sue a foreign securities issuer for losses incurred as a result of fraud taking place at least partly outside of the United States. This is the so-called “foreign-cubed” scenario<sup>4</sup> on display in *Morrison*, in which Australian investors sued an Australian bank for allegedly fraudulent overvaluation of HomeSide, a Florida-based subsidiary of National Australia Bank (National).<sup>5</sup> In *Morrison*, the Court took aim at the venerable “effects” and “conduct” tests<sup>6</sup> that had been applied in the lower courts since the 1960s to determine the geographic scope of Section 10(b) of the Securities and Exchange Act of 1934, as well as its associated regulation, Rule 10b-5.<sup>7</sup> Rejecting these tests, the Court held that the presumption against extraterritoriality – which states that “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States” – governed the reach of Section 10(b).<sup>8</sup> The Court explained that, in practice, applying the presumption meant that Section 10(b) may be used to state a cause of action only if it involves a security “listed on domestic exchanges” or a “domestic transaction[] in other securities.”<sup>9</sup> Thus, plaintiffs allegedly defrauded in

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<sup>4</sup> *Id.* at 2894 n.11 (Stevens, J., concurring) (defining a “foreign-cubed” case as one in which “(1) *foreign* plaintiffs [are] suing (2) a *foreign* issuer in an American court for violations of American securities laws based on securities transactions in (3) *foreign* countries” (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167, 172 (2d Cir. 2008))).

<sup>5</sup> *Id.* at 2875-76.

<sup>6</sup> *Id.* at 2881 (agreeing with commentators’ criticisms of the Second Circuit tests). *Morrison* was in fact an *affirmance* (on different grounds) of the Second Circuit, which had dismissed the case on the grounds that the conduct and effects tests did not apply, but it nonetheless made a significant change to the law in securities cases; investors in foreign-cubed scenarios had previously sued successfully under Section 10(b). See *Beyea*, *supra* note 2, at 549-50.

<sup>7</sup> These tests allowed Section 10(b) to apply when either “the wrongful conduct had a substantial effect in the United States or upon United States citizens” (the “effects test”) or “the wrongful conduct occurred in the United States” (the “conduct test”). *Morrison*, 130 S. Ct. at 2879 (quoting *SEC v. Berger*, 322 F.3d 187, 192-93 (2d Cir. 2003)); see *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983) (describing the tests and their history).

<sup>8</sup> *Morrison*, 130 S. Ct. at 2877, 2883 (“[T]here is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not.”).

<sup>9</sup> See *id.* at 2884.

connection with foreign securities transactions are likely foreclosed from relying on federal law.<sup>10</sup>

But as some commentators have suggested in the wake of *Morrison*, foreign investors thwarted in their attempt to rely on Section 10(b) may have an alternative avenue for relief under state law.<sup>11</sup> Suppose that such investors sue for fraud under New York law in state or perhaps federal court (provided that some federal jurisdictional hook can be found). Although state law may present additional difficulties of proof, common-law fraud claims in many states are similar to Section 10(b) claims, often consisting of the same elements.<sup>12</sup>

To be sure, the plaintiffs in such a scenario will face challenges – most notably, establishing the existence of personal jurisdiction over the defendants and avoiding a forum non conveniens dismissal.<sup>13</sup> One problem they are unlikely to confront, however, is the argument that state law should not be applied extraterritorially. Most states' choice-of-law regimes treat other-country law similarly or identically to other-state law.<sup>14</sup> State choice-of-law analysis rarely if ever takes into account extraterritoriality concerns, and the limits on a state's ability to apply its own law (or, for that matter, another state's), even when the state is only marginally connected to a dispute, are modest.<sup>15</sup> Further, in many state choice-of-law systems, bias toward the application of forum law is common, making it all the more likely that a New

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<sup>10</sup> Some confusion attends the contours of the Supreme Court's decision, since the Court noted on the first page of its opinion that National's American Depositary Receipts (ADRs) were listed on the New York Stock Exchange, *id.* at 2875, which effectively means that its shares were also "listed." See Beyea, *supra* note 2, at 565-66 (explaining the Court's possible confusion regarding the status of National's ADRs). Despite the ambiguous language concerning ADRs, the Court clearly held that federal law does not apply in situations like the one at issue in *Morrison*. *Morrison*, 130 S. Ct. at 2888.

<sup>11</sup> See William C. Fredericks, "Foreign-Cubed" and "Foreign-Squared" Securities Litigation in the Wake of *Morrison v. National Australia Bank*, in "BET THE COMPANY" LITIGATION 2010, at 85, 97 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. H-840, 2010); Roger W. Kirby, *Access to United States Courts by Purchasers of Foreign Listed Securities in the Aftermath of Morrison v. National Australia Bank Ltd.*, 7 HASTINGS BUS. L.J. 223, 225 (2011).

<sup>12</sup> Fredericks, *supra* note 11, at 107 (citing, among other cases, *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 651 F. Supp. 2d 155, 171 (S.D.N.Y. 2009)).

<sup>13</sup> See *id.* at 99-104.

<sup>14</sup> Mathias Reimann, *A New Restatement – For the International Age*, 75 IND. L.J. 575, 576-77 (2000) (stating that, for purposes of much choice-of-law analysis under the *Restatement (Second) of Conflict of Laws*, foreign law and state law occupy the same footing).

<sup>15</sup> 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, 1059 (2009) ("[W]e are not accustomed to thinking of state courts' routine choice-of-law decisions as raising serious extraterritoriality problems.").

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York court hearing the dispute will apply New York law.<sup>16</sup> Thus, even if *Morrison* has taken federal law off the table for investors in foreign securities, the law of individual U.S. states may still apply to those same transactions.

This situation is perplexing. Assuming that principles of international comity or norms of foreign relations<sup>17</sup> counsel against applying federal law to transactions primarily foreign in nature,<sup>18</sup> why should those principles not similarly counsel against applying state law to the action? Application of federal law is arguably far *preferable* to reliance on state law in cases involving substantial contacts with other nations. After all, broader use of federal law fosters greater uniformity and predictability – concerns that the *Morrison* Court identified as central in deciding to apply the presumption against extraterritoriality.<sup>19</sup> Moreover, should other countries complain about the application of American law abroad, Congress would seem far better equipped than individual state courts or legislatures to take those concerns into account. Nonetheless, current law sharply restricts the applicability of federal law to cases with some substantial foreign component, while imposing virtually no limit on states' abilities to apply their laws so long as some tenuous connection exists between the state and the case. This situation seems difficult to defend.

Consequently, one aim of this Article is to reflect on the aftermath of *Morrison* by arguing that, in addition to the deficiencies already identified by

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<sup>16</sup> See Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 495 (2011) (“[T]he modern [choice-of-law] approaches have an ‘inherent forum law preference.’” (quoting FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 148 (spec. ed. 2005))).

<sup>17</sup> The presumption against extraterritoriality is not in itself a principle of comity and is not necessarily concerned with international law. The Court has been criticized for its decreasing attention to international norms in determining whether United States law has extraterritorial effect. See Knox, *supra* note 2, at 352. Nonetheless, issues of policy and international relations appear to have exerted a strong influence on the Court's decision in *Morrison*. For example, the Court observed that the Second Circuit's “conduct” and “effects” tests were “not easy to administer,” *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2879 (2010), and mentioned that “[c]ommentators have criticized the unpredictable and inconsistent application of § 10(b) to transnational cases,” *id.* at 2880. The Court also remarked that the presumption was strengthened in this case by the “probability of incompatibility with the applicable laws of other countries,” suggesting that, had Congress intended for Section 10(b) to apply abroad, it would have considered these problems explicitly. *Id.* at 2885. Finally, the Court took note of the concern expressed by some that the United States “has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets,” *id.* at 2886, thus suggesting that concerns about the policy implications of wide application of Section 10(b) to extraterritorial conduct were a motivating factor in its decision.

<sup>18</sup> Of course, determining what makes a transaction sufficiently “foreign” that application of American law is in some way problematic is itself a difficult question.

<sup>19</sup> See *Morrison*, 130 S. Ct. at 2880-81.

commentators,<sup>20</sup> *Morrison* has the perverse effect of substituting state law for federal law in securities cases involving substantial foreign contacts. Beyond that purpose, however, another goal of this Article is to draw attention to an additional facet of a problem I have discussed in earlier writings<sup>21</sup>: the general failure of courts to analyze the application of state law under choice-of-law principles as an extraterritoriality problem.

This failure is problematic not because state courts have generally been reckless in applying their law to actions arising, or involving significant conduct taking place, beyond U.S. borders. The combination of preference for a federal law or forum,<sup>22</sup> problems with personal jurisdiction, and the ready application of forum non conveniens means that courts in fact rarely apply state law to disputes with substantial foreign elements.<sup>23</sup> Further, even when states do not formally distinguish between foreign-nation law and sister-state law, some state choice-of-law methodologies are flexible enough to permit states to consider a variety of concerns, including (at least in theory) those present in the international arena.<sup>24</sup>

Nonetheless, the potential applicability of state law to primarily foreign disputes is worthy of attention for two reasons. First, even a few cases in which a state does reach out to apply its law to primarily foreign events may prove troubling for U.S. policy and interests.<sup>25</sup> Second, the broad potential

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<sup>20</sup> See, e.g., Beyea, *supra* note 2, at 560 (arguing that the decision, among other problems, “ignores the interconnectedness of the financial markets and the resulting interest of governments in punishing fraud, regardless of who is directly harmed”); Colangelo, *supra* note 2, at 1044 (stating that *Morrison* “return[s] to the old vested rights theory in choice of law” by formalistically relying on a single element – in this case the location of the purchase or sale of securities – to “localize” the dispute and thus determine which jurisdiction’s law should apply); Kirby, *supra* note 11, at 225 (criticizing *Morrison* for “overstating its claims to support in the language of § 10(b) and the Exchange Act,” articulating inauthentic concerns about comity, and potentially increasing rather than decreasing “foreign exposure to American litigation”). Commentators, however, are by no means uniform in their dislike for *Morrison*. For one contrary view, see Dodge, *supra* note 2, at 688 (arguing that “*Morrison* changes the presumption against extraterritoriality” and that “[t]he change is a good one”).

<sup>21</sup> See generally Florey, *supra* note 15.

<sup>22</sup> In some cases, of course, outright federal preemption may mean that state law is not an option.

<sup>23</sup> See Fredericks, *supra* note 11, at 97-109 (detailing numerous obstacles that could interfere with litigation of state-law fraud claims in a foreign-cubed scenario).

<sup>24</sup> See *infra* Part II.B.

<sup>25</sup> One such case might be a high-profile California case that, while subsequently disapproved by the state’s highest court, illustrates the potential for state court decisions to have de facto regulatory impact abroad. *Holmes v. Syntex Laboratories, Inc.* involved a suit by a class of British women allegedly, injured as a result of taking the oral contraceptive Norinyl, and their spouses. 202 Cal. Rptr. 773, 774-75 (Cal. Ct. App. 1984). Defendants (collectively referred to as “Syntex”) were Syntex Laboratories and Syntex U.S.A, two corporations doing business in California, and Syntex Corporation, a Panamanian

reach of state law indicates that the Supreme Court's analysis of the extraterritorial reach of federal statutes, insofar as the Court has increasingly relied on a rigid application of the presumption against extraterritoriality, is incomplete. The Court has generally conceptualized the problem of extraterritorial application of federal law as a question of whether *U.S. law or foreign law* will apply to a given circumstance. Yet where state law continues to apply to the same sorts of conduct, the problem is really one of whether *state law or federal law* will govern. The recognition that state law too can have extraterritorial effects outside of the United States is relevant to thinking about both Congress's intentions regarding the geographic scope of federal law and the policy consequences of limiting the territorial reach of a particular statute.

This Article proceeds in three parts. In the first Part, the Article considers the Court's recent treatment of the extraterritorial scope of federal law. It discusses briefly *Morrison's* reasoning and significance, making the argument that *Morrison* illustrates the increasing prominence of the presumption against extraterritoriality in the Court's jurisprudence. The second Part turns to the extraterritorial application of state law. This Part explains how courts handle choices of foreign *versus* state law using state choice-of-law principles, and it discusses the possibility that plaintiffs may rely on state law in cases in which the presumption against extraterritoriality restricts federal law's application. The third Part looks at parallels and divergences between the application of federal law and state law to foreign events. The Article concludes by calling for a greater understanding of the relationship between federal and state law in the context of transnational litigation in United States courts.

corporation, which were allegedly responsible for the marketing and distribution of the drug in the United Kingdom. *Id.* Syntex successfully sought a forum non conveniens dismissal in the trial court, asserting that its British subsidiary, Syntex Pharmaceuticals Limited, "had sole responsibility for all phases of decisionmaking regarding the compounding, promotion, marketing and distribution of Norinyl in Britain and that all relevant events had occurred and all evidence was to be found in Britain." *Id.* at 775 (internal quotation marks omitted). Citing case law under which California courts had held that plaintiff's forum choice "should not [be] disturbed unless the balance of relevant factors weighs strongly in favor of [the defendant]," the court reversed this decision after a lengthy discussion of the difficulties plaintiffs would face seeking recovery in Britain. *Id.* at 779-782. The court further found that California substantive law would apply, despite the defendants' affidavits that "the British affiliate and its English licensees were responsible for clinical investigations and trials, marketing applications, manufacture, packaging, quality control, advertising and promotion, sales, post-marketing safety studies, and collection and dissemination of information regarding Norinyl." *Id.* at 783. The California Supreme Court expressed disapproval of the *Holmes* court's forum non conveniens analysis in a later opinion, *Stangvik v. Shiley Inc.*, although the result in *Holmes* itself was not reversed. 819 P.2d 14, 26 (Cal. 1991).

### I. THE POTENTIAL SUBSTITUTION OF STATE LAW FOR FEDERAL LAW

In the past two decades, the Supreme Court has applied an increasingly rigid presumption against the extraterritorial application of federal law, a trend that *Morrison* both embodies and potentially accelerates. As legal options under federal law have narrowed in cases involving foreign litigants or conduct, parties are likely to view suits under state law as an appealing alternative. The following section explores this phenomenon.

#### A. *Morrison and the Restricted Reach of Federal Law Abroad*

The Court's early attempts to grapple with the extraterritorial reach of federal law reflected a restrictively territorial view of U.S. power. In *American Banana Co. v. United Fruit Co.*,<sup>26</sup> Justice Holmes famously held that U.S. antitrust law did not apply to actions taken by an American company abroad, finding it "surprising" that the plaintiff argued for the applicability of federal law when "the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States, and within that of other states."<sup>27</sup> That view, however, softened by the mid-twentieth century. Following the Second Circuit case *United States v. Aluminum Co. of America (ALCOA)*,<sup>28</sup> courts began to apply federal law (including antitrust law) abroad in accordance with international norms, which permitted a nation to regulate extraterritorial conduct that "has consequences within its borders which the state reprehends."<sup>29</sup>

As John Knox explained in a recent article, modern Supreme Court doctrine regarding the extraterritorial application of federal statutes has in fact been composed of two distinct strands.<sup>30</sup> On the one hand, the Court for many years construed federal statutes in light of international norms, "[i]n effect . . . appl[ying] a presumption against extrajurisdictionality: that is, a presumption that federal law does not extend beyond the jurisdictional limits set by international law."<sup>31</sup> The Court first articulated this principle in the 1804 case *Murray v. Schooner Charming Betsy*,<sup>32</sup> in which the Court stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."<sup>33</sup> The Court's return to this idea in the

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<sup>26</sup> 213 U.S. 347 (1909).

<sup>27</sup> *Id.* at 355, 357.

<sup>28</sup> 148 F.2d 416 (2d Cir. 1945).

<sup>29</sup> *Id.* at 443; see Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on Hartford Fire Insurance Co. v. California*, 34 VA. J. INT'L L. 213, 214 (1993).

<sup>30</sup> Knox, *supra* note 2, at 352.

<sup>31</sup> *Id.*

<sup>32</sup> 6 U.S. (2 Cranch) 64 (1804).

<sup>33</sup> *Id.* at 118; see Knox, *supra* note 2, at 352 (quoting the "*Charming Betsy* canon").

twentieth century represented, in effect, a turning away from the strict territorial approach of *American Banana*.<sup>34</sup>

More recently, however, the Court has applied a related but stricter presumption against extraterritoriality, under which the Court presumes “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”<sup>35</sup> This presumption developed as an “offshoot” of the presumption against extrajurisdictionality, but was initially “easier to overcome” and “had a [more] limited scope.”<sup>36</sup> Further, in contrast to the *Charming Betsy* approach, the presumption against extraterritoriality was not rooted in the prohibitions of international law, in that it applied even to extraterritorial regulation that posed no danger of offending international norms.<sup>37</sup> The presumption was never fully supported by a theoretical underpinning (that is, the Court never made it entirely clear why Congress would presumptively be concerned with solely domestic affairs, particularly in situations where international law would permit U.S. regulation) and was applied somewhat haphazardly.<sup>38</sup>

Under the Rehnquist Court, however, the presumption against extraterritoriality acquired a new prominence,<sup>39</sup> beginning with the Court’s decision in *Aramco*, in which the Court applied the presumption against extraterritoriality to hold that Title VII of the Civil Rights Act of 1964 did not apply to the actions of U.S. employers who employed American citizens abroad.<sup>40</sup> Starting in *Aramco*, the Court began both to apply the presumption in a broader range of circumstances and to justify it in more detail, describing its purpose as one of “protect[ing] against unintended clashes between our laws and those of other nations which could result in international discord.”<sup>41</sup> Shortly thereafter, the Court applied a strict version of the presumption in cases involving the return of Haitian refugees, in which plaintiffs invoked the Immigration and Nationality Act to argue against repatriation of the refugees, and a Federal Tort Claims Act suit arising in Antarctica.<sup>42</sup>

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<sup>34</sup> See Knox, *supra* note 2, at 367.

<sup>35</sup> EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)); see Knox, *supra* note 2, at 374.

<sup>36</sup> Knox, *supra* note 2, at 371.

<sup>37</sup> See Dodge, *supra* note 2, at 687 (“During the twentieth century . . . the presumption against extraterritoriality broke free of international law and came to rest on other justifications.”).

<sup>38</sup> Knox, *supra* note 2, at 372-73.

<sup>39</sup> See *id.* at 352 (arguing that in the 1990s the Court “detach[ed] the presumption against extraterritoriality from its roots in international law, ma[de] it harder to overcome, and broaden[ed] its application”). Cf. HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS 71-72 (2008) (asserting that, beginning in the 1990s, the Court “has applied the presumption against extraterritoriality with increasing rigidity”).

<sup>40</sup> *Aramco*, 499 U.S. at 246-47.

<sup>41</sup> *Id.* at 248; see Knox, *supra* note 2, at 374.

<sup>42</sup> *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 159 (1993); *Smith v. United States*,

Despite the Court's increased reliance on the presumption against extraterritoriality, events nonetheless combined to mute the practical impact of this change on cases with foreign elements litigated in the United States. In the specific case of employment discrimination, Congress quickly amended Title VII to overrule *Aramco* and permit Title VII and the Americans with Disabilities Act to apply to United States citizens working abroad.<sup>43</sup> In addition, the Court declined to apply the presumption against extraterritoriality in a closely watched case about the extraterritorial scope of the antitrust laws, *Hartford Fire Ins. Co. v. California*,<sup>44</sup> in which the Court held that the Sherman Act did in fact apply to extraterritorial conduct so long as it "was meant to produce and did in fact produce some substantial effect in the United States."<sup>45</sup> The Court's majority opinion notably did not discuss or even mention the presumption against extraterritoriality; Justice Scalia's dissent, while noting the theoretical relevance of the presumption, concluded that it was not at issue because of "well established" case law holding that the presumption was overcome in the case of the Sherman Act.<sup>46</sup>

*Hartford Fire* represented, if anything, an expanded notion of the degree to which the Sherman Act applied abroad.<sup>47</sup> The Court diverged from the approach of the Ninth Circuit's influential *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*,<sup>48</sup> which had held that courts should consider a number of comity-based factors before applying the Sherman Act to foreign conduct.<sup>49</sup> Instead, the Court concluded that such extraterritorial application was acceptable as long as the conduct produced a "substantial effect" in the United States; comity factors would counsel against jurisdiction, if ever, only in a scenario in which "a person subject to regulation by two states can[not] comply with the laws of both."<sup>50</sup> Thus, a combination of congressional action

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507 U.S. 197, 204 (1993) (finding that the Federal Tort Claims Act's waiver of sovereign immunity did not apply to a claim arising in Antarctica). For a detailed discussion of these cases' applications of the presumption, see KOH, *supra* note 39, at 73-75, and Knox, *supra* note 2, at 375-76.

<sup>43</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077-78 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-1, 12111-12 (2006)); *Smith v. Petra Cablevision Corp.*, 793 F. Supp. 417, 419 n.3 (E.D.N.Y. 1992).

<sup>44</sup> 509 U.S. 764 (1993).

<sup>45</sup> *Id.* at 796.

<sup>46</sup> *Id.* at 813 (Scalia, J., dissenting).

<sup>47</sup> See KOH, *supra* note 39, at 79 (referencing *Hartford Fire* for the proposition that "[i]n cases where Congress has made its intent to legislate extraterritorially plain, the Court has made it exceedingly difficult for foreign defendants to seek dismissal based on comity . . . regardless of how attenuated the connection between the foreign conduct and the United States may be").

<sup>48</sup> 549 F.2d 597 (9th Cir. 1976).

<sup>49</sup> *Id.* at 613-15.

<sup>50</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795-96, 798-99 (1993) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 403 cmt. e

(in the case of Title VII) and a departure from the Court's trend (in regard to the Sherman Act)<sup>51</sup> meant that, with regard to the bread-and-butter statutes of federal courts, the Court's increasing embrace of the presumption against extraterritoriality had less practical impact than might be expected.

All this was to change in *Morrison*, in which the Court surprised observers<sup>52</sup> by dispensing once and for all with the Second Circuit's venerable "effects" and "conduct" tests used to determine the applicability of federal securities law abroad. *Morrison* involved a putative class action against National Australia Bank, the largest bank in Australia.<sup>53</sup> Its common stock was not listed on any U.S. exchange, although its American Depository Receipts (ADRs), representing the right to receive a certain number of shares, were listed on the New York Stock Exchange.<sup>54</sup> The case arose out of National's purchase of HomeSide Lending, a mortgage servicer based in Florida; information about HomeSide's assets appeared in National's financial statements.<sup>55</sup> After "tout[ing] the success of HomeSide's business" in its annual reports and other public documents, National wrote down HomeSide's assets in July and September 2001 by \$450 million and \$1.75 billion, respectively.<sup>56</sup> Plaintiffs, all Australians seeking to represent a class of foreign purchasers of National's stock, sued for violations of the Securities Exchange Act and SEC Rule 10b-5, alleging that National had fraudulently manipulated the value of HomeSide's assets.<sup>57</sup> As the concurring opinion of Justice Stevens observed, the case – though it centered on the valuation of assets of a U.S. company – fell within the definition of a "foreign-cubed" case, in which "(1) *foreign* plaintiffs [are] suing (2) a *foreign* issuer in an American court for violations of American securities laws based on securities transactions in (3) *foreign* countries."<sup>58</sup>

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(1987)).

<sup>51</sup> Further muting the impact of *Hartford Fire*, Congress had (prior to the decision) attempted to clarify the extraterritorial reach of the antitrust laws by limiting their application to conduct that has a "direct, substantial, and reasonably foreseeable effect" in the United States. See 15 U.S.C. § 6a (2006). Courts, moreover, applied the *Timberlane* factors in conjunction with this statutory standard to further limit the laws' extraterritorial scope. See Alford, *supra* note 29, at 216-17.

<sup>52</sup> See, e.g., Beyea, *supra* note 2, at 573 (describing *Morrison* as "a significant departure from courts' longstanding approach to deciding when the securities laws apply in cases involving transnational securities fraud").

<sup>53</sup> *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2875 (2010).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 2875-76.

<sup>57</sup> *Id.* at 2876.

<sup>58</sup> *Id.* at 2894 n.11 (Stevens, J., concurring). Claims by domestic shareholders involving securities purchased on foreign exchanges are known as "foreign-squared" cases. Elizabeth Cosenza, *Paradise Lost: § 10(b) after Morrison v National Australia Bank*, 11 CHI. J. INT'L L. 343, 356 (2011).

The Second Circuit affirmed the district court's dismissal of the case,<sup>59</sup> applying its longstanding test, widely adopted by other circuits, that permitted application of Section 10(b) when either "the wrongful conduct had a substantial effect in the United States or upon United States citizens" (the "effects test") or "the wrongful conduct occurred in the United States" (the "conduct test").<sup>60</sup> Satisfying either was sufficient to permit the application of Section 10(b) to the dispute, and in addition, the Second Circuit suggested, the effects test and conduct test could be considered in tandem "[w]here appropriate."<sup>61</sup> Only the conduct test was at issue before the Second Circuit, since the plaintiffs-appellants conceded that National's conduct had no "meaningful effect on American investors or America's capital markets."<sup>62</sup> The Second Circuit found that, because the "heart of the . . . fraud" had been in Australia, the conduct test was not satisfied.<sup>63</sup>

While affirming the result, the Supreme Court held that the presumption against extraterritoriality, not the conduct and effects tests, was key to interpreting Section 10(b)'s scope. Citing *Aramco*, Justice Scalia described the presumption against extraterritoriality as a "longstanding principle of American law"<sup>64</sup> and criticized the Second Circuit for its longtime "disregard" of the presumption in federal securities cases.<sup>65</sup> The Court also attacked the Second Circuit's tests on policy grounds, noting, for example, the unpredictability of the results they produced in transnational cases.<sup>66</sup>

Having determined that the presumption against extraterritoriality governed the scope of Section 10(b) abroad, the Court turned to the question of whether the presumption should bar application of Section 10(b) to a case in which

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<sup>59</sup> The Second Circuit had regarded the issue of Section 10(b)'s application as one of subject matter jurisdiction. See *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 177 (2d Cir. 2008). The Supreme Court clarified that treating the question of a statute's extraterritorial reach as a jurisdictional one was improper. As the Court stated, "to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question," not a question of the court's "power to hear a case." See *Morrison*, 130 S. Ct. at 2877 (internal quotation marks omitted).

<sup>60</sup> See *Morrison*, 130 S. Ct. at 2879 (quoting *SEC v. Berger*, 322 F.3d 187, 192-93 (2d Cir. 2003)) (internal quotation marks omitted).

<sup>61</sup> See *Morrison*, 547 F.3d at 171.

<sup>62</sup> See *id.* at 176.

<sup>63</sup> See *id.* at 175-76.

<sup>64</sup> See *Morrison*, 130 S. Ct. at 2877 (citing *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1990)) (internal quotation marks omitted).

<sup>65</sup> See *id.* at 2878. Justice Scalia's dissent in *Hartford Fire*, by contrast, treated it as a settled question that the Sherman Act had overcome the presumption against extraterritoriality despite the Act's lack of explicit language granting its provisions extraterritorial effect. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (Scalia, J., dissenting); *supra* text accompanying note 46.

<sup>66</sup> See *Morrison*, 130 S. Ct. at 2880.

plaintiffs alleged that much relevant conduct had occurred in Florida.<sup>67</sup> Because most cases implicating the presumption against extraterritoriality have *some* domestic elements, Justice Scalia observed that the presumption “would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.”<sup>68</sup> Instead of attempting to parse the degree of domestic conduct that would tip a given dispute out of the extraterritorial category, the Court instead attempted to articulate what it called a “clear test” – that is, “whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange.”<sup>69</sup> For the Court, this test barred the application of Section 10(b) to the conduct at issue in *Morrison*,<sup>70</sup> although as some commentators have noted, the process of listing ADRs on a national stock exchange requires registering and technically “listing” the underlying shares.<sup>71</sup> The Court itself explained on the first page of its opinion that National’s ADRs were listed on the New York Stock Exchange.<sup>72</sup>

*Morrison* worked a substantial change in the law applied by lower federal courts in securities actions, and it is likely to have significant impact on the foreign investors who would otherwise find U.S. courts attractive venues for their lawsuits.<sup>73</sup> Congress attempted in a provision in the Dodd-Frank Act to reinstate pre-*Morrison* law with respect to actions in federal court by the Department of Justice and the Securities and Exchange Commission, but it may have failed to do so successfully because of a lack of attention to the specifics of the Court’s decision.<sup>74</sup> Further, Congress’s efforts do not touch

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<sup>67</sup> See *id.* at 2883-84.

<sup>68</sup> See *id.* at 2884.

<sup>69</sup> See *id.* at 2886.

<sup>70</sup> See *id.* at 2888 (“This case involves no securities listed on a domestic exchange . . . . Petitioners have therefore failed to state a claim on which relief can be granted.”).

<sup>71</sup> See Beyea, *supra* note 2, at 564-65; Richard Painter, Douglas Dunham & Ellen Quackenbos, *When Courts and Congress Don’t Say What They Mean: Initial Reactions to Morrison v. Australia National Bank and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act*, 20 MINN. J. INTL L. 1, 2 (2011).

<sup>72</sup> *Morrison*, 139 S. Ct. at 2875.

<sup>73</sup> See Beyea, *supra* note 2, at 537 (describing *Morrison* as “overturning nearly fifty years of federal court jurisprudence”).

<sup>74</sup> For a concise description of the problem, see Painter, Dunham & Quackenbos, *supra* note 71, at 2-5. As the authors observe, much pre-*Morrison* case law had characterized the problem of determining whether the Securities Exchange Act applies extraterritorially as one of the subject matter jurisdiction of the federal courts. See *id.* at 3. As a result, “Congress drafted the Dodd-Frank Act provisions based on the assumption that the question they were addressing was whether disputes involving the application of securities laws [to] transactions outside the United States could be considered questions of subject matter jurisdiction.” *Id.* at 2-3. In *Morrison*, however, the Court clarified that the extraterritorial application of Section 10(b) was a merits question, not one of subject matter jurisdiction, see *id.* at 3 (discussing the Solicitor General’s role in originally flagging this issue), and

actions by private investors at all.<sup>75</sup> Thus the effect of *Morrison* is to narrow significantly the possibilities for enforcement of the securities laws within the United States when the fairly strict test articulated by Justice Scalia is not met.<sup>76</sup>

In addition, *Morrison* reinforces and intensifies the Court's recent trend toward strict application of the presumption against extraterritoriality, a trend that may well have implications for the extraterritorial reach of other federal laws. In *Norex Petroleum Ltd. v. Access Industries, Inc.*,<sup>77</sup> for example, the Second Circuit held that the Racketeer Influenced and Corrupt Organization Act (RICO) did not apply extraterritorially to permit a private suit by a Cypriot company alleging that the defendants, a billionaire and his New York-based company, illegally took control of a Russian oil company in which Norex held a controlling interest. Although the complaint alleged "slim contacts with the United States,"<sup>78</sup> nonetheless the "principal actions and events [at issue] . . . occurred outside of the United States."<sup>79</sup> Under such circumstances and in light of *Morrison*'s "wholehearted[] embrace[] . . . of the presumption against extraterritoriality," the Second Circuit found, the suit had to be dismissed given RICO's silence as to any extraterritorial application.<sup>80</sup>

*Norex* is a reasonable interpretation of *Morrison*; the *Morrison* Court seems to suggest that the presumption against extraterritoriality should guide all further understanding of the scope of federal law, past practice and case law (including the anomaly of *Hartford Fire*) notwithstanding.<sup>81</sup> Thus *Morrison* appears to portend a rough road ahead for foreign litigants (and American litigants aggrieved by conduct abroad) for two reasons: first, *Morrison* itself closes off a popular avenue of relief in the broad category of securities fraud cases, and second, the logic of *Morrison* appears to dictate a similar approach to all other federal statutes.

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consequently that federal courts have *jurisdiction* to entertain securities cases that do not satisfy *Morrison*'s test (even if such cases are likely to be swiftly dismissed on the merits). See *Morrison*, 130 S. Ct. at 2877. Puzzlingly, Congress failed to redraft the Dodd-Frank provisions to reflect this change, arguably rendering the Act merely a restatement of existing law regarding jurisdiction rather than an overruling of *Morrison* on Section 10(b)'s extraterritorial reach. See Painter, Dunham & Quackenbos, *supra* note 71, at 4. In light of this, it is unclear whether courts interpreting Dodd-Frank will honor Congress's apparent intent or read the language of Dodd-Frank literally. See *id.* at 4-5.

<sup>75</sup> See Painter, Dunham & Quackenbos, *supra* note 71, at 7.

<sup>76</sup> See *Morrison*, 130 S. Ct. at 2888.

<sup>77</sup> 631 F.3d 29, 31-32 (2d Cir. 2010).

<sup>78</sup> *Id.* at 33.

<sup>79</sup> See *id.* at 32 (internal quotation marks omitted).

<sup>80</sup> See *id.* at 32-33.

<sup>81</sup> See *Morrison*, 131 S. Ct. at 2873.

B. *The Potential Role of State Law*

In the wake of *Morrison*, commentators have suggested actions in state courts as a possible alternative to Section 10(b) litigation for plaintiffs aggrieved by securities fraud occurring with regard to foreign securities not listed on U.S. exchanges or bought or sold within the United States.<sup>82</sup> Fredericks, for example, posits a hypothetical situation in which the CEO of a French multinational corporation makes a speech to a conference of investors in New York misrepresenting the company's current condition, inducing both French and American investors to buy securities not listed on an American exchange.<sup>83</sup> If the investors wished to sue the French multinational in the United States following discovery of the fraud, *Morrison* would appear to foreclose the possibility of a Section 10(b) action because the shares were neither purchased in the United States nor listed on a U.S. exchange.<sup>84</sup> Nonetheless, were the plaintiffs to state a cause of action under state law, they might be able to construct an essentially equivalent suit by stating claims for common-law fraud.<sup>85</sup> Indeed, *Morrison* has actually removed a potential obstacle to state-law securities claims founded in foreign transactions. The Securities Litigation Uniform Standards Act (SLUSA) preempts some such claims in situations where federal law applies, but by making federal claims under Section 10(b) unavailable extraterritorially, the Court may unintentionally have "liberated" such claims from SLUSA's constraints.<sup>86</sup>

It is reasonable to expect that, where similar causes of action are available under state law, foreign plaintiffs disappointed by the Court's ruling in *Morrison* (and other cases that have been decided in its wake) will simply re-file immediately in state court.<sup>87</sup> This is precisely what happened in the *Norex*

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<sup>82</sup> See Fredericks, *supra* note 11, at 110.

<sup>83</sup> See *id.* at 97-98. Fredericks' hypothetical is slightly simplified here for brevity.

<sup>84</sup> For a discussion of some of the ambiguities attending the *Morrison* standard and subsequent legislative action, see *supra* notes 10 and 74.

<sup>85</sup> Common-law fraud under the law of many states permits plaintiffs to state a claim similar or identical to one they could assert under Section 10(b). See, e.g., *King Cnty., Wash. v. IKB Deutsche Industriebank AG*, 708 F. Supp. 2d 334, 338 (S.D.N.Y. 2010) ("Because the elements of common law fraud under New York law are substantially identical to those governing Section 10(b) [of the Securities and Exchange Act of 1934], the identical analysis applies." (citation omitted) (internal quotation marks omitted)). Under the law of some (but not all) states, plaintiffs may face additional problems of proof, such as the need to prove individual reliance, that may make class certification difficult. See Fredericks, *supra* note 11, at 108; Kirby, *supra* note 11, at 266-71 (explaining that New York, Illinois, and Texas require proof of individual reliance but that California does not). Nonetheless, given the lack of viable alternatives for suing in the United States, a suit even under the law of one of the more restrictive states might still prove attractive to individuals or a group of plaintiffs.

<sup>86</sup> See Kirby, *supra* note 11, at 256.

<sup>87</sup> In some cases, they may also be able to file in federal court pursuant to diversity or supplemental jurisdiction, depending on other characteristics of the suit.

*Petroleum* case described above. The plaintiff in that case, immediately following the Second Circuit's affirmance of the case's dismissal on extraterritoriality grounds, filed a suit in New York State Supreme Court,<sup>88</sup> alleging state-law claims for common-law conspiracy, fraud, and conversion, based on essentially the same conduct as the federal suit.

Thus the result in *Morrison* may create a phenomenon that has not really arisen under past extraterritoriality decisions: the replacement of federal actions involving foreigners by equivalent suits under state law. Justice Breyer obliquely alluded to this issue in his brief concurring opinion in *Morrison*, noting that "state law . . . may apply to the fraudulent activity alleged here to have occurred in the United States."<sup>89</sup> Of course, foreign plaintiffs or U.S. plaintiffs injured as a result of events taking place abroad have always had the option of suing under state law and may choose to do so for various reasons – for example, to take advantage of more favorable state forum non conveniens law by remaining in state court<sup>90</sup> or to assert common-law claims in addition to statutory ones.<sup>91</sup> *Morrison*, however, by overruling a well-established line of cases permitting some foreign securities cases to be heard under federal law, has the potential to create an unprecedented number of state-law suits with foreign elements. After all, state courts have many of the same attributes that have made federal courts, in Justice Scalia's view, a "Shangri-La" for litigation.<sup>92</sup> Many state courts, for example, follow procedural rules similar to

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<sup>88</sup> Complaint at 3, 21-25, *Norex Petroleum Ltd. v. Access Indus. Inc.*, No. 650591/2011 (N.Y. Sup. Ct. filed Mar. 7, 2011) (stating seven causes of action, including conversion, tortious interference, breach of fiduciary duties, and conspiracy, based upon the "same transaction or occurrence" as that pleaded in Norex's federal action). On May 27, 2011, the case was stayed pending a final resolution of Norex's federal suit, in which Norex has asked the Supreme Court to grant certiorari. See Karen Freifeld, *Norex Suit Against Blavatnik, Access over Yugraneft Put on Hold*, BLOOMBERG BUSINESSWEEK (May 27, 2011, 6:31 PM), <http://www.bloomberg.com/news/2011-05-27/norex-suit-against-blavatnik-access-over-yugraneft-put-on-hold-by-judge.html>. On June 22, 2011, Norex initiated proceedings to withdraw its petition for certiorari from the Supreme Court so that the case could proceed; the petition was dismissed on June 29, 2011. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29 (2d Cir. 2010), *cert. dismissed*, 180 L. Ed. 2d 913 (2011); see also Amended Complaint at 7, *Norex Petroleum Ltd. v. Access Indus. Inc.*, No. 650591/2011 (N.Y. Sup. Ct. June 23, 2011).

<sup>89</sup> See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2888 (2010) (Breyer, J., concurring).

<sup>90</sup> At least until recently, forum non conveniens doctrine in many states was "significantly less draconian" than the federal equivalent, making such states "magnets" for foreign litigation. Elizabeth T. Lear, *Federalism, Forum Shopping, and the Foreign Injury Paradox*, 51 WM. & MARY L. REV. 87, 101 (2009).

<sup>91</sup> See, e.g., *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 446 F. Supp. 2d 163, 191-205 (S.D.N.Y. 2006) (declining to dismiss most New York common-law claims alleged by large group of foreign investors and applying New York law rather than the law of the British Virgin Islands, as requested by defendant).

<sup>92</sup> See *Morrison*, 130 S. Ct. at 2886.

or identical to the Federal Rules of Civil Procedure, allowing for the same broad discovery,<sup>93</sup> and state law is also likely to provide for larger recoveries than are obtainable in many foreign courts.<sup>94</sup> Thus, even though state common-law actions may pose additional difficulties relative to Section 10(b) actions and represent a less well-trodden path for foreign investors, many plaintiffs are likely to find them a worthwhile course to pursue.

By contrast, as previously mentioned, other recent Supreme Court extraterritoriality decisions have not posed the same potential for driving large numbers of suits into state court.<sup>95</sup> Previous decisions have been quickly overruled by Congress,<sup>96</sup> have been limited to a specific and narrow situation concerning federal policy alone,<sup>97</sup> or (in the case of antitrust) have, if anything, expanded the possibility of federal suits relating to foreign conduct.<sup>98</sup> Thus *Morrison* in itself may significantly increase the degree to which state courts are asked to entertain suits involving foreign parties or extraterritorial conduct. Further, to the extent that *Morrison* represents a marked intensification of the Court's trend toward relying more rigidly on the presumption against extraterritoriality (even when it upends many decades of settled law in the lower courts), it may herald a long-term narrowing of the extraterritorial scope of federal law in other areas, as has already occurred with RICO in the Second Circuit.<sup>99</sup> With these potential effects in mind, the following section discusses the various ways in which state choice-of-law principles treat disputes with foreign contacts.<sup>100</sup>

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<sup>93</sup> See Jay Tidmarsh, *Procedure, Substance, and Erie*, 64 VAND. L. REV. 877, 922 n.181 (2011) (“[A]fter the enactment of the Federal Rules of Civil Procedure, many state courts adopted the Federal Rules nearly in *toto*, and the basic vision of the Federal Rules – liberal pleading, broad discovery, generous joinder, and so on – has exercised an influence even on those states that did not adopt the Rules.”).

<sup>94</sup> Professor Samuels quotes Lord Denning on the enduring appeal of American courts to damages-seeking foreign plaintiffs: “As a moth is drawn to light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.” See Joel H. Samuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis*, 85 IND. L.J. 1059, 1072 n.78 (2010) (quoting *Smith Kline & French Labs., Ltd. v. Bloch* [1983] 1 W.L.R. 730 (C.A.) 733 (Eng.)).

<sup>95</sup> See *supra* Part I.A.

<sup>96</sup> See *supra* text accompanying note 43.

<sup>97</sup> See *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 158-59 (1993) (considering the applicability of provisions of the Immigration and Nationality Act to the United States' policy of returning Haitian refugees on the high seas); *Smith v. United States*, 507 U.S. 197, 198 (1993) (holding that tortious acts or omissions occurring in Antarctica are not actionable under the Federal Tort Claims Act).

<sup>98</sup> See *supra* note 47 and accompanying text.

<sup>99</sup> See *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 31-32 (2d Cir. 2010).

<sup>100</sup> The fact that a suit is brought in state court does not mean that state law will necessarily apply; state courts can and do frequently apply foreign law. As the following section discusses, however, some state choice-of-law principles will direct the application of

## II. STATE CHOICE-OF-LAW PRINCIPLES AND FOREIGN DISPUTES

Even as state law may potentially apply to more disputes with foreign contacts, state choice-of-law doctrine remains firmly rooted in the interstate context. When state courts apply forum law to out-of-state conduct and events, they rarely view such decisions as raising extraterritoriality issues. Further, state choice-of-law principles generally do not treat foreign law and sister-state law differently.<sup>101</sup> As a result, state choice-of-law doctrine is in some respects inadequate for analyzing cases involving significant foreign contacts.

### A. *States and Extraterritoriality*

In theory, the question of a court's jurisdiction over extraterritorial conduct encompasses two distinct concepts: judicial jurisdiction and legislative jurisdiction. As Justice Scalia explained, dissenting in *Hartford Fire*, judicial jurisdiction is simply "jurisdiction to adjudicate" (for example, whether courts have jurisdiction over the subject matter of a suit), while legislative jurisdiction is the "authority of a state to make its law applicable to persons or activities."<sup>102</sup> In the federal context, courts have treated the decision of a court to apply a U.S. statute as an assertion of the United States' legislative jurisdiction.<sup>103</sup>

By contrast, state courts do not frame their choice-of-law decisions in terms of legislative jurisdiction. This might seem odd, given that courts considering state-law causes of action would seem to engage in a process that is clearly divided into judicial and legislative jurisdiction stages. First, the court determines whether it has subject-matter and personal jurisdiction – in other words, jurisdiction to adjudicate the matter.<sup>104</sup> Next, if the dispute has contacts with more than one jurisdiction, the court engages in choice-of-law analysis, determining which of two or more potential jurisdictions' laws will apply. At first blush, this might appear to be an exercise in determining whether a particular state has legislative jurisdiction over the case. If, after all, it is a question of legislative jurisdiction whether U.S. antitrust law will apply to events in Britain, it would equally seem to be so when the issue is whether, say, California law will apply to events abroad.

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state law even in some circumstances in which a dispute involves foreign parties, foreign conduct, or both. *See infra* Part II.B.

<sup>101</sup> *See* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1224 (1992).

<sup>102</sup> *See* *Hartford Fire Ins. Co. v. California*, 509 U.S. 765, 813 (1993) (Scalia, J., dissenting) (quoting 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 231 (1987)).

<sup>103</sup> *See id.*

<sup>104</sup> Most state courts are courts of general jurisdiction. *See* ERWIN CHEREMINSKY, FEDERAL JURISDICTION 265 (5th ed. 2007). Thus, subject-matter jurisdiction is seldom an issue, though subject-matter jurisdiction may be contested if a state-law claim is brought in federal court pursuant to the court's supplemental or diversity jurisdiction.

In practice, however, courts applying state law have not reasoned in these terms. State courts considering the application of forum law to out-of-state (and even out-of-country) events generally do not frame the question in light of the doctrines that govern the application of federal law to events abroad.<sup>105</sup> This is something of a departure from historical practice; for many years, state and federal choice-of-law doctrines were “something of an undifferentiated mass,” relying on “constitutional law, international law, natural law, and raw untutored reason.”<sup>106</sup> Yet while some courts continue to refer to cases from the international context in considering domestic extraterritoriality issues,<sup>107</sup> principles of extraterritoriality are generally applied quite differently depending on whether state or federal law is at issue.<sup>108</sup> It is thus “a serious mistake to discuss domestic and international choice-of-law cases interchangeably.”<sup>109</sup> Notably, the mid-century “choice-of-law revolution” that altered the way state courts addressed choice-of-law issues<sup>110</sup> had almost no impact on the way the Supreme Court considered the applicability of federal law abroad.<sup>111</sup>

Thus, in contrast to federal courts considering the reach of U.S. law abroad, courts generally do not regard the decision to apply state law to events abroad in terms of the extraterritorial reach of the state’s power to assert legislative jurisdiction.<sup>112</sup> Rather, states dealing with cases involving multijurisdictional contacts rely on choice-of-law principles that generally apply even-handedly

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<sup>105</sup> See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 256-57 (1992).

<sup>106</sup> See Brilmayer & Norchi, *supra* note 101, at 1224-25 (1992).

<sup>107</sup> See, e.g., *Taylor v. Rodale, Inc.*, No. Civ.A. 04-799, 2004 WL 1196145, at \*2 (E.D. Pa. May 27, 2004) (citing the federal presumption against extraterritoriality in determining whether the Pennsylvania Human Relations Act, a state anti-discrimination statute, applied to out-of-state employees); *Campbell v. Arco Marine, Inc.*, 60 Cal. Rptr. 2d 626, 632 (Cal. Ct. App. 1996) (considering traditional federal analyses concerning choice-of-laws when determining the reach of a California statute to a Washington resident); *Union Underwear Co. v. Barnhart*, 50 S.W.3d 188, 191-92 (Ky. 2001) (citing the federal presumption against extraterritoriality in determining that a Kentucky statute is inapplicable outside of state borders). By no means, however, have state courts consistently taken this approach. Some have broadly applied state statutes to out-of-state events, applying essentially the opposite of a presumption against extraterritoriality. See, e.g., *Burnside v. Simpson Paper Co.*, 864 P.2d 937, 940 (Wash. 1994) (finding that, in the absence of evidence that the legislature intended to limit application of Washington antidiscrimination statute, it applied to nonresidents).

<sup>108</sup> See Brilmayer & Norchi, *supra* note 101, at 1224 (“To the uninitiated, it might seem that issues of state and federal extraterritoriality should be treated substantially the same. . . . However, state international extraterritoriality cases are treated identically to state interstate extraterritoriality cases and differently from federal extraterritoriality cases.”).

<sup>109</sup> See Laycock, *supra* note 105, at 259.

<sup>110</sup> See *infra* Part II.B.

<sup>111</sup> See Brilmayer & Norchi, *supra* note 101, at 1228-29.

<sup>112</sup> See generally Florey, *supra* note 15.

whether the laws that are candidates for being applied in the case are those of sister states, foreign countries, or the forum itself.<sup>113</sup>

What accounts for this failure to think about extraterritorial applications of state law in the same terms used by courts determining the reach of federal law abroad? One explanation may be simply that state courts generally deal with state-law issues and only rarely are asked to choose between state and foreign law or to apply state law to foreign parties or conduct. In addition, there are important doctrinal and practical differences between federal and state law. Courts considering the reach of federal law abroad are almost invariably dealing with the question of a federal statute's applicability; thus the question is generally treated as one of congressional intent.<sup>114</sup> By contrast, the state law at issue is often common law, where the issue of legislative intent cannot come into play.<sup>115</sup> Further, the analysis of whether federal law applies abroad involves, as mentioned, questions of intent and perhaps of comity, but not questions of federal power; in other words, there are no formal restrictions, constitutional or otherwise, on Congress's ability to make federal law applicable abroad if it so pleased.<sup>116</sup> By contrast, the applicability of state law to out-of-state events is restricted by the Due Process and Full Faith and Credit Clauses.<sup>117</sup> While in practice the restrictions imposed by these constitutional provisions are quite modest, the presence of even minor constitutional limits on the application of state law to remote events might lull courts into thinking that choice-of-law decisions that fall within these limits is necessarily proper. This false sense of security perhaps causes state courts applying state law to refrain from performing any further extraterritoriality analysis.

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<sup>113</sup> See Daniel C.K. Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 IOWA L. REV. 165, 181 (1988) (finding state choice-of-law analyses are often applied to cases with foreign contacts, potentially frustrating "uniformity in foreign relations"); Reimann, *supra* note 14, at 577; *infra* text accompanying notes 160-161. If anything, state choice-of-law principles tend to favor the application of forum law, even though this would seem to be the most problematic option in terms of extraterritoriality concerns. See Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 495 (2011).

<sup>114</sup> See, e.g., *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 244 (1990).

<sup>115</sup> Interestingly, where state statutory law is at issue, courts have occasionally performed an extraterritoriality analysis that mimics that applied to determine the applicability of federal law abroad. See, e.g., *Taylor v. Rodale, Inc.*, No. Civ.A. 04-799, 2004 WL 1196145, at \*2 (E.D. Pa. May 27, 2004); *Campbell v. Arco Marine, Inc.*, 60 Cal. Rptr. 2d 626, 632 (Cal. Ct. App. 1996); *Union Underwear Co. v. Barnhart*, 50 S.W.3d 188, 191-92 (Ky. 2001).

<sup>116</sup> See Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 5 n.12-15 (1992). But see Brilmayer & Norchi, *supra* note 101, at 1223 (arguing that the Fifth Amendment Due Process Clause limits federal power to apply law extraterritorially).

<sup>117</sup> See *Campbell*, 60 Cal. Rptr. 2d at 632; Brilmayer & Norchi, *supra* note 101, at 1223.

B. *The State-Law vs. Foreign-Law Choice*

State choice-of-law regimes are diverse. This is perhaps unsurprising given the minimal constitutional constraints on states' abilities to apply whatever laws they wish. At the same time, however, only recently has such diversity arisen. For the majority of state courts' history, choice-of-law thinking was dominated by principles advanced perhaps most influentially by Joseph Beale and incorporated into the first *Restatement of Conflict of Laws*. Beale argued that a cause of action came into being in the place where the last event necessary to give rise to it occurred and that the law of that place should govern regardless of the court in which the action was brought.<sup>118</sup> Because Beale believed that the cause of action became "vested" at the time this crucial final event occurred, his approach is referred to as one of "vested rights."<sup>119</sup> While having the advantages of simplicity and (at least in theory) predictability, Beale's approach was criticized for its formalism, slighting of important additional factors, and lack of coherent intellectual foundation.<sup>120</sup> Beginning with the New York case *Auten v. Auten*<sup>121</sup> in 1954 and gathering force in the 1960s, courts began to experiment with different approaches. While sharply divergent from each other both in theoretical underpinnings and, in some cases, results produced, these modern approaches generally broke from past practice in a somewhat similar way – by expanding the range of contacts and elements of the action that courts could consider in making the choice-of-law determination.<sup>122</sup> The New York approach, for example, required consideration of the dispute's "center of gravity," which considered the number of contacts the dispute had with each jurisdiction and the relative interest those jurisdictions had in having their own law applied.<sup>123</sup>

While the vested rights approach has been described as "territorial,"<sup>124</sup> in contrast to those that (mostly) supplanted it,<sup>125</sup> it is not unique in this respect;

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<sup>118</sup> See JOSEPH HENRY BEALE, A TREATISE ON THE CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW § 73, at 105 (1916).

<sup>119</sup> See Florey, *supra* note 15, at 1169.

<sup>120</sup> See, e.g., David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 175 (1933); Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 174-77; Symposium, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1219-57 (1963).

<sup>121</sup> 124 N.E.2d 99, 101-04 (N.Y. 1954). New York expanded the use of the "center of gravity" approach to torts cases in the arguably even more significant decision of *Babcock v. Jackson*. 191 N.E.2d 279, 282-83 (N.Y. 1963).

<sup>122</sup> E.g., 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

<sup>123</sup> See *Babcock*, 191 N.E.2d at 282-83.

<sup>124</sup> Brilmayer & Norchi, *supra* note 101, at 1225-26.

<sup>125</sup> A handful of jurisdictions, in fact, still use the first *Restatement's* methodology, mostly citing its fostering of predictable outcomes as a reason for not abandoning it. See, e.g., *Paul v. Nat'l Life*, 352 S.E.2d 550, 554-55 (W. Va. 1986) (rejecting modern approaches in favor of the traditional *lex loci delicti* (law of the place of the wrong) principle in tort

all choice-of-law approaches generally rely on some sort of weighing of territorial contacts in determining the proper law to apply.<sup>126</sup> Further, while the description of the vested rights approach as a “territorial” approach suggests that it confined states to events within their territorial boundaries, the vested rights approach in some respects facilitated what was in effect the extraterritorial regulation of conduct taking place in one state by the courts of another state.<sup>127</sup> If, for example, a train crash occurred in Mississippi as a result of negligent conduct in Alabama, the Mississippi courts would apply Mississippi law notwithstanding the fact that the negligent conduct had occurred in Alabama.<sup>128</sup>

The more modern choice-of-law approaches tend to vary by state. A full discussion of the varied choice-of-law approaches applied by the fifty states is beyond the scope of this Article, particularly because many states apply distinct methodologies to different areas of law (such as torts and contracts).<sup>129</sup> Most state choice-of-law approaches, however, direct courts to consider some combination of relevant contacts and state interests. The most commonly followed approach, currently applied by twenty-three states in contract actions and twenty-four states in tort actions,<sup>130</sup> is that of the *Restatement (Second) of Conflict of Laws*, which directs courts to choose the law of the state with the “most significant relationship” to the cause of action after consideration of a variety of factors.<sup>131</sup> For example, in tort cases, courts are to consider the place of injury; the place of conduct causing the injury; the domicile, residence, and

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cases, stating that clear rules “get cases settled quickly and cheaply”).

<sup>126</sup> See Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 Yale L.J. 1277, 1306 (1989) (explaining that choice of law cannot escape some sort of territoriality). A partial exception might be methodologies that direct courts to select the “better” law or that are more consistent with modern trends. Even these choice-of-law principles, however, rely on territorial contacts to winnow down the available possibilities. See, e.g., Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1586-88 (1966) (advocating that courts consider several factors, including which law is “better,” in resolving choice-of-law issues).

<sup>127</sup> See Florey, *supra* note 15, at 1073-74.

<sup>128</sup> These are, more or less, the facts of the famous “vested rights” case of *Alabama Great Southern Rail Road Co. v. Carroll*, except that in the actual case it was an Alabama court that forbore application of its own law based on the fact that the accident had occurred in Mississippi. 11 So. 803, 807 (Ala. 1892). I have changed the decision-making court to a Mississippi court in my hypothetical to illustrate the phenomenon vested rights principles may create of states applying forum law to conduct outside state borders.

<sup>129</sup> For an overview of the different methodologies applied by the states, see Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 331 (2011).

<sup>130</sup> See *id.*

<sup>131</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

place of business of the parties; and the place where the parties' relationship was centered.<sup>132</sup>

Other states' approaches center on state interests. California courts, for example, apply "comparative impairment" analysis, under which "conflicts [are] resolved by applying the law of the state whose interest would be the more impaired if its law were not applied."<sup>133</sup> Some states, as noted, continue to subscribe to the traditional (i.e., first *Restatement*) approach, while others follow idiosyncratic approaches that, in some cases, combine elements of various modern methodologies.<sup>134</sup>

As with the vested rights approach, more modern principles may also result in situations in which state law is applied to conduct occurring beyond its borders. The California case that established the comparative impairment approach is itself an example of this phenomenon. In *Bernhard v. Harrah's Club*, a California court found that a Nevada tavern-keeper could be liable under California's dram-shop act for providing alcohol in Nevada to an intoxicated couple who had caused an accident while returning to California.<sup>135</sup> Though the relevant conduct occurred in Nevada, the court found that California's interest in safe public highways would be impaired if California could not impose liability on Nevada barkeepers who foreseeably caused harm in California.<sup>136</sup> *Bernhard* thus showed that Nevada bars might be subject to liability under California standards pursuant to the actions of a California court.

The possibility that the law of one state may apply to conduct or events in another state is heightened by the preference for forum law that many choice-of-law regimes contain either explicitly or in practice.<sup>137</sup> If state courts prefer their own law, they may end up applying that law to extraterritorial conduct.<sup>138</sup> Forum-law preference thus might be said to function as almost the opposite of a presumption against extraterritoriality.

There is nothing, of course, inherently improper about state courts' decisions having this sort of extraterritorial effect. As Gillian Metzger has explained, "In practice, states exert regulatory control over each other all the

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<sup>132</sup> *Id.*

<sup>133</sup> *Bernhard v. Harrah's Club*, 546 P.2d 719, 723 (Cal. 1976).

<sup>134</sup> *See* Symeonides, *supra* note 129, at 331.

<sup>135</sup> *Bernhard*, 546 P.2d at 727-28.

<sup>136</sup> *Id.* at 725. Because Nevada also proscribed serving drinks to intoxicated patrons, the court reasoned that bartenders would not be subject to conflicting demands based on the state citizenship of their patrons; rather, they would simply suffer the possibility of increased liability if a customer caused harm in California. *See id.*

<sup>137</sup> *See* Christopher A. Whytock, *supra* note 113, at 495 ("According to choice-of-law scholars, this 'choice-of-law revolution' gave rise to a strong bias in favor of applying domestic law. . . . This pro-domestic-law bias purportedly encourages transnational forum shopping into U.S. courts by raising plaintiffs' expectations that judges will apply plaintiff-favoring U.S. substantive law in transnational litigation.").

<sup>138</sup> *See id.*

time.”<sup>139</sup> Delaware law, for example, has widespread applicability because of the number of corporations incorporated in the state.<sup>140</sup> As Mark Rosen has observed, the fact that state law extends to conduct outside the state’s borders in some cases – or that two or more states may have overlapping regulatory authority over certain conduct – rarely causes problems in practice.<sup>141</sup> A great deal of domestic litigation involves contacts with two or more states; state courts have every incentive to manage such inter-jurisdictional disputes amicably and little incentive to overreach in the application of their own state’s law.

Moreover, application of state law to out-of-state conduct only rarely runs the risk of violating constitutional limits.<sup>142</sup> The constitutional constraints on states’ choice-of-law decisions are quite modest and are usually (albeit not invariably) satisfied in situations in which minimum contacts-based personal jurisdiction is present. This is because the test for minimum contacts<sup>143</sup> strongly resembles the test for a constitutionally valid choice of law.<sup>144</sup> While the choice-of-law standard is theoretically more exacting, requiring a “significant aggregation of contacts” rather than simply “certain minimum contacts,” in practice it has seldom been applied stringently.<sup>145</sup> As the Court observed in another choice-of-law case, *Sun Oil Co. v. Wortman*, “[I]t is frequently the case . . . that a court can lawfully apply either the law of one State or the contrary law of another.”<sup>146</sup>

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<sup>139</sup> Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1521 (2007).

<sup>140</sup> *See id.*

<sup>141</sup> *See* Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1149 (2010) (“American law has been able to deal with conflicts in the many contexts of [overlapping authority] by means of assorted practices and through creating . . . several conflict-resolution mechanisms.”).

<sup>142</sup> *See id.*

<sup>143</sup> The test requires “certain minimum contacts” with the forum state “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>144</sup> The test requires a “significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction,” as the minimum requirement for applying a particular state’s law. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 317 (1981). For a discussion of the standards’ similarities, see Florey, *supra* note 15, at 1058-59, and Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309, 1333 (1999) (“Because of the ‘minimum contacts’ requirement for judicial jurisdiction, a court will rarely lack the necessary ‘significant contacts.’” (footnotes omitted)).

<sup>145</sup> *See* Laycock, *supra* note 105, at 257-58 (making the case that “[a]t the constitutional level, the modern Supreme Court has all but abandoned the field” of choice-of-law limitations).

<sup>146</sup> 486 U.S. 717, 727 (1988); *see also* Juenger, *supra* note 144, at 1333 (stating that the

The common preference for forum law, the general acceptance of some de facto state extraterritorial regulation via court decision, and the modest constitutional limits on state choice-of-law principles all reinforce the blurring of judicial and legislative jurisdiction in the state-law context. That is, where a state court has personal jurisdiction over the defendant, it usually may (and frequently does) apply its own law to the action.<sup>147</sup> Further, a well-known debate in conflicts circles reinforces the notion that the question of a state court's power over the defendant and its power to apply any law it chooses to the defendant are essentially similar questions, if not indeed the same one. "Local law" theory, favored by many choice-of-law reformers, holds that all law applied by the courts of a given state is in fact forum law.<sup>148</sup> In other words, whether a California court applies a California rule or a Nevada one, it is always in some sense applying California law; Nevada law has no applicability of its own force.<sup>149</sup> Some conflicts scholars have mocked this theory; David Cavers famously analogized it to his four-year-old son's decision to reconcile himself to eating tuna fish by calling it "[f]ish made of chicken."<sup>150</sup> But controversial or not, local law theory has further obscured the difference between judicial and legislative jurisdiction by treating the personal jurisdiction of the California courts as essentially coextensive with the ability of California courts to apply whatever law they choose.

In the domestic context, some logic exists to this conflation of power over the person and power to choose what law will be applied to the litigants. Common law may differ from state to state, but it is often perceived to share an underlying framework of tradition and practice.<sup>151</sup> Further, all states are bound by the Constitution and by the preemptive force of other federal law, meaning that state law should conform to national norms of fairness and due process.<sup>152</sup> As a result, it seems reasonable to assume that a defendant forced to defend in a faraway state – say, a Floridian subject to process in Arizona – is (all else

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"loose verbiage" of the *Hague* test "leaves state judiciaries free to experiment").

<sup>147</sup> See, e.g., *Int'l Shoe*, 326 U.S. at 320-22 (affirming the decision of the Washington Supreme Court to apply its own law to an out-of-state company after finding that the company had "sufficient contacts" with the State). This also applies, of course, to federal courts applying state law pursuant to state choice-of-law principles.

<sup>148</sup> See Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 988-89 (1991).

<sup>149</sup> See *id.* at 988.

<sup>150</sup> *Id.* at 989 (quoting David F. Cavers, *The Two "Local Law" Theories*, 63 HARV. L. REV. 822, 823 (1950)).

<sup>151</sup> See Patrick H. Martin, *The BP Spill and the Meaning of "Gross Negligence or Willful Misconduct"*, 71 LA. L. REV. 957, 976 (2011) (explaining that "[b]ecause much of tort law in the United States came from an original common source, the common law of England, we often operate from an assumption that tort law is the same from state to state," then going on to explain that this assumption is "an illusion, albeit an occasionally attractive one").

<sup>152</sup> 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 . . .").

being equal) much more likely to be concerned with the inconvenience of defending in a distant forum than with the possible imposition of having Arizona law applied.<sup>153</sup> Thus any consideration of whether Arizona is illegitimately extending its power over the defendant is likely to begin and end with the question of personal jurisdiction.

The question becomes more complicated, however, when a state applies its law to a dispute with substantial foreign elements. In such a case, the possibility of conflict is more acute; the harmonizing mechanisms that ensure that the law of one state will generally not dramatically diverge from the law of other states are simply not present in the international context.<sup>154</sup> Further, disputes involving foreign litigants or substantial foreign elements are far from the typical fare in state courts, and it seems likely that state courts rarely craft law with them in mind. While state courts have tended to act in ways that permit the harmonious exercise of concurrent regulatory power with other states, they may lack comparable experience negotiating conflicts between state law and foreign law.<sup>155</sup> Thus, in contrast to the Floridian forced to litigate in Arizona, a resident of France in the same position is more likely to perceive two independent burdens: first, the trouble of having to defend in a distant forum and, second, the unfairness, surprise, or other due process considerations entailed in having Arizona state law applied to a predominantly French dispute.<sup>156</sup>

This conclusion in some ways seems so obvious as to hardly be worth elaborating upon. The fact that international norms recognize a difference between legislative and judicial jurisdiction attests that these two forms of jurisdiction are commonly felt to affect litigants in different ways that require separate analyses. The concerns underlying this separation permeate the Supreme Court's case law on the extraterritorial application of U.S. federal law. The Court has expressed the opinion that applying U.S. law too broadly may end up subjecting foreign actors to competing regulatory commands or simply creating friction with other nations. In *Aramco*, for example, the Court explained that the presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which

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<sup>153</sup> While there are some situations in which the choice of a particular state's law will strongly favor one party or the other, there is no reason in the above scenario why a Floridian should systematically and consistently prefer Florida law to Arizona law.

<sup>154</sup> See Rosen, *supra* note 141, at 1149.

<sup>155</sup> See *id.*

<sup>156</sup> The burden of having to travel to Arizona may itself be substantially more severe for a French defendant than an American one who merely happens to live in another state. This is partly because the French defendant has farther to travel and perhaps language and cultural barriers to surmount and partly because Europeans are frequently skeptical of many aspects of American civil procedure and thus "are said to fear U.S. courts like medieval torture chambers." Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1006 (2006).

could result in international discord.”<sup>157</sup> Likewise, the *Morrison* Court was concerned about “the interference with foreign securities regulation that application of § 10(b) abroad would produce.”<sup>158</sup> Of course, it is open to debate both how serious these problems are and whether application of a sweeping presumption against extraterritoriality is the proper mechanism for addressing them. Nonetheless, the Court’s remarks highlight the fact that application of U.S. law to conduct or actors abroad may raise issues not present in the domestic context.

By contrast, in the state context, analyses of the court’s legislative and judicial jurisdiction, even if technically separate, tend to merge in practice.<sup>159</sup> Thus no obvious mechanisms exist for addressing any special concerns that may be raised by the application of state law to foreign events. Further, most state choice-of-law principles treat all “foreign” law, whether it is the law of a sister state or the law of a foreign nation, identically. As one commentator observed, for example, under the influential *Restatement (Second) Conflict of Laws*, “[t]o put it bluntly . . . it does not matter whether the choice is between the law of New York and New Hampshire or between the law of New York and New Guinea.”<sup>160</sup> This trend potentially has negative consequences: state courts may choose to ignore any federal interests that may be present in cases with an international dimension, and the wide diversity of state choice-of-law systems “frustrates the important federal interest in maintaining uniformity in foreign relations.”<sup>161</sup>

Further, apart from the fairly minimal constitutional limits that may exist on a state’s choice-of-law decisions, there does not appear to be any limit grounded in the Constitution or any other federal-law principle to the application of state law (particularly state common law) to conduct that occurs abroad. In rare cases, state laws that attempt to regulate conduct outside the United States or that interfere with the conduct of foreign affairs in other ways may be invalidated under principles of preemption or the dormant Foreign Commerce Clause.<sup>162</sup> Such principles, however, have generally not been found to limit state power to apply state law to traditional tort or breach of warranty actions.<sup>163</sup>

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<sup>157</sup> *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991).

<sup>158</sup> *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2886 (2010).

<sup>159</sup> *See supra* notes 135-150 and accompanying text. The same is true, of course, of federal courts deciding whether state law should be applied to a dispute with many out-of-state connections.

<sup>160</sup> Reimann, *supra* note 14, at 577.

<sup>161</sup> Chow, *supra* note 113, at 181.

<sup>162</sup> *See Lear*, *supra* note 90, at 123-25.

<sup>163</sup> *See id.* at 129-30 (arguing that although “Congress has restricted the scope of federal power to domestic accidents” such restrictions “arguably say[] nothing about state regulatory power in the foreign injury context”). The implicit distinction between state common law and state statutory law is not unique to the international realm; a similar

None of this is to say that state courts or federal courts applying state law are heedless of foreign relations issues. Most state courts, for example, routinely enforce foreign judgments as a matter of comity.<sup>164</sup> Furthermore, forum non conveniens dismissals in favor of a foreign court are a time-honored way for both federal and state courts to avoid adjudicating cases with substantial foreign elements.<sup>165</sup> In deciding whether to grant a forum non conveniens dismissal, courts consider not only so-called “private interest factors,” such as the location of evidence and witnesses, but also several “public interest factors,” including “the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law.”<sup>166</sup> State courts may use other devices to avoid unnecessary friction with foreign nations; increasingly, for example, inquiry into the “reasonableness” of asserting personal jurisdiction in a given situation fulfills this function, operating in effect like a supplemental forum non conveniens doctrine.<sup>167</sup>

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(though little-scrutinized) distinction exists between the treatments of statutory law and common law that apply extraterritorially to sister states. State regulation that attempts to reach outside state borders to regulate conduct in sister states may be struck down under the dormant Commerce Clause, under a test that at its strictest may have the effect of invalidating state legislation that applies “to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State,” that has the “practical effect . . . [of] control[ing] conduct beyond the boundaries of the State,” or that creates inconsistency “arising from the projection of one state regulatory regime into the jurisdiction of another State.” *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (plurality opinion) (citations omitted) (internal quotation marks omitted). Because these tests have been applied inconsistently and with varying levels of strictness, commentators disagree about the extent to which they represent real and meaningful limitations on state extraterritorial regulation; nonetheless, it is clear that some such limits exist. *See Florey, supra* note 15, at 1090-91.

<sup>164</sup> *See* John A. Spanogle, *The Enforcement of Foreign Judgments in the U.S. – A Matter of State Law in Federal Courts*, 13 U.S.-MEX. L.J. 85, 86 (2005) (describing the rise of comity-based principles in state courts). An overwhelming majority of states (all but Michigan, which repealed the statute in 2008, *see* MICH. COMP. LAWS § 691.1143 (2008), and Vermont) have enacted the Uniform Foreign Money Judgments Recognition Act, which promotes the presumptive recognition of foreign judgments. *See* ROBERT A. SOLOMON ET AL., *INTERNATIONAL ENFORCEMENT ORDERS OF FOREIGN JUDGMENTS* 554 (Paul Hopkins ed., 2006).

<sup>165</sup> *See* Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609, 624 (2008) (explaining that most state courts apply the same forum non conveniens doctrine as articulated by the Supreme Court in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)).

<sup>166</sup> *See Piper Aircraft*, 454 U.S. at 241 n.6.

<sup>167</sup> *See, e.g., J. M. Sahlein Music Co. v. Nippon Gakki Co.*, 243 Cal. Rptr. 4, 8 (Cal. Ct. App. 1987) (affirming the dismissal on personal jurisdiction grounds while explaining that courts should be particularly cautious in asserting jurisdiction in cases involving foreign litigants).

Forum non conveniens and similar doctrines do not, however, ensure that all cases with foreign elements will be channeled to foreign forums, and such doctrines do nothing to ensure that state courts will refrain from applying their own law to those cases that are retained, regardless of where the central conduct occurred. Since forum non conveniens analysis generally treats the presence of a foreign-law issue as a factor favoring dismissal,<sup>168</sup> cases in which the court determines that state law should be applied are more likely to remain in a state forum. Of course, the extent to which state law will be applied is probably a very rough proxy for the “Americanness” (or, conversely, the “foreignness”) of the dispute, in the sense that state law is more likely to be selected when a dispute has significant contacts to that state.<sup>169</sup> This is by no means, however, an exact correspondence, especially given the diversity of both choice-of-law *and* forum-non-conveniens regimes and the common preference for forum law in tiebreaker situations.<sup>170</sup> Further, connections to the United States that are relatively incidental to the substance of the case could have a reasonably large impact on efficiency factors, tilting the balance in the forum-non-conveniens analysis toward adjudication in the United States. In *Morrison*, for example, plaintiffs maintained that much of the relevant evidence of fraud would have been located in Florida and that it would thus be logical to adjudicate the suit in Florida despite the many foreign elements of the case.<sup>171</sup> Likewise, courts may fail to grant forum-non-conveniens motions because they are deferential to the forum choices of American plaintiffs, regardless of whether the defendant is foreign or the relevant conduct took place abroad.<sup>172</sup>

Overall, then, the experience of state and federal courts applying state law to foreign disputes presents a mixed picture. On the one hand, it is difficult to find examples of states overreaching dramatically in applying state law to

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<sup>168</sup> *E.g.*, *Piper Aircraft*, 454 U.S. at 241 n.6.

<sup>169</sup> Further, consideration of the policy concerns of applying state law may be subsumed into the forum non conveniens analysis and point toward dismissal of many cases with substantial foreign elements on the grounds that adjudication of the case in a U.S. forum, especially if state law is to be applied, may interfere with another nation’s policy objectives. *See, e.g.*, *Stangvik v. Shiley Inc.*, 819 P.2d 14, 24 (1991) (pointing out, in affirming forum non conveniens dismissal, that “interests and policy concerns of Sweden and Norway in the litigation . . . might be threatened by applying American regulation of medical products and liability laws to actions brought by foreign citizens”).

<sup>170</sup> *See* Whytock, *supra* note 113, at 495 (explaining that “the modern approaches have an inherent forum law preference” and that “[t]his pro-domestic-law bias purportedly encourages transnational forum shopping into U.S. courts by raising plaintiffs’ expectations that judges will apply plaintiff-favoring U.S. substantive law in transnational litigation” (footnotes omitted) (internal quotation marks omitted)).

<sup>171</sup> *See* Transcript of Oral Argument at 10, *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010) (No. 08-1191).

<sup>172</sup> *See* Michaels, *supra* note 156, at 1055 (“U.S. law distinguishes between domestic and foreign *plaintiffs* in the application of *forum non conveniens*.” (emphasis added)).

foreign events.<sup>173</sup> This is likely the result of several factors: the fact that, relative to federal courts, state courts are less commonly asked to decide cases with substantial foreign elements;<sup>174</sup> the fact that state courts have general experience in mediating issues of concurrent regulation with other jurisdictions;<sup>175</sup> and the fact that state courts have devices such as forum non conveniens to deal with potentially troublesome foreign cases.<sup>176</sup> On the other hand, however, the overall framework for application of state law to foreign disputes is radically different from that used for federal law. Whereas federal law is limited in its extraterritorial effect by the application of an increasingly strict presumption against extraterritoriality, state law, particularly state common law, is subject to no comparable presumption;<sup>177</sup> cases with foreign elements are generally treated exactly like cases involving sister states for state choice-of-law purposes.<sup>178</sup> Indeed, state choice-of-law principles generally provide little or no guidance to courts about how to think about the particular issues that cases with foreign elements may pose.<sup>179</sup>

As a result, increasing resort by foreign plaintiffs to state courts in the wake of *Morrison* has the potential to produce an odd disparity between the application of federal versus state law to foreign events – a situation in which federal law does not apply extraterritorially at all but where essentially equivalent state law applies frequently and without meaningful limit. The following Part considers some of the implications of this potential scenario.

### III. MAKING SENSE OF THE FEDERAL LAW/STATE LAW DISPARITY

What should we make of the fact that, in many areas of law, state law is more likely than federal law to be applied outside the United States? It is a tempting conclusion that the divergence between extraterritorial application of state and federal laws should be resolved in favor of scaling back the use of state laws to resolve disputes with strong foreign elements (or, put differently, disputes that can be seen as an assertion of state or federal regulatory

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<sup>173</sup> This is not to say that those cases do not exist. As previously noted, *Holmes v. Syntex Laboratories*, 202 Cal. Rptr. 773, 783-84 (Cal. Ct. App. 1984), is arguably an example of such a case, though its approach was later disapproved by the California Supreme Court. See *Stangvik v. Shiley Inc.*, 819 P.2d 14, 27 (Cal. 1991).

<sup>174</sup> See Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 15-16 (1998) (providing empirical evidence suggesting that foreign defendants “see federal courts as more congenial, and when able will remove the case to that forum”); see also Whytock, *supra* note 113, at 530 n.215 (providing several citations suggesting that foreign litigants have historically preferred federal court, while acknowledging that this preference may be changing).

<sup>175</sup> See Rosen, *supra* note 141, at 1149.

<sup>176</sup> See Solimine, *supra* note 174, at 23 n.137.

<sup>177</sup> See *supra* Part II.A.

<sup>178</sup> See Rosen, *supra* note 141, at 1149.

<sup>179</sup> See Florey, *supra* note 15, at 1058-59.

jurisdiction over foreign conduct). I want to strongly resist this implication. Instead, I want to point toward a nearly opposite one: the relatively uncontroversial application of state law to foreign conduct should weigh in favor of a less exacting application of the presumption against the extraterritorial application of federal law than has become the trend in the Supreme Court. At the same time, however, courts applying state law should strive for a fuller understanding of the extraterritoriality problem implicit in state choice-of-law decisions and explicitly recognize that the state-law versus foreign-law determination calls for a different sort of analysis from sister-state choice-of-law analysis.

A. *Implications for the Presumption Against Extraterritoriality*

As a starting point, the disparity between the extraterritorial application of state and federal law has implications for the way we think about the presumption against extraterritoriality as the Supreme Court has applied it. The Court has justified the presumption against extraterritoriality in two principal ways, neither of which appears to take account of the implications of the possibility that state law will fill the void when the applicability of federal law is restricted.

Most basically, the Court has justified the presumption as a statement about what Congress, in all likelihood, intended. The Court has stressed that Congress, if it wishes, has the power to legislate extraterritorially; no constitutional or other limitation precludes it from doing so.<sup>180</sup> Thus, as the Court noted in *Morrison*, “[T]his principle represents a canon of construction, or a presumption about a statute’s meaning, rather than a limit upon Congress’s power to legislate.”<sup>181</sup> Instead, the presumption “rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters.”<sup>182</sup> As an attempt to divine congressional intent, the presumption is self-reinforcing, since Congress is now presumed to legislate against its backdrop.<sup>183</sup> Of course, it is questionable whether the presumption represents an accurate understanding of Congress’s likely intentions, given that Congress reacted to both *Aramco* and *Morrison* by attempting to overrule them, at least in part.<sup>184</sup> Nonetheless, unlike some other clear statement rules<sup>185</sup> that are

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<sup>180</sup> See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (“[U]nless there is affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions.” (citation omitted) (internal quotation marks omitted)).

<sup>181</sup> *Id.* at 2869.

<sup>182</sup> *Id.*

<sup>183</sup> See *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991).

<sup>184</sup> See *Smith v. Petra Cablevision Corp.*, 793 F. Supp. 417, 419 n.3 (E.D.N.Y. 1992); *supra* note 74 and accompanying text.

<sup>185</sup> The presumption against extraterritoriality can be put in this category, since overcoming it requires “the affirmative intention of the Congress clearly expressed.” See

motivated in part by the desire to keep a legislative body squarely on the right side of some slippery prohibition,<sup>186</sup> the presumption against extraterritoriality appears to rest purely on a belief about how Congress would have wished its legislation to be interpreted. The Court made a particularly forceful pronouncement to this effect in interpreting the scope of the Federal Tort Claims Act in *Smith v. United States*: “We think these norms of statutory construction have quite likely led us to the same conclusion that the 79th Congress would have reached had it expressly considered the question we now decide.”<sup>187</sup>

At the same time, this aspect of the presumption is not the whole story. Even as the Court has proclaimed the presumption against extraterritoriality to be solely a matter of divining likely congressional intent, it has also articulated policy rationales for why the presumption is desirable from a policy, efficiency, and foreign-relations standpoint.<sup>188</sup> Thus, the rule “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord”<sup>189</sup> even though it applies “regardless of whether there is a risk of conflict between the American statute and a foreign law.”<sup>190</sup> Indeed, in *Morrison*, the Court called particular attention to the “probability of incompatibility” between American securities law and the law of other nations.<sup>191</sup> The *Morrison* Court also highlighted another presumed virtue of the presumption against extraterritoriality: the fact that it produces predictable results.<sup>192</sup> The Court cited commentary criticizing the uncertain application of the Second Circuit’s conduct and effects tests<sup>193</sup> and by contrast touted application of the presumption as “preserving a stable background against which Congress can legislate with predictable effects”<sup>194</sup> and creating a “clear test” that does not “interfere[] with foreign securities regulation.”<sup>195</sup>

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*Aramco*, 499 U.S. at 248.

<sup>186</sup> See, for example, John Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 399 (2010), who argues that many clear statement rules “impose a clarity tax on Congress by insisting that Congress legislate exceptionally clearly when it wishes to achieve a statutory outcome that threatens to intrude upon some judicially identified constitutional value.” *Id.*

<sup>187</sup> *Smith v. United States*, 507 U.S. 197, 204-05 (1992).

<sup>188</sup> See, e.g., *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2879 (2010); *Aramco*, 499 U.S. at 248.

<sup>189</sup> See *Aramco*, 499 U.S. at 248.

<sup>190</sup> See *Morrison*, 130 S. Ct. at 2877-78; *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173-74 (1992) (finding that the presumption “has a foundation broader than the desire to avoid conflict with the laws of other nations”).

<sup>191</sup> See *Morrison*, 130 S. Ct. at 2879.

<sup>192</sup> See *id.* at 2880-81.

<sup>193</sup> See *id.* at 2880 (“Commentators have criticized the unpredictable and inconsistent application of §10(b) to transnational cases.”).

<sup>194</sup> See *id.* at 2881.

<sup>195</sup> See *id.* at 2886.

Finally, the Court appeared to be motivated by simple distaste for foreign investors, who it saw as perhaps exploiting the American legal system, remarking that the United States had become “the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.”<sup>196</sup>

The Court, with the exception of Justice Breyer’s brief reference,<sup>197</sup> did not explicitly consider the consequences of the potential replacement of a federal-law “Shangri-La” by a state-law one.<sup>198</sup> It seems fair to say, however, that the possible use of state law to fill a void left by federal law should alter the Supreme Court’s calculus in deciding to apply the presumption.

To begin with, the notion that the presumption represents an accurate understanding of congressional intent appears much more problematic when the role of state law is taken into account. While it may be reasonable to believe, as the Court has suggested, that domestic affairs are, in general, Congress’s dominant concern,<sup>199</sup> it is also true that Congress and the federal government, rather than the states, are the main players in dealing with international issues.<sup>200</sup> If Congress intended to offer a federal alternative to state causes of action domestically, it seems odd to assume that Congress did not intend for a federal option to be available in a case with an extraterritorial dimension, especially if state options are available. Indeed, Congress might be *more* interested in having federal rather than state law applied where the case involves foreign elements. For example, the existence of a federal cause of action, given that it is inherently uniform in all jurisdictions in which it is brought, might foster a predictability that is particularly desirable in the international arena.

Further, whenever Congress legislates in an area in which state law also exists, it is generally assumed that Congress wishes for federal law to play a dominant, standard-setting role, even when it does not outright preempt state causes of action. In other words, when Congress legislates, even without the intent to preempt concurrent common-law remedies, it anticipates that federal law will set a regulatory baseline that will provide greater predictability and consistency.<sup>201</sup> In some cases, Congress may also be interested in providing a

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<sup>196</sup> *See id.*

<sup>197</sup> *See id.* at 2888 (Breyer, J., concurring).

<sup>198</sup> *See id.*

<sup>199</sup> *See, e.g., id.* at 2877 (majority opinion).

<sup>200</sup> *See, for example, the Supreme Court’s strong statement of this principle in Hines v. Davidovitz:* “Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.” 312 U.S. 52, 63 (1941).

<sup>201</sup> For example, in a review of the book *Preemption Choice: The Theory, Law, and Reality of Federalism’s Core Question*, Michael Greve summarizes the contributors’ view of concurrent regulation:

Congress, the contributors agree, should use its powers to set a regulatory “floor”

more certain route to federal jurisdiction or a cause of action that will be more desirable for certain plaintiffs.<sup>202</sup>

If these general considerations prevail in the realm of domestic legislation, it seems difficult to understand why they should not also do so in the foreign arena. That is, if Congress usually anticipates in the domestic context that federal regulation will set baseline standards and foster greater consistency than state law alone can provide, why should it wish extraterritorial conduct to be left to a patchwork of state regulation with no moderating federal impulse? Presumably, Congress would expect the same default relationship between federal and state law to prevail abroad as well as at home.<sup>203</sup> Even if one supposes that Congress might hesitate to legislate in the foreign arena out of a wish to avoid the inappropriate projection of U.S. power, the fact that state law will still apply in federal law's absence entirely undermines such a motive. When viewed vis-à-vis foreign conduct and actors, state law is just as much a manifestation of the power of the United States as federal law. Thus it would be surprising that Congress would choose an entirely domestic focus for its legislation in situations where the law of individual states might still apply abroad.

The fact that the potential applicability of state law challenges the Court's ideas of congressional intent does not, of course, amount to a definitive case against the presumption against extraterritoriality in itself. The Court has applied many interpretive canons that are justified by values other than simply effectuating congressional intent.<sup>204</sup> In the context of determining the extraterritorial reach of federal statutes, Professor Knox argued that consistent principles rooted in tradition are valuable even if they do not necessarily reflect

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underneath the states. In the absence of federal minimum requirements (for example, for product safety or environmental quality), states are likely to "race to the bottom." Above the floor, however, states should be left free to adopt more stringent, protective regulations. Concurrent state and federal regulation – and, for producers in interstate commerce, a polyphony of at least fifty-one regulators for any given product or transaction – ought to be the general rule.

Michael S. Greve, *Preemption Choice in Context*, 26 CONST. COMMENT. 679, 680-81 (2010) (reviewing WILLIAM W. BUSBEE, *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION* (2009)) (footnote omitted). In some respects, it seems obvious that Congress must have some such intentions; if Congress did not intend to supplement state law in some way, why would it regulate at all in areas of traditional state concern?

<sup>202</sup> In the area of securities regulation, for example, plaintiffs may prefer federal law to state law because federal law does not require individualized proof of reliance, making it easier to certify a class action. See Fredericks, *supra* note 11, at 101.

<sup>203</sup> In the case of securities litigation, moreover, the Court's construction of federal law in *Morrison* not only upsets this balance but *upends* it, to the extent that *Morrison* eliminates the federal-preemption obstacle to some state-law litigation that would otherwise exist under SLUSA. See Kirby, *supra* note 11, at 256.

<sup>204</sup> See Manning, *supra* note 186, at 402 (arguing that many clear statement rules "seek to shift the burden of inertia in favor of the constitutional values at stake").

“a genuine effort by judges to apply the assumed preferences of the legislature.”<sup>205</sup> Nonetheless, in defending its decision to extend the presumption, the Court has relied heavily on the notion that it represents an attempt to make a realistic guess about Congress’s usual intentions.<sup>206</sup> Thus, to the extent the presumption systematically fails to reflect Congress’s wishes, the Court at a minimum faces an increased burden to justify the presumption in other ways.

Further, the potential applicability of state law is, if anything, even more relevant to the Court’s policy-based justifications for the presumption. Although the Court has sometimes framed the presumption as a pure question of congressional intent, it seems clear, particularly in the wake of *Morrison*, that policy issues not only play into the Court’s understanding of congressional intent but also serve as additional justifications for the presumption. Thus the Court in *Morrison* emphasized the gains in predictability from avoiding the presumption and the desirability of avoiding conflict with foreign laws.<sup>207</sup> Even beyond that, Justice Scalia’s majority opinion displayed intense skepticism of the “allegedly cheated” foreign investors who seek the “Shangri-La” of U.S. courts.<sup>208</sup> The possible substitution of state-law causes of action calls into question the fundamental basis for these policy arguments. If foreign conduct is increasingly subject to the differing regulatory demands of the fifty states, results are unlikely to be predictable, conflict with the laws of foreign jurisdictions is likely to increase rather than decrease, and foreign investors need only adjust their compass slightly to find a new Shangri-La. All of this is true even if state law proves less desirable than foreign law to foreigners interested in litigating in the United States. Whatever the relative appeal of state and federal law, which will vary depending on the state, the substantive area, and the particular conduct in question, state law and procedure are sufficiently similar to their federal counterparts in many areas to significantly appeal to foreign plaintiffs or American plaintiffs wishing to litigate causes of action involving foreign actors or conduct.<sup>209</sup>

Of course, the potential that federal law will simply be replaced by state law depends in part on whether the status quo, under which few constraints exist on states’ abilities to apply their laws abroad, continues to prevail. But even if such constraints were desirable, it is difficult to conceive of a mechanism by which they could be imposed, at least in the absence of action by Congress to explicitly extend the reach of federal law abroad, which would make resort to state law less common. The application of state law to foreign conduct generally arises in common-law decisions.<sup>210</sup> Thus no legislative intent is at

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<sup>205</sup> See Knox, *supra* note 2, at 354-55.

<sup>206</sup> See *supra* notes 181-187 and accompanying text.

<sup>207</sup> See *supra* notes 189-194 and accompanying text.

<sup>208</sup> See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2886 (2010).

<sup>209</sup> See *supra* note 85 and accompanying text.

<sup>210</sup> See, e.g., *King Cnty., Wash. v. IKB Deutsche Industriebank AG*, 708 F. Supp. 2d 334,

issue, and courts cannot simply apply a presumption against extraterritoriality comparable to the federal one. In the absence of such a presumption, constraints on states' choice-of-law decisions are modest.<sup>211</sup> It is true that state choice-of-law doctrines have internal principles that generally require at least some relationship between the parties and conduct at issue and the law applied, and forum non conveniens doctrine may result in some dismissals of cases with foreign elements in favor of foreign courts.<sup>212</sup> At the same time, as is true in the federal context, these principles permit the application of state law to foreign parties and conduct in many situations.<sup>213</sup>

In addition, whether state or foreign law is applied and whether the case is dismissed on forum non conveniens grounds depends in part on the skill, priorities, and preferences of the parties' lawyers. In state court, the burden is sometimes placed on the parties to plead and prove the content of foreign law that they seek to have applied – certainly an obstacle to the application of any non-U.S. law.<sup>214</sup> There are numerous reasons why both plaintiff and defendant might in individual cases agree on their preference for state law or a U.S. forum, or why a party might fail in its arguments that the case should be dismissed<sup>215</sup> or that foreign law should apply.<sup>216</sup>

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338 (S.D.N.Y. 2010).

<sup>211</sup> Further, such constraints are grounded both in the Due Process and Full Faith and Credit Clauses. To the extent they are based in the latter, they may not even be fully applicable in the international context. This is significant because more exacting efforts to limit state choice-of-law freedom have generally relied more on the Full Faith and Credit Clause than the Due Process Clause. See, e.g., Michael Steven Green, *Horizontal Erie and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1257-60 (2011) (arguing that the Full Faith and Credit Clause imposes independent limits on the way in which states apply the law of sister states).

<sup>212</sup> See, e.g., *Stangvik v. Shiley Inc.*, 819 P.2d 14, 27 (Cal. 1991).

<sup>213</sup> See *supra* notes 170-173 and accompanying text.

<sup>214</sup> See Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 898 (1992) (“The traditional common-law rule in this country has been to treat questions of foreign law as, for the most part, questions of fact which must be pleaded and proved in accordance with the ordinary rules of evidence.”). In federal court, the issue is governed by FED. R. CIV. P. 44.1, which provides that in determining the content of foreign law, “[t]he court . . . may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.” Some state courts now have analogous provisions. See Tidmarsh, *supra* note 93, at 922 n.181. While it may be permissible for courts to raise forum non conveniens arguments sua sponte, they have seldom done so. See Lonny S. Hoffman, *Forum Non Conveniens – State and Federal Movements*, in CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS 441, 454 (ALI-ABA Course of Study Materials, No. SG046, 2002) (stating that “federal courts typically do not invoke the forum non conveniens doctrine sua sponte” but citing *List v. List*, 224 N.J. Super. 432, 540 A.2d 916 (1988) as an example of a state court doing so).

<sup>215</sup> In *Morrison*, for example, defendants did not raise a forum non conveniens argument. In oral argument before the Supreme Court, Justice Ginsburg raised the issue of whether the case could have been dismissed on forum non conveniens grounds; plaintiffs' counsel

The combination of these factors means that state law is likely to be applied to a reasonable percentage of suits with foreign elements. Although federal law provides some advantages and foreign plaintiffs have often preferred federal law, state law may become more attractive if the Supreme Court continues to restrict federal law's extraterritorial effect and as foreign plaintiffs and lawyers consequently become more knowledgeable about the state-law causes of action that may serve as alternatives. Whether this effect ultimately proves modest or significant, the Supreme Court has not reckoned with it, in either its theoretical or practical dimension, in thinking about the presumption against extraterritoriality.<sup>217</sup> This short-sightedness adds to the many other ways in which the Court's increasingly strict application of the presumption may be misplaced.

B. *New Directions for State Choice-of-Law Principles*

The way in which state choice-of-law principles resolve the state-law vs. foreign-law choice should prompt us to rethink the presumption against extraterritoriality. Yet that is not the whole story. The Court's increasingly rigid application of the presumption should also be cause for state courts to re-examine the ways in which they apply their choice-of-law principles to disputes with foreign elements. Traditionally, state choice-of-law principles have treated sister-state law and foreign law identically.<sup>218</sup> Further, courts applying state law, particularly state common law, have not regarded the application of state law as an assertion of legislative jurisdiction subject to any extraterritoriality constraints.<sup>219</sup> Any limits on choice-of-law decisions are modest and generally rooted in due process considerations rather than concerns about extending state and the United States' power past permissible limits.<sup>220</sup> Finally, state choice-of-law decisions have evolved separately from the body of

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responded that forum non conveniens would not be appropriate in this situation because of the various contacts with Florida, including the fact that "the people who committed the fraud on a nuts-and-bolts level are the senior management who are defendants from HomeSide bank in Florida." See Transcript of Oral Argument at 10, *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010) (No. 08-1191).

<sup>216</sup> See, e.g., *In re Estates of Garcia-Chapa*, 33 S.W.3d 859, 862 (Tex. App. 2000) (affirming the application of Texas law to a case involving two estates holding funds in numerous bank accounts, even where *Restatement (Second)* principles would have dictated that Mexican law apply, and explaining that "Mexican law cannot be applied to this case because appellants did not follow the procedures required by Texas law").

<sup>217</sup> On a theoretical level, the fact that state law arguably applies more broadly than federal law abroad upsets our normal understanding of the relationship between states and the federal government, particularly in foreign affairs. As a practical matter, the proliferation of state litigation may foster increased confusion about the regulatory standards applicable to foreign actors or conduct abroad.

<sup>218</sup> See *supra* notes 174-178 and accompanying text.

<sup>219</sup> See *supra* Part II.A.

<sup>220</sup> See Green, *supra* note 211, at 1257-60.

law delineating limits on the power of the United States and other nations to apply their laws internationally.<sup>221</sup>

Such an approach seems acutely problematic in cases with substantial foreign elements, particularly cases of the sort that would trigger the presumption against extraterritoriality if federal rather than state law were involved. First, the current standards have the potential for inappropriate projection of American regulatory power abroad. The presumption against extraterritoriality reins in federal legislation far more than international norms about extraterritoriality generally require.<sup>222</sup> At the same time, however, norms of international law do pose meaningful limits on the degree to which a nation can impose its regulatory law on conduct outside its borders.<sup>223</sup> These constraints are quite different from, and almost certainly stricter than, the constitutional standard of relatedness that currently forms the only external limitation on states' choice-of-law decisions.<sup>224</sup> Technical debates about the nature of "local law" aside,<sup>225</sup> many would reasonably understand the application of state law to conduct outside the jurisdiction as an assertion of regulatory power by that state.<sup>226</sup> When state law applies to conduct abroad, it is no less an application of U.S. law than when federal law is applied, and similar concerns about subjecting foreign actors to U.S. liability standards and damages should apply. This is particularly true when state law applies in situations where the availability of federal law has been limited by Congress or the Supreme Court.

More broadly, however, the failure of state courts to differentiate between sister-state and foreign-nation law or to take account of current developments and thought on extraterritoriality worldwide fosters an anachronistic and inappropriate provincialism. State courts hear, and can expect to hear more, disputes in which they are asked to pronounce on foreign conduct or the actions of foreign actors.<sup>227</sup> Current state choice-of-law principles mostly evolved to negotiate modest differences in state law over such relatively minor issues as the availability of guest statutes and interspousal immunity.<sup>228</sup> Such

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<sup>221</sup> See Brilmayer & Norchi, *supra* note 101, at 1228-29.

<sup>222</sup> See Knox, *supra* note 2, at 374-77 (discussing the Court's expansion of the presumption against extraterritoriality).

<sup>223</sup> See *id.* at 356-57.

<sup>224</sup> See *id.*

<sup>225</sup> See *supra* notes 149-150 and accompanying text.

<sup>226</sup> See Florey, *supra* note 15, at 1115-18, for a more sustained version of this argument.

<sup>227</sup> See, e.g., Holmes v. Syntex Labs., 202 Cal. Rptr. 773, 774-75 (Cal. Ct. App. 1984).

<sup>228</sup> See Friedrich K. Juenger, *The Complex Litigation Project's Tort Choice-of-Law Rules*, 54 LA. L. REV. 907, 915 (1994) ("In the past, the large majority of tort conflicts cases were prompted by such obsolete and draconian precepts as guest statutes, or their functional equivalent, common law rules on interspousal immunity."). These disputes occasionally involved Canadian provinces rather than states, but courts employed the same principles for both. See, e.g., Neumeier v. Kuehner, 286 N.E.2d 454, 455 (N.Y. 1972) (weighing the use of Ontario law).

principles are an uneasy fit for disputes with an international dimension. As William Dodge has explained, choice-of-law rules are designed “to mediate . . . between the local laws of various jurisdictions” while principles against extrajurisdictionality mediate between “local law and international law.”<sup>229</sup> State choice-of-law principles, therefore, are simply not designed to deal with concerns about extrajurisdictionality.

None of this is to say that state choice-of-law methodologies cannot be tailored to the distinct factors that may come into play when foreign nations are involved. Approaches to determining the scope of federal law abroad have occasionally drawn in some cases from state conflicts methodologies,<sup>230</sup> even though such influence has been one-sided; modern state conflicts law has seldom drawn from federal extraterritoriality cases.<sup>231</sup>

Superficially, interest analysis, which informs so many modern state conflicts methodologies, may seem particularly tailored to addressing such concerns. For example, California’s “comparative impairment” analysis chooses an applicable law by asking which state’s interest “would be the more impaired if its law were not applied.”<sup>232</sup> At least in theory, such principles, like other forms of interest analysis, permit courts to look beyond mere contact-counting or the location of particular events to grapple meaningfully with state and national interests and the purpose underlying the laws at issue.

Nonetheless, interest analysis, whatever its value may be for mediating sister-state conflicts, poses perils in the international context. To begin with, the weighing of state and foreign-nation interests may lead states to make inappropriate judgments about the laws or policies of a foreign country. In the context of forum-non-conveniens analysis, Lea Brilmayer argued that states should not adopt doctrinal tests that require them to “rul[e] on the suitability of the courts of another nation.”<sup>233</sup> Moreover, interest analysis may call upon courts applying state law to weigh the interests of a particular state and a foreign country or even to assess which jurisdiction’s laws are “better.” Such determinations have the potential to offend foreign nations or at the very least to permit state interference with matters best left to the federal government.<sup>234</sup>

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<sup>229</sup> See William S. Dodge, *The Public-Private Distinction in the Conflict of Laws*, 18 DUKE J. COMP. & INT’L L. 371, 384 (2008).

<sup>230</sup> See William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theories: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L.J. 101, 104 (1998) (stating that, for example, *Timberlane* borrows from the *Restatement (Second) of Conflicts*).

<sup>231</sup> See Laycock, *supra* note 105, at 259-60.

<sup>232</sup> See *Bernhard v. Harrah’s Club*, 546 P.2d 719, 723 (Cal. 1976).

<sup>233</sup> See Susan Burke, *Panel: The Increasing Focus of Public International Law on Private Issues*, 86 AM. SOC’Y INT’L L. 456, 476 (1992) (reporting on a panel discussion in which Brilmayer stated, “[A]t least some areas currently governed by state law should be preempted by the federal foreign affairs power.”).

<sup>234</sup> See *id.* at 469-71.

The common implicit or explicit “tiebreaker” status of forum law in interest analysis compounds the problem.

Some commentators have criticized interest analysis in the sister-state context for permitting states to inappropriately apply their own law in areas where other states are the more natural regulators.<sup>235</sup> Likewise, importation of interest analysis principles into the context of international legislative jurisdiction has been criticized in the *Restatement (Third) of the Foreign Relations Law of the United States*, which allows courts to consider such quasi-interest analysis factors as “the extent to which another state may have an interest in regulating the activity” and “importance of regulation to the regulating state” in deciding which law is applicable to transnational disputes.<sup>236</sup> Some commentators regard the *Restatement* principles as biased toward forum law, contrary to international norms, and “likely to lead to international conflict” because courts tend to slight or misunderstand foreign interests.<sup>237</sup> These concerns are all the more acute when the application of state law rather than federal law is at stake, because the potential for foreign offense may be greater and the sensitivity of states to foreign interests smaller.<sup>238</sup> Further, because it is usually more problematic for parties to plead the applicability of foreign law,<sup>239</sup> parties may simply not raise the issue, meaning that courts apply state law by default and never perform a choice-of-law analysis.

To be sure, doctrines such as forum non conveniens and the “reasonableness” part of personal jurisdiction analysis go some way toward keeping problematic international disputes out of state courts. But whether these doctrines are applied is dependent on the skill and interests of the parties. Even when they are skillfully briefed and argued, they may not apply because of idiosyncratic features of the case (e.g., substantial evidence is located in the United States even though the substantive conduct at issue occurred abroad).<sup>240</sup> But even to the extent these doctrines prevent acute conflicts from arising, they do not address head on the fundamental problem: the differing considerations entailed in thinking about legislative jurisdiction (i.e., the application of state law) and judicial jurisdiction (i.e., the choice of a state forum). It might be the

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<sup>235</sup> For example, Peter Hay criticizes the Oregon court’s decision in *Lilienthal v. Kaufman*, 395 P.2d 543, 549 (Or. 1964), for applying Oregon law under a form of interest analysis to a contract the plaintiff had entered into in California with a California resident. See Peter Hay, *Judicial Jurisdiction and Choice of Law: Constitutional Limitations*, 59 U. COLO. L. REV. 9, 29-30 (1988) (arguing that in *Lilienthal*, “Oregon had the power to adjudicate, but should have been precluded from applying its own law”).

<sup>236</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2) (1987).

<sup>237</sup> See, e.g., Knox, *supra* note 2, at 380.

<sup>238</sup> See *id.*

<sup>239</sup> See Lawson, *supra* note 214, at 898-99.

<sup>240</sup> This was possibly the case in *Morrison*. See *supra* text accompanying note 215.

case, for example, that state courts should hear *more* of the cases that are now dismissed under forum non conveniens doctrine but at the same time find that some or most of those cases should be governed by foreign law. Current principles, however, are insufficient to allow state courts to make careful determinations on such issues.

Again, a call for states to revise their approach to this issue is not necessarily a plea for states to scale back the applicability of their law to foreign disputes as a general practice, particularly since there is little reason to believe that states have as a usual matter been overly aggressive in applying their law to such cases. States, however, should have in place a process that is more in keeping with the prevailing treatment of interjurisdictional conflicts between countries. State law is a form of U.S. law, and state courts should give greater consideration to this fact in developing choice-of-law principles.

This does not mean that states should apply the presumption against extraterritoriality as the Supreme Court has applied it in recent years. Not only is the presumption far too sweeping in itself, but because it is first and foremost an interpretive canon, it has little to say about common law that poses no issue of legislative intent.<sup>241</sup> States should, however, be cognizant of the fact that typical choice-of-law principles may be inadequate to address interjurisdictional conflicts involving other nations.<sup>242</sup> In general, states may want to think about the aims of avoiding conflict and fostering predictability when choosing choice-of-law principles for cases with an international dimension, and they may want to be cautious about importing principles that require weighing the interests of various jurisdictions. At the very least, courts may wish to consider explicitly the possibility that applying state rather than foreign law may create conflicting regulatory mandates – a theoretical possibility even when dealing with competing sister-state laws, but a much more serious problem when foreign states are involved. At the same time, states might wish to consider incorporating into choice-of-law principles some consideration of within-jurisdiction effects as a basis for applying state law to disputes with foreign elements. The doctrine permitting the application of U.S. law based on within-U.S. effects has a long history in the Court's extraterritoriality jurisprudence, predating the Court's more recent reliance on the presumption against extraterritoriality.<sup>243</sup> Further, unlike the presumption against extraterritoriality, the notion of within-jurisdiction effects is readily adaptable to the state context.<sup>244</sup> Some restraint is called for in application of

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<sup>241</sup> Many approaches, actual and proposed, to interjurisdictional conflict assume that the law in question is statutory law, making them ill-suited for adaptation to the state context. *See, e.g.*, Knox, *supra* note 2, at 383 (proposing a set of interpretive canons as an alternative to the presumption against extraterritoriality).

<sup>242</sup> *See id.*

<sup>243</sup> *See* Dodge, *supra* note 2, at 688-89.

<sup>244</sup> I have previously made an argument to this effect. *See* Florey, *supra* note 15, at 1130 (“As a starting point, within-state effects represent a useful basis for assessing the

an effects test by states; states should also consider comity factors before they heedlessly rush to apply their law to all foreign conduct with in-state effects.<sup>245</sup> Still, it is potentially a useful starting point.

Are these rather modest suggestions sufficient to permit states to gracefully negotiate interjurisdictional conflicts involving foreign states in ways that do not increase international tension? Possibly not. But because cases with substantial foreign contacts only tend to be brought in federal court,<sup>246</sup> it is difficult to know what problems may or may not arise. What is important is that state courts have an adequate framework in place for recognizing and analyzing the unique concerns that may arise when the law of a foreign nation is involved. Without a demonstrated problem, there is no reason to think that more drastic measures – such as some form of explicit federal preemption – will be necessary.

#### CONCLUSION

Approaches to the application of both state and federal law abroad can be improved by considering the relationship between the two sources of law. Among the many criticisms that can be leveled at the Supreme Court's inflexible reliance on the presumption against extraterritoriality is that it fails to take account of this relationship. Where federal law does not apply, state law often does. While the presumption against extraterritoriality does not account for this fact, it is hard to imagine that the potential applicability of state law would not have affected Congress's intentions regarding the scope of federal law abroad. Further, the fact that state law may continue to apply makes it far less likely that even a strict application of the federal presumption against extraterritoriality will foster predictability and help to avoid regulatory conflicts, as the Supreme Court has suggested it will.

The potential increase in the role of state law in interjurisdictional disputes involving foreign nations is also cause to reflect on how states' approaches to choice of law in such conflicts could be improved. State choice-of-law

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legitimacy of a state's concern with a particular activity. If an activity is causing harm within a given state's borders, it is fair to say that the state has some basis for being concerned with it.”).

<sup>245</sup> States could, for example, be open to drawing from approaches from courts like that of *Timberlane*, which have proposed relatively open-ended comity concerns that courts may take into consideration. See *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 614-15 (9th Cir. 1976) (suggesting that courts in determining the reach of U.S. laws abroad should consider factors including the parties' nationalities, the likelihood of achieving compliance, the “degree of conflict with foreign law or policy,” the “relative significance of effects on the United States as compared with those elsewhere,” the “extent to which there is explicit purpose to harm or affect American commerce [and] the foreseeability of such effect,” and the “relative importance to the violations charged of conduct within the United States as compared with conduct abroad”). Again, one of the reasons such comity concerns may be useful in the state context is because they do not hinge on legislative intent.

<sup>246</sup> See Solimine, *supra* note 174, at 15-16.

principles have generally failed to consider the special factors that may be at stake when foreign rather than sister-state law is at issue and have developed, for the most part, independently of case law considering the role of federal law abroad. While state principles should not (and could not, given the role of common law) mirror the strict restrictions the Court has recently placed on the applicability of federal law abroad, states should nonetheless be open to greater influence from federal and international norms.