



2-1-2014

Bridging the Divide: The Case for Harmonizing State and Federal Extraterritoriality Principles After Morrison and Kiobel

Katherine Florey
U.C. Davis School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/globe>



Part of the [International Law Commons](#)

Recommended Citation

Katherine Florey, *Bridging the Divide: The Case for Harmonizing State and Federal Extraterritoriality Principles After Morrison and Kiobel*, 27 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 197 (2014).

Available at: <https://scholarlycommons.pacific.edu/globe/vol27/iss2/4>

This Symposium is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in Global Business & Development Law Journal by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Bridging the Divide: The Case for Harmonizing State and Federal Extraterritoriality Principles After *Morrison* and *Kiobel*

Katherine Florey*

TABLE OF CONTENTS

I. INTRODUCTION	197
II. EXTRATERRITORIALITY AND FEDERAL LAW	200
III. STATE CONFLICTS PRINCIPLES AND EXTRATERRITORIALITY	204
IV. CALIFORNIA: AN EXTRATERRITORIALITY TEST CASE	208
V. THE FUTURE: RECONCILING THE PRESUMPTION AGAINST EXTRATERRITORIALITY WITH STATE APPROACHES	213
A. <i>What the Presumption Means (and Does Not Mean) for States</i>	213
B. <i>State Conflict Doctrine’s Relevance to the Interpretation of Federal Statutes</i>	216
VI. CONCLUSION	218

I. INTRODUCTION

The Supreme Court’s recent expansion of the federal presumption against extraterritoriality in *Morrison v. National Australia Bank Ltd.*¹ and *Kiobel v. Royal Dutch Petroleum Co.*² has had an unexpected consequence. In many circumstances, state law may apply abroad far more broadly than does federal law.³ Thus, even as the Supreme Court has significantly scaled back the reach of federal law abroad, advocates and litigators have awakened to the potential use of state law to obtain relief in disputes occurring partially or largely outside U.S. borders.⁴

* Professor of Law, U.C. Davis School of Law. I would like to thank Anupam Chander, William S. Dodge, Franklin Gevurtz, John Patrick Hunt, and Courtney Joslin for comments on this Article.

1. See *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2877-78 (2010).

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

3. See 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, 255 (2011).

4. Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709 (2012); see Kirby, *supra* note 3, at 150; See generally, e.g., Christopher A. Whytock et al., *After Kiobel—International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1 (2013); see generally Roger Alford, *Kiobel Insta-Symposium: The Death of the ATS and the Rise of Transnational Tort Litigation*, <http://opiniojuris.org/2013/04/17/kiobel-instthe-death-of-the-ats-and>

2014 / Bridging the Divide

To be sure, personal jurisdiction and *forum non conveniens* continue to present obstacles for litigants wishing to adjudicate primarily foreign controversies.⁵ But those who surmount these procedural hurdles are likely to find that, at the choice-of-law stage, many state courts readily apply their own law or the law of a different U.S. state to disputes with foreign elements.⁶ Although choice-of-law methodologies vary from state to state, many states have explicit preferences for forum law in close cases,⁷ and in many other circumstances, conflicts principles may dictate the application of state law even where a substantial percentage of the events involved occurred abroad.⁸ Further, state courts rarely address the problem of extraterritoriality explicitly, and state choice-of-law principles in general do not differentiate between sister-state and foreign-nation law.⁹ These factors, in combination, make it likely that cases will frequently arise in which courts apply state law to overseas litigants and conduct; indeed, in many cases (most of which have attracted little fanfare), they have already done so.¹⁰

Thus, in the wake of *Morrison* and *Kiobel*, it appears that state law may have greater extraterritorial application than federal law.¹¹ This result is surely not what anyone would have intended, much less desired. State law applied abroad indiscriminately raises concerns similar to those present when federal law is applied too broadly to foreign disputes.¹² The use of state law in this manner has, for example, the potential to be seen as an inappropriate projection of U.S. power¹³ and to send unclear signals to those who must shape their primary

the-rise-of-transnational-tort-litigation/ (last visited July 17, 2013); see generally Svetlana Meyerzon Nagiel, Note, *An Overlooked Gateway to Victim Compensation: How States Can Provide a Forum for Human Rights Claims*, 46 COLUM. J. TRANSNAT'L L. 133 (2007).

5. See, e.g., Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of Morrison v. National Australia Bank*, 92 B.U. L. REV. 535, 537 (2012) (noting that plaintiffs adjudicating claims arising abroad in U.S. courts “will face challenges—most notably, establishing the existence of personal jurisdiction over the defendants and avoiding a *forum non conveniens* dismissal”).

6. *Id.* at 537-38.

7. See *id.* (“[I]n many state choice-of-law systems, bias toward the application of forum law is common.”).

8. See, e.g., the examples given in Part III.

9. See Mathias Reimann, *A New Restatement—for the International Age*, 75 IND. L.J. 575, 576-77 (2000) (explaining that the influential Restatement (Second) of Conflict of Laws treats foreign law and state law more or less identically).

10. See generally *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, (2010); see generally *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

11. Florey, *supra* note 5, at 537.

12. *Id.* at 540.

13. See *id.* at 571 (“When state law applies to conduct abroad, it is no less an application of U.S. law than when federal law is applied.”); see also *Doe I v. Exxon Mobil Corp.*, No. Civ.A.01-1357(LFO), 2006 WL 516744, at *1-2 (D.D.C. Mar. 2, 2006) (describing the law of individual states as “U.S. state law” and finding that the “interest of the United States” outweighed “Indonesia’s interest in applying its own law” in the case at hand).

Global Business & Development Law Journal / Vol. 27

conduct to conform to the law.¹⁴ Moreover, extraterritorial application of state law raises issues of unpredictability and lack of uniformity that are present to an even greater extent than when federal law is involved, given the differences among states both in their decisional rules and their choice-of-law methodologies. Because of this, to the extent that U.S. law is to be applied abroad, sound reasons exist for such law to be predominantly federal.¹⁵

Existing state choice-of-law doctrine, however, slights such considerations.¹⁶ From the state perspective, state courts have little doctrinal guidance in how to navigate the special issues that are present when an otherwise routine conflicts problem involves foreign rather than sister-state law.¹⁷ At the same time, the federal presumption against extraterritoriality (which has increasingly become the standard methodology for interpreting the reach of federal law) leaves little or no room for taking into account the possibility that state law may apply where federal law does not.¹⁸

This Article thus argues that, even as state-law and federal-law approaches regarding extraterritoriality have been growing farther apart, a strong case can be made for greater convergence. Ideally, this convergence should come from both directions. On the one hand, the Supreme Court's presumption against extraterritoriality has been criticized (among other grounds) for resting on an overly narrow and formalistic view of both congressional intent and of the proper territorial scope of law.¹⁹ Many of these criticisms are just, and the likely substitution of state law for federal law in similar cases provides an additional argument against expansion of the presumption.

At the same time, the choice-of-law principles applied by state courts suffer from an unjustifiable provinciality. The battles of the mid-twentieth century choice-of-law "revolution"—which occurred at a time when the main task of conflicts principles was to navigate minor differences between states—continue to drive conflicts doctrine today in a way that constrains choice-of-law development.²⁰ It is time for state courts to begin considering the international

14. Those who engage in conduct abroad, in other words, may have little way of ascertaining which legal standards should govern their behavior. See Anthony J. Colangelo, *Spatial Legality*, 107 NW. U. L. REV. 69, 73 (2012) (arguing that "if the state had no prescriptive jurisdiction over the conduct when the defendant engaged in it . . . the defendant could not reasonably have expected the state's law to apply at the time of conduct," thus creating potential due process problems).

15. See Florey, *supra* note 5, at 568-70 (discussing potential problems when federal law is supplanted by state law abroad).

16. *Id.* at 569.

17. *See id.*

18. *Id.* at 552.

19. For critical views of the presumption in general and *Morrison* in particular, see generally, 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 (2011); see generally Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019 (2011); see generally John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351 (2010).

20. Knox, *supra* note 19, at 361-62.

2014 / Bridging the Divide

context and taking extraterritoriality concerns seriously in cases involving foreign elements.

This Article proceeds in four parts. In Section II, it briefly sketches the history of the presumption against extraterritoriality and the Court’s recent expansion of the scope of that doctrine in *Morrison* and *Kiobel*.²¹ Section III discusses the contrasting picture presented by the application of state choice-of-law to cases involving foreign elements.²² In Section IV, the Article then considers the example of California—a large state with courts that hear many cases with foreign elements—by examining cases in which California choice-of-law methodology has dictated the application of California substantive rules to conduct abroad.²³ Finally in Section V, the Article briefly makes the case for bringing federal and state extraterritoriality approaches into greater harmony, and outlines ways in which that aim might be accomplished.²⁴

II. EXTRATERRITORIALITY AND FEDERAL LAW

The Supreme Court has always recognized that some presumptive limits exist on the degree to which federal law should apply abroad.²⁵ These limits are not imposed by the Constitution, which does not clearly speak to the issue,²⁶ but by other principles. One such principle, rooted in international norms, was first described by the Court in 1804.²⁷ In *Murray v. Schooner Charming Betsy*,²⁸ the Court found that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”²⁹ establishing, as John H. Knox has put it, “a presumption that federal law does not extend beyond the jurisdictional limits set by international law.”³⁰

Charming Betsy, however, was not the last word on the matter.³¹ Subsequent cases, such as the Court’s famous 1909 opinion in *American Banana Co. v. United Fruit Co.*,³² took a more narrowly territorial view of U.S. power, suggesting that federal law would be presumed to apply only within the territory

21. See *infra* Part II.

22. See *infra* Part III.

23. See *infra* Part IV.

24. See *infra* Part V.

25. Knox, *supra* note 19, at 361.

26. See *id.* at 351 (“Congress could not, of course, exceed constitutional limits [on enacting extraterritorial legislation], but the Supreme Court has never clarified such limits, if they exist.”).

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

28. *Id.*

29. *Id.*

30. See Knox, *supra* note 19, at 352 (describing this principle as an “offshoot of the *Charming Betsy* canon”).

31. See, e.g., *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909).

32. See generally *id.*

Global Business & Development Law Journal / Vol. 27

of the United States.³³ Later lower-court cases relaxed this standard and allowed for broader application of U.S. law abroad where, for example, foreign conduct had effects within the United States effects.³⁴

In a handful of cases, however, the Court applied the presumption, rooted in *American Banana Co.*'s reasoning, that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,"³⁵ or what is now referred to as the presumption against extraterritoriality.³⁶ Initially, the presumption applied in a narrow range of cases and imposed a rather modest hurdle.³⁷ In the past twenty years, however, the Court has applied the presumption far more widely and strictly. In *Aramco*,³⁸ which launched this recent expansion, the Court relied on the presumption to hold that Congress did not intend Title VII of the Civil Rights Act of 1964 to govern the actions of U.S. employers who employed American citizens abroad.³⁹

While the Court applied the presumption against extraterritoriality in some post-*Aramco* cases,⁴⁰ elsewhere it allowed for a more expansive application of U.S. law abroad.⁴¹ But in *Morrison v. National Australia Bank Ltd.*, the Court seemed to bring an end to the more expansive view, suggesting that the presumption against extraterritoriality should become the dominant framework for assessing the applicability of federal law abroad.⁴² In *Morrison*, a class of foreign investors sought to sue Australia's largest bank, National Australia Bank, for violations of the Securities Exchange Act and SEC Rule 10b-5.⁴³ The case arose out of National's purchase of HomeSide Lending, a Florida-based

33. *See id.* at 357 (describing principle of adopting "in case of doubt . . . a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power").

34. *See Florey, supra* note 5, at 541 (noting that courts began increasingly to embrace a principle that U.S. law applied abroad to the extent consistent with international jurisdictional norms).

35. *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 19, at 366-74 (describing early evolution of the presumption).

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

37. *See Knox, supra* note 19, at 371; *see Aramco*, 499 U.S. at 271; *see Florey, supra* note 5, at 541 (describing Court's initial formulation of the presumption against extraterritoriality having a "limited scope" and requiring a "lower standard" to overcome than the Charming Betsy/extra jurisdictionality presumption).

38. *Aramco*, 499 U.S. at 246-47.

39. *Id.* Congress quickly reversed this result legislatively. *See Civil Rights Act of 1991*, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077-78 (2006) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-1, 12111-12).

40. *See Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 158-59 (1993); *see Smith v. United States*, 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); *see also Knox, supra* note 19, at 375-76.

41. Most notably, in *Hartford Fire Ins. v. California*, 509 U.S. 764, 796 (1993), the Court held that the Sherman Act applied to extraterritorial conduct that was intended to produce and did produce "some substantial effect" in the United States. The majority did not mention the presumption against extraterritoriality; in dissent, Justice Scalia discussed the presumption but found that it had been overcome because of "well established" case law interpreting the Sherman Act. *Id.* at 813 (Scalia, J., dissenting).

42. *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2881 (2010).

43. *Id.* at 2875-76.

2014 / Bridging the Divide

mortgage servicer;⁴⁴ plaintiffs alleged that National had made fraudulent representations about HomeSide's value.⁴⁵

The Second Circuit had dismissed the action on the basis of its venerable test holding that Section 10(b) could be applied only when the wrongful conduct at issue either "had a substantial effect in the United States or upon United States citizens" or "occurred in the United States."⁴⁶ Neither of these tests, the Second Circuit had found, was satisfied in this case.⁴⁷ The Supreme Court affirmed the dismissal, but on an entirely different ground—the presumption against extraterritoriality.⁴⁸ In doing so, the Court referred to the presumption as a "longstanding principle of American law"⁴⁹ and criticized the Second Circuit for failing to rely on it in earlier securities cases.⁵⁰ Notably, *Morrison* made clear that the presumption was a matter of presumed congressional intent, a "canon of construction . . . rather than a limit upon Congress's power to legislate," and that it could be overcome by "the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect."⁵¹

Morrison had both obvious and subtler consequences.⁵² Most obviously, *Morrison* significantly scaled back the reach of federal securities law.⁵³ More broadly, by suggesting that it was error⁵⁴ not to apply the presumption in the securities context (where long-standing case law had applied more liberal tests), *Morrison* suggested an expanded and entrenched role for the presumption against extraterritoriality.⁵⁵ And indeed, taking their cues from the Court, lower courts in the wake of the decision applied *Morrison* to find that other federal statutes, such as the Racketeer Influenced and Corrupt Organizations Act ("RICO"), did not apply abroad because the presumption had not been overcome.⁵⁶

44. *Id.*

45. *Id.* at 2876.

46. *See id.* at 2879 (quoting *SEC v. Berger*, 322 F.3d 187, 192-93 (2d Cir. 2003)) (internal quotation marks omitted).

47. *See Morrison*, 130 S. Ct. at 2876.

48. Invoking the presumption, the Court formulated a different test of Section 10(b)'s territorial reach, finding that Section 10(b) applied only to cases when a "purchase or sale is made in the United States, or involves a security listed on a domestic exchange." *Id.* at 2886.

49. *Id.* at 2877 (citing *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1990)) (internal quotation marks omitted).

50. *Id.* at 2878.

51. *Id.* at 2877 (internal citation and quotation marks omitted).

52. *See generally id.*

53. *See Beyea*, *supra* note 19, at 540 (noting that *Morrison* "mak[es] the private cause of action unavailable in most securities fraud cases with a significant overseas component").

54. The Court, that is, criticized the Second Circuit for not applying the presumption, which it described as a "principle of interpretation . . . long and often recited in our opinions." *See Morrison*, 130 S. Ct. at 2878.

55. *Id.* at 2881.

56. *See Norex Petroleum Ltd. v. Access Industries, Inc.*, 631 F.3d 29, 31-32 (2d Cir. 2010) (presumption against extraterritoriality barred suit by Cypriot company against New York-based defendants alleging various fraudulent machinations in wresting control of a Russian oil company).

Global Business & Development Law Journal / Vol. 27

Any lingering uncertainty about the central place of the presumption against extraterritoriality in the Court's interpretive framework was dispelled by the Court's 9-0 decision in the 2013 case *Kiobel v. Royal Dutch Petroleum Co.*⁵⁷ In *Kiobel*, several Nigerian nationals living in the United States sued various "Dutch, British, and Nigerian corporations . . . under the Alien Tort Statute" (ATS), alleging that the defendants "aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria"⁵⁸ by providing food, transportation, and money to Nigerian military forces who had beaten, raped, and killed anti-oil protesters.⁵⁹ In an earlier case, *Sosa v. Alvarez-Machain*,⁶⁰ the Court had held that the ATS, in addition to granting federal district courts jurisdiction over certain claims,⁶¹ had also "been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations."⁶² Thus, the question before the Court in *Kiobel* was "not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign."⁶³

Analysis of this issue, the Court concluded, was "constrain[ed]" by the presumption against extraterritoriality.⁶⁴ Further, the Court found, the presumption could not be overcome in this case.⁶⁵ Reviewing evidence contemporary to the ATS's enactment, the Court found that it "provide[d] no support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad."⁶⁶

Kiobel is significant not only for cementing the Court's reliance on the presumption, but for the narrow view it took of the notion of "territory" itself.⁶⁷ *Kiobel* itself concerned events that had clearly occurred outside U.S. territory—the alleged conduct at issue concerned events in Nigeria and had presumably occurred either there or in the corporations' home countries.⁶⁸ Yet *Kiobel* also offered some speculation about what conduct might be sufficiently tied to the United States to become subject to the ATS's reach.⁶⁹ The Court noted that "even where . . . claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial

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

58. *Id.*

59. *Id.* at 1662-63.

60. See generally *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

61. *Id.* at 739.

62. *Id.* at 724.

63. *Kiobel*, 133 S. Ct. at 1664.

64. *Id.* at 1665.

65. *Id.*

66. *Id.* at 1666.

67. *Id.* at 1669.

68. *Id.* ("On these facts, all the relevant conduct took place outside the United States.")

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

2014 / Bridging the Divide

application.”⁷⁰ Justice Robert’s use of the term “touch and concern” is striking here, suggesting a literal, physical view of territory that is one not of a sovereign but of a landowner.⁷¹ As the following section will discuss, this literal understanding of territory is quite alien to the state choice-of-law context, which focuses on state interests rather than a literal view of state power’s territorial reach.⁷²

Kiobel may be said to divorce further the presumption against extraterritoriality from an analysis that focuses on international norms or broader jurisdictional questions. As the following section will discuss, this widens the gap between federal and state approaches in both a practical way and a doctrinal one.⁷³ From a practical perspective, the strictness of the presumption, in contrast to the relative liberality of many state approaches, means that in many cases with foreign elements, state law will apply where federal law does not.⁷⁴ Doctrinally, the presumption focuses narrowly on legislative intent and on an old-fashioned and formalistic view of territory,⁷⁵ neither of which is of much use to state courts, which deal substantially in judge-made law and cannot escape the reality of cases with complex multijurisdictional contacts.

III. STATE CONFLICTS PRINCIPLES AND EXTRATERRITORIALITY

In contrast to the federal context, the law of extraterritoriality in most states is strikingly underdeveloped. In state courts, concerns that fall under the rubric of extraterritoriality in the federal context are typically addressed through the normal state choice-of-law process.⁷⁶ For the most part, that process lacks a mechanism for taking into account extraterritoriality concerns.⁷⁷

In some ways, it is difficult to generalize about state choice-of-law approaches. As a result of the mid-twentieth century choice-of-law “revolution,” state choice-of-law methodologies are extremely diverse.⁷⁸ A handful of states adhere to traditional territorial approaches that require courts to look to a single localizing factor, such as the place of injury in a tort case.⁷⁹ Many states use some form of governmental interest analysis, which looks to the degree to which applying a particular decisional rule will further the policies motivating that

70. *Id.*

71. *Id.*

72. *See infra* Part III.

73. *See infra* Part III.

74. Florey, *supra* note 5, at 538.

75. *Id.* at 542.

76. *Id.* at 537.

77. *Id.* at 560.

78. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 AM. J. COMP. L. 217, 278 (2013) (presenting table summarizing state approaches).

79. *See id.*

Global Business & Development Law Journal / Vol. 27

rule.⁸⁰ The largest group of states follows the approach of the Restatement (Second) of Conflict of Laws, a multifactor framework that incorporates a bit of each of these methods.⁸¹ For all their differences, however, many choice-of-law systems have common features: a preference for forum law,⁸² some consideration of whether any potentially involved jurisdiction has an “interest” in the dispute,⁸³ and a general policy of flexibility that necessarily entails some judicial discretion.⁸⁴

Further, state choice-of-law methodologies almost universally treat other-state and non-U.S. law identically.⁸⁵ As one commenter has observed, for example, under the Restatement (Second) Conflict of Laws, “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.”⁸⁶ The same tends to be true of other methods.⁸⁷ Indeed, many of the foundational cases of the choice-of-law revolution dealt with conflicts between the law of a U.S. state and that of a Canadian province, with little or no consideration of how the international dimension might shape the issues involved.⁸⁸

From a historical perspective, states’ lack of focus on extraterritoriality concerns is understandable.⁸⁹ Modern choice-of-law doctrines evolved primarily to deal with relatively minor conflicts with sister states (or Canadian provinces) such as guest statutes and inter-spousal immunity.⁹⁰ Their architects were concerned with avoiding arbitrariness, manipulation, and unpredictable results—not with navigating clashes of values between jurisdictions.⁹¹ Thus, state conflicts principles were never developed with an eye to navigating the more serious

80. *See id.* at 278-80. One version of governmental interest analysis is California’s comparative impairment methodology. *See infra* Part IV.

81. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). In addition to the choice-of-law theories discussed, a handful of states follow their own idiosyncratic methods. *See Florey, supra* note 5, at 556.

82. *See Florey, supra* note 5, at 553.

83. *See id.* at 555.

84. *See id.* at 539, 554-58 (summarizing some common features of most state choice-of-law regimes).

85. *Id.* at 537.

86. *Id.* at 560.

87. *See infra* Part IV (discussing various California cases).

88. *E.g.*, *Babcock v. Jackson*, 191 N.E.2d 279, 284 (N.Y. 1963). One of the earliest cases to abandon the traditional First Restatement choice-of-law methodology, involved a conflict between the law of New York and the law of Ontario. The majority found that New York law should apply despite the fact that the case arose out of an accident in Ontario. *Id.* at 284-85. Interestingly, the dissent criticized the majority for resorting to “a form of extraterritoriality.” *See id.* at 286-87 (Van Voorhis, J., dissenting).

89. *See generally* Friedrich K. Juenger, *Symposium: Conflict of Laws and Complex Litigation Issues in Mass Tort Litigation: Mass Disasters and the Conflict of Laws*, 1989 U. ILL. L. REV. 105 (1989).

90. One scholar, for example, has criticized conflicts doctrine as excessively concerned with such “humdrum mishaps as a collision on an interstate highway.” *See id.* at 105.

91. *See* Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1136-37 (2010).

2014 / Bridging the Divide

differences on regulatory policy and other issues that may attend disputes with foreign elements.⁹²

Perhaps an even more difficult problem, however, is that much state law remains common law. To the extent that federal extraterritoriality doctrines have focused on legislative intent, they provide little guidance to state courts in such cases.⁹³ For this reason, federal cases applying the presumption against extraterritoriality are arguably *less* helpful to state courts than earlier cases that focused on questions of comity⁹⁴ and extrajurisdictionality (that is, assertions of U.S. law in violation of international norms)⁹⁵ in ascertaining the proper reach of federal law abroad. State courts generally have not relied on federal case law in deciding conflicts cases,⁹⁶ but the principles such cases articulated held at least the potential to be transferrable to scenarios that state courts confront.⁹⁷ By

92. *See generally id.*

93. *See, e.g., Smith v. United States*, 507 U.S. 197, 204-05 (1993) (suggesting that the presumption against extraterritoriality caused the Court to arrive at the “same conclusion that the 79th Congress would have reached had it expressly considered the question we now decide”). Earlier anti-extrajurisdictionality doctrines likewise focused on legislative intent in the sense that they could be overcome by a clear statement of Congress’s wishes. *See Knox, supra* note 19, at 361.

94. *See Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613-15 (9th Cir. 1976). *Timberlane Lumber Co.* was widely influential in announcing a number of comity-based factors (which came to be called the “*Timberlane* factors”) that courts should consider in determining whether a federal statute (the Sherman Act) should be applied abroad. *Id.* Among the factors the Ninth Circuit considered were:

[T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of businesses or corporations, the extent to which enforcement by either state can be expected to achieve compliance, 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, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Id. at 614. The Supreme Court, however, has diverged from the Ninth Circuit’s framework. While not explicitly overruling *Timberlane Lumber Co.*, the Court took a strikingly different approach in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (holding that comity factors need not come into play so long as foreign conduct produced a “substantial effect” in the United States). And “a person subject to regulation by two states [could] comply with the laws of both.” *Id.* at 799 (citations and internal quotation marks omitted).

95. *See Knox, supra* note 19, at 360-61 (advocating canon of interpreting the extraterritorial reach of statutes based on “international limits of jurisdiction,” and citing case law taking this approach); *id.* at 362-66 (discussing early case law applying a presumption against extrajurisdictionality).

96. For example, as of August 2013, the Ninth Circuit’s opinion in *Timberlane Lumber Co.* had been cited in nearly 200 opinions available on Westlaw, but only once by a state court, and not by that court for any comity-related proposition. *See UFJ Bank Ltd. v. Ieda*, 123 P.3d 1232, 1239 (Haw. 2005) (citing *Timberlane Lumber Co.* for the proposition that forum non conveniens may apply only when venue is proper).

97. For example, the comity-based *Timberlane* factors focus on the practical effect and foreign-relations consequences of applying American law abroad, not on legislative intent. *See Brilmayer & Anglin, supra* note 91, at 1136-37. Interestingly, Hannah Buxbaum has pointed out that the Restatement (Third) of Foreign Relations Law, which sought to take an international rather than purely domestic perspective on the subject of extraterritorial regulation, was influenced by the Restatement (Second) of Conflict of Laws, suggesting a potential avenue for mutual influence between state and federal extraterritoriality approaches. *See Hannah L. Buxbaum, Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631, 649 (2009). The Third Restatement, however, has generally been seen as “simply aspirational,” failing to “reflect U.S. understanding or practice regarding the limits of legislative jurisdiction.” *See id.*

Global Business & Development Law Journal / Vol. 27

contrast, the current articulation of the presumption against extraterritoriality has far more limited relevance to state courts.⁹⁸

To be sure, cases like *Aramco* and *Morrison* have not completely lacked influence in state courts.⁹⁹ In rare cases, some state courts have borrowed from federal extraterritoriality cases in interpreting the reach of state *statutes* outside state borders.¹⁰⁰ This borrowing, however, has obvious limits. First, a presumption against extraterritoriality, insofar as it is modeled on the federal one, can only be applied to state statutory law; courts thus have little guidance in more routine choice-of-law situations involving the applicability of state common law.¹⁰¹ Second, many of the state decisions that look to federal doctrine deal with state statutes that closely map federal ones, to which the presumption against extraterritoriality has already been applied.¹⁰² In many cases in which more state-specific statutes are at issue, state courts tend to analyze them through ordinary choice-of-law methods without recourse to the presumption against extraterritoriality.¹⁰³

In sum, traditional state conflicts principles do little to constrain the extraterritorial application of state law. Further, although the Supreme Court has

98. Arguably, *Kiobel* bridges the divide to some degree in the sense that the Alien Tort Statute, which it interprets, is a jurisdictional statute; substantive causes of action under the statute must be based on common law. See 28 U.S.C. § 1350 (2006) (granting federal district courts “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”). The Court in *Kiobel* thus worried about the foreign policy consequences that might ensue when “a cause of action under the ATS reaches conduct within the territory of another sovereign.” See *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1665 (2013). At the same time, in considering whether the presumption had been overcome, the Court focused exclusively on the statutory “text, history, and purposes” of the ATS, not on more general comity or foreign-policy concerns. *Id.*

99. See, e.g., *Abel v. Planning and Zoning Comm’n of New Canaan*, 998 A.2d 1149, 1154-55 (Conn. 2010).

100. Richard D. Bernstein et al., *Closing Time: You Don’t Have to Go Home, But You Can’t Stay Here*, 67 BUS. LAW. 957, 969 (2012) (noting that “many state courts apply a similar test to *Morrison* to presume that state statutes do not apply extraterritorially”). To some extent, this trend pre-dated *Morrison*. See *Abel*, 998 A.2d at 1154-55 (noting that “[m]any state courts have applied this principle [the presumption against extraterritoriality] to state statutes” and citing several cases to do so).

101. Bernstein et al., *supra* note 100, at 969.

102. Thus, for example, courts interpreting state employment discrimination standards appear particularly likely to apply the Court’s opinion in *Aramco*. See, e.g., *Union Underwear Co. v. Barnhart*, 50 S.W.3d 188, 190-92 (Ky. 2001) (relying on part on *Aramco* to find that Kentucky state anti-discrimination statute did not apply to conduct outside Kentucky); see, e.g., *Judkins v. Saint Joseph’s College of Maine*, 483 F. Supp. 2d 60, 65-66 (D. Me. 2007) (reaching similar result with respect to similar Maine law); see, e.g., *Blackman v. Lincoln Nat’l Corp.*, No. 10-6946, 2012 U.S. Dist. LEXIS 175021, at *4-5 (E.D. Pa. Dec. 10, 2012) (same with respect to Pennsylvania law). Note that “extraterritorial” in this context has generally referred to the operation of state statutes outside state territory (i.e., in sister states) rather than outside the United States. Similarly, state courts interpreting state RICO statutes have followed federal case law on the issue. See, e.g., *El Instituto Costarricense de Electricidad v. Alcatel-Lucent (S.A.)*, No. 10-25859 CA 13 (Fla. 11th Cir. Ct. Jan. 18, 2011) (order), discussed in Bernstein et al., *supra* note 100, at 969.

103. See Caleb Nelson, *State and Federal Models of the Interaction between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 665-70 (2013) (discussing the “presumption that [a] state’s statutes accommodate[s] the state’s normal choice-of-law rules”).

2014 / Bridging the Divide

restricted the extent to which federal law applies abroad, it has done so in a way that has little relevance to state courts and is thus likely to be of fairly limited influence on them.

IV. CALIFORNIA: AN EXTRATERRITORIALITY TEST CASE

To consider how state rules and standards may often operate extraterritorially, it is worth considering the example of California. California is a useful test case both because it is a large state and because its courts hear many disputes with foreign elements.¹⁰⁴ In choice-of-law cases, California makes use of a “comparative impairment” approach,¹⁰⁵ a form of governmental interest analysis pioneered by William Baxter¹⁰⁶ that has attracted both praise and criticism.¹⁰⁷

Engaging in a full comparative impairment analysis is normally a three-step process: First, the court determines whether any relevant difference exists in the laws of any “potentially affected” jurisdiction.¹⁰⁸ Second, if a difference exists, the court determines whether each such jurisdiction has any interest in the application of its law.¹⁰⁹ Finally, if more than one jurisdiction does have such an interest, the court must “determine which state’s interest would be more impaired if its policy were subordinated to the policy of the other state.”¹¹⁰

Like many choice-of-law regimes,¹¹¹ California’s version of governmental interest analysis has a built-in forum bias.¹¹² Courts applying California choice-of-law principles have generally held that forum (i.e., California) law applies as the default and that the party advocating for the application of foreign law must affirmatively make the case that California law should be displaced.¹¹³ *Hurtado v.*

104. See Jorge A. Vargas, *The Emerging Presence of Mexican Law in California Courts*, 7 SAN DIEGO INT’L L.J. 215, 217-18 (2005) (noting that California courts decided more than 200 cases involving foreign law over a two-year period and suggesting that foreign-law cases will become even more significant part of California courts’ docket).

105. See e.g., *McCann v. Foster Wheeler LLC*, 225 P.3d 516 (Cal. 2010).

106. See William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 18 (1963).

107. For a review of the literature both criticizing and defending comparative impairment, see Lili Levi, *The Problem of Trans-National Libel*, 60 AM. J. COMP. L. 507, 541 (2012) (acknowledging comparative impairment’s critics but suggesting it might be a useful way to think about “libel tourism” cases). Mark Rosen, for example, suggests that relying on comparative impairment in the international context is potentially problematic because it requires courts to balance incommensurable interests and pronounce on matters that the executive and legislative branches are perhaps better suited to assess. Mark D. Rosen, *Should “Un-American” Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 818-19 (2004). Nonetheless, Rosen concludes that these “challenges to international comparative impairment may not be devastating,” because courts in fact have shown some competency in addressing similar issues in the domestic context. See *id.* at 817.

108. *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 107 (2006).

109. *Id.* at 107-08.

110. *Id.* at 108.

111. See, e.g., Florey, *supra* note 5, at 537.

112. See, e.g., *Hurtado v. Superior Court of Sacramento*, 11 Cal. 3d 574, 581 (1974).

113. *Id.*

Global Business & Development Law Journal / Vol. 27

Superior Court,¹¹⁴ for example, suggests that California law applies unless a party “timely invokes the law of a foreign state” and “demonstrate[s] that the latter rule of decision will further the interest of the foreign state.”¹¹⁵ The case for foreign law rather than California law may fail at any of the three steps described above: the court may determine that the content of foreign law does not differ from California law,¹¹⁶ that the foreign jurisdiction lacks an interest in applying its law,¹¹⁷ or that the foreign jurisdiction’s interest would be less impaired than California’s if its policy were “subordinated.”¹¹⁸

While this general framework applies in both foreign-nation and sister-state cases,¹¹⁹ the forum bias is, if anything, sometimes accentuated in foreign-nation cases. It is reasonable to assume that courts generally have more difficulty ascertaining the content or purposes of a foreign nation’s law than they do sister-state law. Thus, the forum-law default may be more likely to apply in foreign-law cases.¹²⁰ In *Sommer v. Gabor*, for example, a California court upheld the application of forum law to a defamation claim arising in Germany.¹²¹ The case, at first glance, had significant ties to Germany: the plaintiff was a German-born actress (Elke Sommer) with a reputation that “crosse[d] the ocean.”¹²² Sommer sued Zsa Zsa Gabor and her husband for allegedly defamatory comments made by Gabor in German to a German journalist while Gabor was staying in a

114. *Id.*

115. See *Hill v. Novartis Pharmaceutical Corp.*, No. 1:06-cv-00939-AWI-DLB, 2012 WL 967577, at *1 (E.D. Cal. Mar. 21, 2012) (“The law of the forum . . . will be displaced only if there is a compelling reason for doing so.”) (citations and quotation marks omitted); see *Marsh v. Burrell*, 805 F. Supp. 1493, 1498 (N.D. Cal. 1992) (“[California] choice of law analysis embodies the presumption that California law applies unless the proponent of foreign law can show otherwise”); see *Browne v. McDonnell Douglas Corp.*, 504 F. Supp. 514, 517 (N.D. Cal. 1980) (“Under the government interest analysis, California will apply its own law unless it is shown that there is a compelling reason to displace forum law.”). Cf. *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal.3d 157, 163 n.5 (1978) (suggesting that this principle is not interpreted rigidly, and that courts may take judicial notice of foreign law).

116. See, e.g., *Rivera v. Southern Pacific Transportation Co.*, 217 Cal. App. 3d 294, 298 (1st Dist. 1990) (“no true conflict of law” existed where two jurisdiction’s laws were “reasonably identical” and thus California law applied as forum law).

117. See *Washington Mutual Bank, FA v. Superior Court of Orange County*, 24 Cal. 4th 906, 920 (2001) (the court “may properly find California law applicable without proceeding to the third step in the analysis if the foreign law proponent fails . . . establish the other state’s interest in having its own law applied”).

118. See, e.g., *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 128 (concluding that California law should apply to most issues in the case because “the interests of California would be severely impaired if its law were not applied in this context, whereas Georgia’s interest would not be significantly impaired if California law rather than Georgia law were applied”).

119. See, e.g., *id.* at 100 (applying interest analysis/comparative impairment framework to conflict between California and Georgia law); *Hurtado v. Superior Court of Sacramento County*, 11 Cal. 3d 574, 579-80 (1974) (applying similar framework to conflict between law of California and of Mexico).

120. “This is the case because forum law applies by default unless “the proponent of foreign law can show otherwise.” *Marsh*, 805 F. Supp. at 1496. Such a showing generally involves both establishing a difference between foreign law and California law and making the case that any such difference creates an interest on the part of the foreign jurisdiction. See *id.* at 1497.

121. *Sommer v. Gabor*, 40 Cal. App. 4th 1455, 1469-70 (2d Dist. 1995).

122. *Id.* at 1463.

2014 / Bridging the Divide

German hotel¹²³ and by Gabor's husband to a German journalist.¹²⁴ In both cases, the allegedly defamatory remarks had been published in German-language publications.¹²⁵ Nonetheless, in large part because of uncertainty about German law's content, the court found the lower court's application of California law (under which plaintiff had recovered a total of \$3.3 million against both defendants)¹²⁶ to be proper. As the court noted, "[t]he snippets and portions of German case law cited by appellants are simply not adequate for us to make any meaningful conclusions regarding the result of applying German law to the instant case," far less to determine Germany's interest in applying its law under the circumstances.¹²⁷ Absent such a showing, the court found that forum—i.e., California—law should apply under governmental interest analysis.¹²⁸

Even where the content of foreign law is clear, courts applying California law sometimes take a restrictive view of what counts as an "interest" on the part of the foreign jurisdiction. Consider, for example, the case of damages. In a variety of cases, courts applying California law have found that non-California jurisdictions that limit either compensatory or punitive damages have no interest in applying those limits unless the defendant is resident there,¹²⁹ even when the conduct at issue occurred in the foreign jurisdiction.¹³⁰

The first two stages, then, tend to have a tilt, either implicit or explicit, in favor of forum law. The third stage, in which courts assess which jurisdiction's interests would be more impaired if its law were not applied, is perhaps more of an equal contest; California courts have chosen non-California law over forum law with some frequency.¹³¹ In these cases, however, analysis is sometimes fact-specific and unpredictable.¹³²

123. *Id.* at 1461-62.

124. *Id.* at 1462-63.

125. *Id.* at 1461.

126. *Id.* at 1463-64.

127. *Sommer*, 40 Cal. App. 4th at 1469.

128. *See id.* at 1470; *see also* *Washington Mutual Bank, FA v. Superior Court of Orange County*, 24 Cal. 4th 906, 919 (2001) (explaining that "the foreign law proponent must identify the applicable rule of law in each potentially concerned state and must show it materially differs from the law of California").

129. *See, e.g., Pecover v. Electronic Arts Inc.*, No. C 08-2820 VRW, 2010 WL 8742757, at *61 (N.D. Cal. Dec. 21, 2010); *see, e.g., Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 WL 2455761, at *8-*9 (N.D. Cal. Aug. 22, 2006); *see, e.g., Bauer v. Club Med Sales Inc.*, No. C-95-1637 MHP, 1996 WL 310076, at *17 (N.D. Cal. May 22, 1996); *see, e.g., Marsh v. Burrell*, 805 F. Supp. 1493, 1498 (N.D. Cal. 1992); *see, e.g., Hurtado v. Superior Court of Sacramento County*, 11 Cal. 3d 574, 583 (1974).

130. *See, e.g., Bowoto*, 2006 WL 2455761, at *10 (noting that conduct at issue occurred primarily within Nigerian borders); *see, e.g., Bauer*, 1996 WL 310076, at *6 (noting that "the acts giving rise to the action occurred in a foreign country"). In at least one case, a court applying California choice-of-law principles applied the California law of punitive damages notwithstanding the fact that the defendant was a resident of New Jersey, which limited damages. *See Hill v. Novartis Pharmaceutical Corp.*, No. 1:06-cv-00939-AWI-DLB, 2012 WL 967577, at *0-10 (E.D. Cal. Mar. 21, 2012).

131. *See, e.g., Herma Hill Kay, The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CALIF. L. REV. 577, 607 (1980) (noting that, under comparative impairment analysis, California courts applied foreign law rather than California law in three of four prominent

Global Business & Development Law Journal / Vol. 27

The often forum-law-friendly environment of California courts has already attracted the notice of foreign plaintiffs, and is likely to do so even more frequently in the wake of *Morrison* and *Kiobel*.¹³³ An instructive recent case is *Bowoto v. Chevron Corp.*,¹³⁴ a Ninth Circuit case applying California conflicts law that has received particular attention in the wake of the *Kiobel* decision. The case alleged that Chevron, acting through a subsidiary, had paid for a “series of brutal attacks” on plaintiffs while they were engaged in political protests.¹³⁵ Plaintiffs alleged several California tort-law claims.¹³⁶ To all issues besides the plaintiffs’ wrongful-death claim, the court applied California law.¹³⁷

The court’s reasons for applying California law were diverse. As to plaintiffs’ assault and battery and negligence claims, the court found that Nigerian law did not materially differ from California law and thus California law applied.¹³⁸ As to plaintiffs’ survival actions, the court found that while Nigeria’s law differed from California’s (Nigeria, unlike California, did not allow punitive damages), Nigeria lacked an interest and thus California law applied.¹³⁹ In reaching this conclusion, the court relied on the established California choice-of-law principle that “limitations of liability, as opposed to exposure to tort liability, are false conflicts when the defendant is a non-resident corporation.”¹⁴⁰

With respect to the causes of action plaintiffs had stated for intentional and negligent infliction of emotional distress, loss of consortium, and civil conspiracy, the court found that a material difference existed: California recognized these claims, while Nigeria did not.¹⁴¹ Further, the court found this difference to create a true conflict in which both jurisdictions had an interest in having their law applied.¹⁴² But in proceeding to comparative impairment analysis, the court found that California’s interest would be the more impaired if

cases).

132. Many scholars have noted the danger that the somewhat subjective nature of comparative impairment analysis will lead to unpredictable results. See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 318 (1990) (noting that “actual cases decided under comparative impairment analysis” illustrate the fact that it requires judgments that are “too subjective and too complex”).

133. See generally, e.g., *Bowoto*, 2006 WL 2455761.

134. See generally *id.*

135. *Id.* at *1.

136. Plaintiffs stated claims for wrongful death, intentional infliction of emotional distress, negligent infliction of emotional distress, loss of consortium, civil conspiracy, assault and battery, negligence, and survival actions. *Id.* at *7-9.

137. See *id.* Interestingly, the court applied Nigerian law to the wrongful death claim based on earlier cases that, relying on *American Banana* and the Restatement (First) of Conflict of Laws (since abandoned by California), suggested that California’s wrongful death statute did not apply outside the state’s borders. See *Gordon v. Reynolds*, 187 Cal. App. 2d 472, 476-77 (1961).

138. See *Bowoto*, 2006 WL 245576, at *9.

139. See *id.*

140. *Id.*

141. *Id.* at *8.

142. *Id.* at *9.

2014 / Bridging the Divide

its law were not applied. California had an interest in regulating the conduct of corporations operating within its borders, while Nigeria's interest in "defining its tort law" did not legitimately extend to "depriving plaintiffs of a mechanism to recover for allegedly brutal attacks."¹⁴³ Thus, even though it was a "close question," California law applied to these claims as well.¹⁴⁴

The case ultimately proceeded to a jury verdict, which Chevron won.¹⁴⁵ Thus, Chevron was not in the end required to pay damages under California law. Nonetheless, *Bowoto* illustrates both the way in which international human rights claims may be reframed in the terms of state tort law (notably, the plaintiffs had stated federal claims under the Alien Tort Statute and Torture Victim Protection Act alongside their state-law claims)¹⁴⁶ and the more general potential for broad applicability of state law to conduct abroad.¹⁴⁷

The experience of California is important because it shows both that plaintiffs have often succeeded in bringing claims with substantial forum elements in state court and that choice-of-law principles have often dictated the applicability of forum law in such circumstances.¹⁴⁸ Further, there is reason to think that California is more similar to, rather than different from, other states in this regard.¹⁴⁹ Most state choice-of-law systems, for example, exhibit some preference for forum law,¹⁵⁰ and in general state conflicts principles, including the Second Restatement applied by a large plurality of states,¹⁵¹ do not treat foreign and sister-state law differently in conflicts analysis.¹⁵²

From a policy standpoint, the potential availability of state-law claims has the potential for both good and bad consequences. On the one hand, the possible applicability of state law may provide the only available avenue of redress to human rights victims, those injured by corporate fraud, and other sympathetic plaintiffs. On the other hand, the widespread use of state courts and state law in disputes with foreign elements raises legitimate concerns about forum-shopping,¹⁵³ difficulty anticipating which sovereign's standards will govern

143. *See id.* at *10.

144. *Bowoto*, 2006 WL 2455761 at *10.

145. *See Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1122 (9th Cir. 2010).

146. *See Bowoto*, 2006 WL 2455761 at *11.

147. The attacks had been ordered and carried out in Nigeria, although plaintiffs alleged that they had been "approved and later ratified in California." *Id.* at *10.

148. Much commentary has focused on potential obstacles plaintiffs face in bringing claims with substantial foreign elements in state courts. *See, e.g.*, Childress, *supra* note 4, at 741-52. The nature and severity of obstacles plaintiffs face depends, of course, on what sort of claims they are trying to bring and how substantial the foreign elements are.

149. *See Florey, supra* note 5, at 537.

150. *Id.*

151. *See Symeonides, supra* note 78, at 278-79.

152. *See Reimann, supra* note 9, at 576-77.

153. In *Morrison*, for example, Justice Scalia invoked worries that the United States might become a "Shangri-La" for foreign securities plaintiffs. *See Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2877-78 (2010).

Global Business & Development Law Journal / Vol. 27

particular conduct,¹⁵⁴ and inappropriate projection of state power.¹⁵⁵ But regardless of where one thinks the balance should be struck, a strong argument exists that the issue of state-law applicability to foreign disputes should be made part of discussions of both the federal presumption against extraterritoriality and to the merits (or lack thereof) of the current state choice-of-law framework when applied in the international context. The next section discusses this point in more detail.¹⁵⁶

V. THE FUTURE: RECONCILING THE PRESUMPTION AGAINST
EXTRATERRITORIALITY WITH STATE APPROACHES

A. *What the Presumption Means (and Does Not Mean) for States*

The Court's recent revival of interest in the presumption against extraterritoriality offers little to guide states in their choice-of-law decision making processes. To begin, the Court's expansion of the presumption suggests that it has abandoned an approach to extraterritoriality grounded in comity and international norms in favor of one rooted entirely in statutory interpretation.¹⁵⁷ Whatever might be said for or against this shift more generally, it suggests that state courts applying predominantly common law will find little in the Court's recent case law to guide them.

This is not for lack of interest or concern on the part of state courts, which have often earnestly attempted to follow the Court's extraterritoriality approach to the extent that they can.¹⁵⁸ But, because of their focus on statutes, *Morrison* or *Kiobel* shed little light on the question of how far state law should extend when no legislative intent exists about which to make presumptions.

The divergence in the applicability of federal and state law raises a number of obvious problems. As a starting point, the potentially greater applicability of state (as opposed to federal) law abroad creates a strong likelihood that disputes with foreign elements will increasingly be governed by state-law standards, whether in state or federal court. Because both state substantive law and state choice-of-law principles are quite diverse, this phenomenon in turn increases uncertainty about the potential legal consequences of foreign conduct and undermines what Anthony Colangelo has called "spatial legality"—the due process principle that conduct that is legal in the jurisdiction where it is

154. See Colangelo, *supra* note 14, at 75 (describing the issue of "retrospective alteration of rules subjecting parties to a law they could not have expected would govern their conduct").

155. See Florey, *supra* note 5, at 571.

156. See *infra* Part V.

157. See Knox, *supra* note 19, at 352. This is true to a great extent even in *Kiobel*, where the Court raised some foreign policy and comity concerns but ultimately treated the question at hand as one largely of statutory interpretation. See *supra* note 98.

158. See Bernstein et al., *supra* note 100, at 969.

2014 / Bridging the Divide

undertaken should not be subject to unforeseeable legal consequences in a distant place.¹⁵⁹

In addition to due process concerns, the greater reach of state law raises both questions about the inappropriate projection of U.S. power and concerns about federalism.¹⁶⁰ States currently enjoy nearly unlimited power under the U.S. Constitution to apply their law to disputes so long as they have at least a few modest connections to the case.¹⁶¹ A state determined to apply its law to a predominantly foreign dispute would face few external checks on its doing so.¹⁶² Yet such a result could have potentially serious consequences for U.S. foreign relations. State power applied abroad is likely to be seen by other nations as U.S. power in a different form, and for that reason the application of state law abroad raises (at a minimum) the same concerns as those present where federal law is concerned.

Further, such application of state law may directly interfere with deliberate decisions by Congress to exercise restraint in how broadly to apply a parallel federal law abroad. For this reason, some scholars have suggested that a preemption principle may, in some circumstances, limit the applicability of state law abroad.¹⁶³ Such a principle, however, finds little support in case law¹⁶⁴ and (particularly where state common law is concerned) is in considerable tension with states' historical freedom to select their preferred conflicts principles without federal interference.¹⁶⁵

Finally, a shift in cases with foreign elements from federal court and federal law to state court and state law lays bare some of the conceptual limitations of state choice-of-law methodology. It is hard to defend an approach that treats identically, on the one hand, a major difference in law reflecting serious policy divisions between two countries and, on the other, a minor difference in sister-

159. See Colangelo, *supra* note 14, at 72-73. Of course, this concern does not by itself dictate any particular interpretation of the territorial scope of state law. It certainly does not mean that such law may never apply to conduct or actors outside the borders of the United States. It simply means that, when state law is applied extraterritorially, it should be done so in a way that is guided by consistent and relatively predictable principles.

160. See Florey, *supra* note 5, at 571.

161. States, that is, are limited in their ability to apply their law to a particular dispute only by the modest constraints imposed by the Due Process Clause. See *id.* at 557.

162. This is not at all to say that such practices are common; many state courts, indeed, are sensitive to concerns about projecting state law into the foreign arena, and make use of many devices (such as forum non conveniens and the personal jurisdiction "reasonableness" inquiry) to exercise restraint. See *id.* at 561. Indeed, one could argue that the lack of guidance available to state courts results in a suboptimal degree of application of state law to foreign disputes, since state courts in marginal cases may err on the side of restraint.

163. See Childress, *supra* note 4, at 749-50 (exploring various preemption theories).

164. See *id.* at 749 ("Few decisions have held state laws unconstitutional on the grounds that they impact the federal government's exercise of foreign affairs.").

165. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727-28 (1988) (noting that states may permissibly apply a variety of choice-of-law principles and expressing wariness about the "enterprise of constitutionalizing choice-of-law rules, with no compass to guide us beyond our own perceptions of what seems desirable").

Global Business & Development Law Journal / Vol. 27

state laws such as which insurance policies can be used to provide compensation for a motorcycle accident.¹⁶⁶ To the extent that states wish their choice-of-law regimes to be fair, effective, and coherent, they will have to adapt them to this new reality.¹⁶⁷

Such adaptation, however, should go beyond simply mimicking recent developments in federal extraterritoriality principles. It would be a mistake, that is, for state courts to take the restrictive approach to the applicability of U.S. law abroad that underlies the presumption against extraterritoriality.

To begin with, the central justification for the presumption against extraterritoriality is that it accords with legislative intent. As the Court opined, applying the presumption against extraterritoriality to the Federal Tort Claims Act in *Smith v. United States*, it believed its result to be the “same conclusion that the 79th Congress would have reached had it expressly considered the question we now decide.”¹⁶⁸ Similarly, the Court’s analysis in *Kiobel* focused almost entirely on events surrounding the passage of the Alien Tort Statute in an attempt to discern Congress’s intent as to its territorial reach.¹⁶⁹

To the extent congressional intent is the primary justification for the presumption against extraterritoriality, the presumption should not apply to state common law. Arguably, it should not apply to state statutory law either. Given that states’ economies and overall welfare are highly interconnected, the “perception that [the legislature] ordinarily legislates with respect to domestic, not foreign matters,”¹⁷⁰ which underpins the presumption against extraterritoriality, is a far less plausible assumption in the state context, at least where applicability of state law to sister states is at issue.¹⁷¹ Further, the fact that Congress may legislatively override the presumption, and has in fact done so, mitigates its strictness in the federal context.¹⁷² Though similar overrides by state legislatures are of course possible, the sheer scope of state statutory and common

166. This was the question at issue in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 305 (1981), one of the principal cases in which the Supreme Court has discussed the constitutional limits on state choice-of-law decisions. Such differences may, of course, be highly meaningful to the litigants in a particular case, but they have few long-term policy implications. Moreover, many such disputes involve national businesses that can certainly predict and plan for the fact that they will be likely held to account in multiple states that may apply somewhat different legal regimes to them.

167. Of course, given the controversy that has long attended the development of state choice-of-law principles even in the wholly domestic context, however, any such adaptation is likely to be a complex and fraught process.

168. *Smith v. United States*, 507 U.S. 197, 204-05 (1993).

169. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1665-69 (2013).

170. *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010).

171. Indeed, routine application of state conflicts principles produces results that might be characterized as “extraterritorial.” *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, 1074 (2009). Because this effect of choice-of-law decisions is a long-standing one, state legislatures can likely be presumed, at least in many circumstances, to have acted against its backdrop.

172. *See Florey, supra* note 5, at 550.

2014 / Bridging the Divide

law makes it unreasonable to think state legislatures could take action to clarify the scope of every state legal rule that might conceivably apply outside state borders.

Yet if the presumption against extraterritoriality is likely to be of little use to state courts, earlier federal cases that grappled with broader issues of extraterritoriality may, by contrast, provide valuable guidance. John Knox has identified various presumptions against extrajurisdictionality that federal courts historically applied in interpreting the reach of federal law;¹⁷³ such principles seem of equal relevance when applied to state statutes that may be applied abroad. Likewise, principles of comity, as articulated in cases like *Timberlane Lumber*, provide an untapped source of guidance for state courts negotiating state-law/foreign-law conflicts.¹⁷⁴ Reliance on such principles may not, of course, be a full solution to the problem, but they could at least provide a starting point for the development of a body of doctrine that recognizes the distinct issues posed by conflicts between state and foreign-nation law.¹⁷⁵

B. State Conflict Doctrine's Relevance to the Interpretation of Federal Statutes

The previous section argued that state courts negotiating state-law/foreign-law conflicts should take more account of federal precedent.¹⁷⁶ While a full discussion of the federal presumption against extraterritoriality is beyond the scope of this brief Article, it is nonetheless worth noting that the case for increased dialogue between federal and state approaches applies to federal law as well. In other words, the potential substitution of state law for federal law in disputes with foreign elements should also guide federal courts as they apply the presumption against extraterritoriality.

The phenomenon of state-law replacement of federal law abroad undermines to some degree the justifications the Court has articulated for the presumption

173. See Knox, *supra* note 19, at 362-66. Knox suggests a modern framework rooted in this early case law and in current international norms, under which

If [such norms] allocate the United States sole or primary legislative jurisdiction, then the court would have a green light to construe the statute without any presumption against its application. If the United States does not have sole or primary jurisdiction, but international law does provide it with some basis for jurisdiction, then the light would turn yellow: the court would employ a soft presumption against application of the statute that could be overcome by an indication of legislative intent that it do so. Finally, if the United States has no basis under international law for jurisdiction, the light would be red.

Id. at 396. Again, this framework is highly adaptable to the state context as well. For a related argument that international relations concerns should guide courts in determining whether the presumption against extraterritoriality is triggered in the first instance, see Franklin A. Gevurtz, *Determining Extraterritoriality*, 56 WILL. & MARY L. REV. __ (forthcoming 2014).

174. See Florey, *supra* note 5, at 575 n.245.

175. See *id.*

176. See *supra* Part V.A.

Global Business & Development Law Journal / Vol. 27

against extraterritoriality.¹⁷⁷ To the extent the presumption is designed to reflect real-world congressional intent, it seems improbable that Congress would, in general, desire state law to apply abroad to a greater extent than federal law.¹⁷⁸ Likewise, to the extent that the presumption is in part driven by the hope that it will foster predictability¹⁷⁹ and discourage forum-shopping, courts should consider the fact that the potential substitution of state law may make these aspirations less likely to be achieved.¹⁸⁰

This tension between the phenomenon of state-law replacement of federal law and the stated justifications for the presumption against extraterritoriality should guide federal courts in applying the latter. To the extent the presumption's primary justification is that it reflects congressional intent, courts should take into account the possibility that applying the presumption will result in state law being substituted for foreign law and weigh that potential result in their consideration of whether the presumption has been overcome.¹⁸¹ To the extent the presumption is also justified by the Court's policy worries,¹⁸² the possible substitution of state law may also be relevant in ascertaining how broadly the presumption should be applied.

Such effects do not make a comprehensive case against the presumption against extraterritoriality, but they do perhaps counsel in favor of greater selectivity and nuance in the way in which courts apply the presumption. At the

177. See Florey, *supra* note 5, at 566.

178. In other contexts, that is, we generally assume that issues touching upon foreign relations are the domain of Congress, not the states. See Childress, *supra* note 4, at 749-50. We further assume that Congress normally legislates because it wants to preempt or supplement state law; it seems reasonable that this intention would not be limited to wholly domestic conduct. See Florey, *supra* note 5, at 566. One could argue that this principle does not necessarily undermine the Court's stated rationale for the presumption—the notion that perception that “Congress ordinarily legislates with respect to domestic, not foreign matters.” See *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2869 (2010). That is, it is completely plausible that, with respect to any given piece of legislation, Congress intended that it only apply domestically and gave no consideration to its possible overseas application or the possibility that state law might become the governing standard. At the same time, a strong argument exists that our more general understanding of what areas Congress legislates in (and why it does so) should inform our understanding of whether and how the presumption against extraterritoriality should be applied.

179. See *Morrison*, 130 S. Ct. at 2878 (criticizing extraterritoriality regimes not rooted in the presumption as “complex in formulation and unpredictable in application”).

180. See *id.* at 2886 (noting danger that, without a strict limit on the extraterritorial application of federal law, the United States might become “Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets”).

181. The Court has yet to clarify exactly what sort of evidence would suffice to overcome the presumption. In *Kiobel*, however, the Court focused extensively not just on statutory language but on “the historical background against which the [Alien Tort Statute] was enacted” to assess whether the presumption had been overcome. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1666 (2013). The Court's lengthy consideration of this issue suggests that the context in which Congress legislates may provide at least some evidence of whether the presumption has been overcome.

182. See Kramer, *supra* note 132.

2014 / Bridging the Divide

very least, courts applying the presumption should do so with an understanding of the potential state-law replacement effects they may be creating.¹⁸³

The substitution of state law for federal law also supports the case for congressional action to clarify federal statutes' extraterritorial reach. Through explicit pronouncements, Congress has the power to overcome the presumption against extraterritoriality.¹⁸⁴ In cases where state law appears likely to apply to foreign disputes, there is a particularly strong case for Congress to pass legislation that would supply a more uniform federal standard. Such legislation, depending on circumstances, might or might not be accompanied by a provision explicitly preempting related state causes of action.

VI. CONCLUSION

State and federal approaches to law's extraterritorial reach have long moved along separate tracks, with states dealing with such issues (if at all) within the rubric of their existing conflicts principles, while federal law has been subject to a distinct body of doctrine regulating its extraterritorial reach.¹⁸⁵ The Supreme Court's recent strengthening of the presumption against extraterritoriality has only accentuated this divide.¹⁸⁶ The Court has moved the doctrine of federal extraterritoriality in a direction increasingly incompatible with state approaches, while at the same time left a void that state law seems likely to fill at least in part.¹⁸⁷ This divergence has the potential to undermine predictability for foreign actors and to upend the normal state-federal balance of power in matters touching on foreign relations.¹⁸⁸ This situation in turn calls upon both state and federal courts to find ways to understand the interrelationship of state and federal approaches and perhaps to reconcile them to some degree. Even as state and federal approaches to extraterritoriality are moving in increasingly different directions, both might be better served by greater dialogue and, ultimately, greater convergence.

183. Justice Breyer, indeed, noted this potential in his brief *Morrison* concurrence, although it is not clear if the majority took such issues into account. *See Morrison*, 130 S. Ct. at 2888. (Breyer, J., concurring) (observing that "state law . . . may apply to the fraudulent activity alleged here to have occurred in the United States").

184. *See, e.g., supra* Part II.

185. *See supra* Parts II, III.

186. *See supra* Part V.A.

187. *See supra* Part V.B.

188. *See supra* Part V.B.