State and Federal Models of the Interaction between Statutes and Unwritten Law

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This Article argues that modern courts read individual federal statutes to encompass more issues than identically worded state statutes would be understood to cover. There are many questions that regularly arise in the implementation of statutes but that the typical statute does not say anything about. When a state statute is silent on such questions, state courts often conclude that the questions lie beyond the statute's domain and that the answers therefore come from the state's version of the common law. But when a federal statute is silent on the same sorts of questions, courts often act as if answers should be imputed to the statute itself.

As an illustration of this difference, the Article studies how courts decide whether forum law governs cross-border events. When state courts need to determine whether one of their own state's statutes supplies rules of decision for a case involving cross-border events, they commonly apply an overarching set of choice-of-law doctrines that they think of as operating outside the statute. By contrast, when a federal *statute does not specifically address its applicability to cross-border events, courts use a canon of construction—the presumption against extraterritoriality—to import the necessary distinctions into the statute.*

Similar examples abound. In a range of different contexts, general legal questions that would be thought to fall outside *the domain of the typical state statute (and that courts might therefore handle as a matter of unwritten law) are presumed to lie* inside *the domain of the typical federal statute (with the result that courts handle them under the rubric of statutory interpretation). To explain this pattern, the Article points to practical concerns that came into focus after* Erie Railroad Co v Tompkins*: under modern doctrine, one way for federal judges to avoid having to accept whatever state courts say about questions that arise in connection with the implementation of a federal statute is to read the statute itself to encompass those questions.*

The consequences of shoehorning general legal questions into the domains of individual federal statutes depend on the interpretive techniques that courts use. To the extent that the rubric of statutory interpretation leads courts to give statute-specific answers to such questions, the federal model can produce dramatically different results than the state model would. Those differences will be muted if courts instead read each individual federal statute as implicitly incorporating generic principles of unwritten law. Even then, though, the mechanism through which those principles operate can have subtle effects.

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INTRODUCTION

In the late 1960s, both the California state legislature and the federal Congress enacted statutes that protect the privacy of telephone conversations by restricting the use of wiretaps and secret recording devices.[1] The statutes have somewhat different substantive provisions,[2] but they establish parallel remedial schemes. In addition to making the willful or intentional violation

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[1] See 1967 Cal Stat 3584, 3584–88, codified at Cal Penal Code § 630 et seq; Omnibus Crime Control and Safe Streets Act of 1968 § 802, Pub L No 90-351, 82 Stat 197, 212–23, codified at 18 USC § 2510 et seq.

[2] Compare Cal Penal Code § 632(a) (establishing a general rule against recording telephone conversations "without the consent of *all* parties") (emphasis added), with 18 USC § 2511(2)(d) (Supp IV 1969) (providing, with certain exceptions, that "[i]t shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where *one* of the parties to the communication has given prior consent to such interception") (emphasis added).

of its provisions a crime, each statute also creates a private cause of action in favor of the victims of illicit recording.[3] Neither statute, however, specifically addresses the geographic reach of the rights and duties that it creates.

With respect to the state statute, that issue reached the California Supreme Court in *Kearney v Salomon Smith Barney, Inc*.[4] The plaintiffs, who lived in California, regularly spoke over the telephone with the defendant's employees in Georgia. Acting in Georgia, the defendant's employees allegedly recorded many of those calls without the plaintiffs' knowledge or consent. Ultimately, the plaintiffs sued the defendant in the California state courts for violating the California statute. The defendant responded that the California statute did not govern the behavior of its employees in Georgia. Under Georgia law, moreover, one party to a phone call has no duty to inform the other party before recording the call.[5]

The California Supreme Court framed the case as presenting "a classic choice-of-law issue," and it proceeded to apply the "governmental interest analysis" that California courts now use for such issues.[6] Part of that analysis hinged on interpreting the California statute and its Georgia counterpart to determine whether both states had relevant interests at stake. In the court's view, they did: Each state's statute expressed a policy that applied whenever either end of a telephone conversation occurred within the state.[7] The policy established by the California statute, moreover, conflicted with the policy established by the Georgia statute. To resolve that conflict, the court proceeded to conduct the "comparative impairment" analysis mandated by California choice-of-law doctrine: the court asked "which state's interest would be more impaired if its policy were subordinated to the policy of the other state."[8] At least insofar as civil remedies for future acts of recording were concerned, the court concluded that this analysis favored applying California law.[9] As a

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3 See 18 USC § 2520; Cal Penal Code § 637.2.

4 137 P3d 914 (Cal 2006).

5 Id at 918–19.

6 Id at 917.

7 See id at 928–33. See also id at 930–31 (rejecting the defendant's argument that interpreting the California statute to impose duties on people in Georgia would amount to "a disfavored 'extraterritorial' application of the statute").

8 *Kearney*, 137 P3d at 922, quoting *Bernhard v Harrah's Club*, 546 P2d 719, 723 (Cal 1976) (quotation marks omitted).

9 *Kearney*, 137 P3d at 934–37. Because people in Georgia might not have known that their conduct could be evaluated under California law, the court declined to use California

result, the court concluded that the California statute gave the defendant's employees in Georgia an enforceable duty to inform the plaintiffs before recording telephone conversations to which the plaintiffs were parties.[10]

Analogous questions can also arise under the federal statute. Imagine, for instance, that a plaintiff in California places a telephone call to someone in Mexico, and that a third party in Mexico secretly intercepts and records this conversation. Unless the international dimension of this case makes a difference, *Kearney* suggests that the plaintiff could assert a cause of action under the California statute against the third party who surreptitiously recorded the conversation. But can the plaintiff assert a cause of action under the federal statute too?

This question closely resembles the one that the California Supreme Court addressed in *Kearney*. Yet courts have uniformly held that the federal statute does *not* restrict wiretaps abroad, even when the wiretaps are being used to record conversations with someone in the United States.[11] In reaching this conclusion, moreover, the courts have structured their analysis quite differently than the California Supreme Court did in *Kearney*. Instead of fitting their analysis of the relevant statute into an overarching framework supplied by choice-of-law doctrine, they have spoken *entirely* in terms of statutory interpretation. The gist of their opinions has been that reading the federal statute to prohibit wiretaps in foreign countries would cause the statute to operate extraterritorially, and the so-called presumption against extraterritoriality disfavors such interpretations.[12]

As this example illustrates, the "presumption against extraterritoriality" that courts apply to federal statutes addresses the

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law insofar as the plaintiffs were seeking damages for conduct that occurred before the date of the court's opinion. Id at 937–38. The court also reserved judgment about whether the *criminal* aspects of the California statute would apply to people acting outside the state. Id at 928.

10 Id at 937.

11 See, for example, *Morrison v Dietz*, 2010 WL 395918, *4 (ND Cal) (dismissing plaintiff's complaint). See also *Stowe v Devoy*, 588 F2d 336, 341 (2d Cir 1978) (rejecting a habeas petitioner's challenge to the admission of recorded conversations between the petitioner in New York and someone in Canada, and explaining that the federal statute did not prohibit wiretapping in Canada); *United States v Cotroni*, 527 F2d 708, 711 (2d Cir 1975) (similar).

12 See, for example, *Cotroni*, 527 F2d at 711 (invoking "the canon of construction which teaches that, unless a contrary intent appears, federal statutes apply only within the territorial jurisdiction of the United States"); id (reasoning that because the federal statute seeks to regulate the interception of communications, the key question that determines its applicability is "where the interception took place").

same sort of questions that courts often use choice-of-law doctrines to handle with respect to state law.[13] But these two approaches do not always generate the same answers. Modern choice-of-law doctrine can lead courts to apply state statutes in ways that would trigger the presumption against extraterritoriality if a federal statute were involved.[14]

This is a puzzle in its own right, and one of my goals in this Article is to say something about it. But my principal aim is to use this puzzle to illuminate some important differences between the modern implementation of state statutes and the modern implementation of federal statutes. When a state legislature enacts a statute, the state's courts naturally draw upon various doctrines of unwritten law (such as the state's choice-of-law principles[15]) as they think about how the statute fits into the

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[13] This point has not completely penetrated the literature about statutory interpretation, but it is well known to choice-of-law scholars. See, for example, David P. Currie, et al, *Conflict of Laws: Cases–Comments–Questions* 814–22 (West 8th ed 2010) (presenting the presumption against extraterritoriality as a device for handling a choice-of-law question); William S. Dodge, *Extraterritoriality and Choice-of-Law Theory: An Argument for Judicial Unilateralism*, 39 Harv Intl L J 101, 143–44, 168 (1998) (noting the "obvious" point that "conflicts and extraterritoriality raise similar problems" and concluding that discussion of extraterritoriality should shift "from *whether* a conflicts approach should be applied to *which* conflicts approach should be applied"). See also Clyde Spillenger, *Risk Regulation, Extraterritoriality, and the Constitutionalization of Choice of Law, 1865–1940* *27 (UCLA School of Law Research Paper No 12-01, Feb 15, 2012), online at http://www.ssrn.com/abstract=2006719 (visited May 9, 2013) (agreeing that questions about the permissible reach of state law have been analyzed in choice-of-law terms from the 1930s on, but arguing that "to late nineteenth-century jurists, the question of territorial limits on a state's exercise of its political jurisdiction . . . constituted a problem of legal and political legitimacy seemingly distinct from the field of conflict of laws").

[14] See Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of* Morrison v. National Australia Bank, 92 BU L Rev 535, 536 (2012) (observing that because of the differences between state choice-of-law analysis and the federal presumption against extraterritoriality, "it is frequently the case . . . that state law applies to [multinational fact patterns] where federal law does not"). See also Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 S Ct Rev 179, 202 (complaining that the presumption against extraterritoriality reflects the choice-of-law thinking of the nineteenth century rather than of the present day); Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 L & Pol Intl Bus 1, 61–74 (1992) (making a similar point).

[15] I refer to these principles as "unwritten" law because most states have not comprehensively codified them. See Symeon C. Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future* 4 (Martinus Nijhoff 2006). Louisiana is different; its statutory code lays out some overarching choice-of-law doctrines. See id at 4 & n 14. Oregon has recently followed suit with respect to issues of tort and contract. See generally James A.R. Nafziger, *The Louisiana and Oregon Codifications of Choice-of-Law Rules in Context*, 58 Am J Comp L 165 (2010). Even in Oregon and Louisiana, though, the state's codified choice-of-law rules are thought to operate separate and apart from the particular statutes that define the substance of the state's law. As a result, most of the

rest of the state's legal system. Often, the courts think of those overarching doctrines of unwritten law as operating outside of the statute, and as having force unless a particular statute opts out of them. When Congress enacts a federal statute, by contrast, courts face pressure to take a different approach. If they conclude that a particular question lies beyond the federal statute's domain,[16] courts will not necessarily be able to fall back on *federal* principles of unwritten law; instead, courts may feel obliged to handle the question according to the local law of an individual state. That result, however, will not always seem appropriate, because some questions that the statutory language does not seem to encompass may nonetheless take on a federal character when they arise in connection with the implementation of a federal statute. To avoid letting the local laws of individual states govern such questions, courts may end up holding that the federal statute encompasses those questions after all.

Admittedly, courts sometimes go on to conclude that Congress enacted the statute against the backdrop supplied by widely accepted principles of unwritten law and that the statute should be understood as implicitly adopting those principles.[17] When that happens, one might think that there is little practical difference between the state and federal models for the interaction between statutes and the unwritten law. To be sure, principles of unwritten law are operating through different mechanisms: in the federal model, courts are reading particular statutes to incorporate principles that would be thought to operate on a different plane if state law were involved. But as long as the same principles end up being applied, one might not care whether those principles are operating directly or only through incorporation into individual statutes.

As we shall see, though, the mechanism through which principles of unwritten law operate has a tendency to affect the content of the principles that the courts apply. One manifestation of that tendency crops up when the unwritten law changes. If the unwritten law applies to a case directly (as in the state model), courts are likely to apply *current* understandings of the

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points that I will make in this Article are true of Louisiana and Oregon no less than of other states.

16 By the "domain" of a statute, I mean the set of questions that the statute either itself answers or authorizes interpreters to answer in its name. See generally Frank H. Easterbrook, *Statutes' Domains*, 50 U Chi L Rev 533 (1983) (introducing this terminology).

17 See Caleb Nelson, *The Persistence of General Law*, 106 Colum L Rev 503, 524 (2006) (providing examples, though not tracing this practice to its source).

unwritten law. But if the unwritten law matters only because a statute has incorporated it (as in the federal model), courts may well assume that the incorporation was "static" rather than "dynamic"—with the result that cases arising under the statute will be decided according to the background doctrines of unwritten law that existed *when the statute was enacted*.

The difference between the state and federal models can have other practical consequences too. To the extent that courts think of federal statutes as encompassing issues that would lie beyond the domain of parallel state statutes, and to the extent that courts proceed to analyze those issues entirely under the rubric of statutory interpretation, the canons and other interpretive principles that courts apply may well affect their bottom-line conclusions. The "presumption against extraterritoriality" that courts apply to federal statutes is a good example: it does not always lead to the same conclusions as the choice-of-law rules that courts use to handle similar questions about the implementation of state statutes.

This Article proceeds as follows. To illustrate what I am calling the state model for the interaction between statutes and the unwritten law, Part I.A discusses how state courts determine whether their own state's statutes govern cross-border transactions or events. Part I.B then describes the emergence of a separate federal model that courts use to answer analogous questions about federal statutes. Part II offers a possible explanation for the divergence of the two models. Part III broadens the picture: it identifies numerous other manifestations of the federal model across a range of legal questions. The Conclusion canvasses some practical consequences of the difference between the state and federal models.

I. AN ILLUSTRATION OF THE MODELS: CHOICE-OF-LAW DOCTRINE AND THE PRESUMPTION AGAINST EXTRATERRITORIALITY

Before we can usefully compare the analysis that courts use to determine the applicability of state statutes with the analysis that courts use to determine the applicability of federal statutes, we must structure the comparison properly. Under longstanding understandings of American federalism, all American courts are obliged to follow all valid federal statutes that purport to govern the cases before them. For the most part, state courts do not

have a similar obligation to apply the statutes of sister states.[18] As a matter of state law, though, each state's courts do have an obligation to apply the statutes of their own state where the state legislature has validly made those statutes applicable. This Part therefore compares how all American courts determine the applicability of federal statutes with how state courts determine the applicability of their own state's statutes.

In conducting this comparison, I will not be addressing questions of constitutional law. Admittedly, those questions have some potential to throw off our comparison, because the federal Constitution has been understood to restrict the geographic reach of state law in certain ways that do not apply to federal law.[19] During what is now called "the *Lochner* era,"[20]

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[18] While this sentence accurately reflects current doctrine, Professor Douglas Laycock has argued that current doctrine conflicts with the Full Faith and Credit Clause of the federal Constitution. In his view, the Founders expected each state's courts to use the same set of choice-of-law rules to identify which state's law governed which issues, and the Founders believed that "the Constitution and [the Rules of Decision Act] would require courts to apply the law of that state." Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum L Rev 249, 290 (1992). See also id at 310 ("The affirmative implication [of the Full Faith and Credit Clause] is that Congress or the federal courts should specify choice-of-law rules and that state courts should follow those rules, to the end that the same law will be applied no matter where a case is litigated.").

As a policy matter, there is much to be said for the system contemplated by Professor Laycock. But as a historical matter, the Constitution probably was not really understood to require such a system. See generally David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 Yale L J 1584 (2009); Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 Va L Rev 1201 (2009); Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 Memphis St U L Rev 1 (1981). See also Spillenger, *Risk Regulation* at *18 (cited in note 13) (observing that in antebellum America, "rules of decision, as distinct from judgments, were not seen as raising full-faith-and-credit or any other constitutional concern").

[19] See, for example, 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, 1084–92 (2009) (discussing territorially based aspects of dormant Commerce Clause doctrine, which restricts the states but not Congress); Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich L Rev 1865, 1884–1913 (1987) (analyzing modern doctrine about constitutional limits on state legislative jurisdiction and attributing that doctrine to a structural principle that does not necessarily apply to the federal government). See also *United States v Bennett*, 232 US 299, 304–07 (1914) (holding that the Due Process Clause of the Fifth Amendment does not limit the territorial reach of Congress's taxing powers in the same way that the Fourteenth Amendment limits the territorial reach of the states' taxing powers). But see Lea Brilmayer and Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv L Rev 1217, 1239 (1992) (advocating more parallelism in due process doctrine).

those restrictions were thought to be particularly robust.[21] Under current doctrine, though, the federal Constitution has less to say on this topic: in many settings, each state can instruct its courts to apply the state's own law as long as the state has some significant contact with the parties or events in suit (and therefore has legitimate "state interests" to protect).[22] So as to avoid unnecessary complications, this Part focuses chiefly on those settings.

A. How State Courts Determine the Geographic Reach of Their Own State's Statutes

1. The presumption that the state's statutes accommodate the state's normal choice-of-law rules.

In our federal system, it is possible for multiple states to prescribe legal rules that all purport to govern the same issue

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[20] For information about the origins of this phrase, see David E. Bernstein, *Rehabilitating* Lochner*: Defending Individual Rights against Progressive Reform* 116–18 (Chicago 2011).

[21] See James Y. Stern, Note, *Choice of Law, the Constitution, and* Lochner, 94 Va L Rev 1509, 1513–32 (2008). Even during the *Lochner* era, of course, the Supreme Court allowed states to use their police powers and their powers of taxation in ways that impinged upon life, liberty, and property. But the Court recognized significant territorial limits on the legitimate reach of those powers. In the name of the Due Process Clause, the Court thus enforced geographic restrictions on what individual states could regulate and tax. See, for example, *Union Refrigerator Transit Co v Kentucky*, 199 US 194, 204–11 (1905) (holding that the Due Process Clause prevents states from taxing tangible property that is located outside the state, even if the owner is domiciled in the state); *Allgeyer v Louisiana*, 165 US 578, 590–92 (1897) (holding that each state's police power "does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction"). During the same period, the Court interpreted the Full Faith and Credit Clause to reflect similar ideas. See, for example, *New York Life Ins Co v Head*, 234 US 149, 161–62 (1914) (associating both the Full Faith and Credit Clause and the Due Process Clause with the idea that Missouri courts could not let a Missouri statute "extend its authority into the State of New York and there forbid the parties, one of whom was a citizen of New Mexico and the other a citizen of New York, from making [a particular] loan agreement in New York simply because it modified a contract originally made in Missouri"); *Bradford Electric Light Co v Clapper*, 286 US 145, 159 (1932) (holding squarely that the Full Faith and Credit Clause constitutionalizes some choice-of-law principles and thus plays a role in allocating legislative jurisdiction among the states).

[22] See *Phillips Petroleum Co v Shutts*, 472 US 797, 818, 823 (1985) (taking the Due Process and Full Faith and Credit Clauses to impose only "modest restrictions" on a state's power to tell its courts to apply the state's own law); *Allstate Ins Co v Hague*, 449 US 302, 308, 313 (1981) (Brennan) (plurality). See also *Alaska Packers Assn v Industrial Accident Commission of California*, 294 US 532, 541–50 (1935) (beginning to signal a retreat from *Lochner*-era jurisprudence on this point); *Pacific Employers Ins Co v Industrial Accident Comm'n*, 306 US 493, 501–05 (1939) (continuing the retreat).

with respect to the same people, property, or events.[23] If that issue is ever litigated, the court in which the litigation proceeds will need to identify the applicable rule of decision. That is not difficult when all of the potentially applicable legal rules say the same thing. But to the extent that they conflict with each other, the court will need to decide which one to use. "Choice-of-law rules" address that topic. More generally, choice-of-law rules tell courts and other adjudicators which sovereign's law to apply to which issues under which circumstances.

Because federal law does not supply a comprehensive set of choice-of-law rules for all American courts to use,[24] each state retains control over the choice-of-law rules that its own state's courts apply.[25] But just as Congress has refrained from enacting comprehensive choice-of-law rules, so too have most state legislatures.[26] By and large, then, the choice-of-law rules applicable in the courts of any particular state are part of the unwritten law of that state. In the absence of contrary directions from Congress or the state legislature, the state's courts will use the state's normal choice-of-law rules to determine which issues are governed by the law of their own state and which issues are governed instead by the law of some other sovereign.

To be sure, a state legislature can tell its own state's courts to deviate from this practice with respect to certain issues.[27] A few state statutes explicitly require the state's courts to apply the state's own law even in circumstances as to which the state's normal choice-of-law rules would otherwise have pointed elsewhere.[28]

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23 See *Sun Oil Co v Wortman*, 486 US 717, 727 (1988) ("[T]he legislative jurisdictions of the States overlap.").

24 Congress has far more power in this area than it has exercised. See Richard H. Fallon Jr, et al, *Hart and Wechsler's The Federal Courts and the Federal System* 565 (Foundation 6th ed 2009) (noting that Congress is "generally believed" to have the power to prescribe choice-of-law rules for both state and federal courts).

25 This statement itself rests on a choice-of-law principle: to the extent that different states have different choice-of-law rules, the courts of each state will use the ones supplied by their own state. Without exception, however, every American state accepts this foundational principle. In the unlikely event that the legislature of State *A* purported to supply choice-of-law rules for use by the courts of State *B*, its attempt to do so would not necessarily be "unconstitutional," but it would be ineffectual; the courts of State *B* would not feel bound to pay attention (unless the law of State *B* itself told them to pay attention).

26 See note 15.

27 See, for example, *Generac Corp v Caterpillar Inc*, 172 F3d 971, 976 (7th Cir 1999) ("We know of nothing that would prevent the Wisconsin legislature from announcing a particular choice of law rule for dealership cases in duly enacted legislation.").

28 See, for example, Tex Civ Prac & Remedies Code Ann § 149.006 ("The courts in this state shall apply, to the fullest extent permissible under the United States Constitution,

Such a directive amounts to a special choice-of-law rule. If a state's legislature establishes a rule of this sort (either explicitly or by implication), the state's courts are bound to pay attention: unless the federal Constitution or other aspects of federal law stand in the way, the courts of each state must apply their own state's law when their state's lawmakers so direct. But explicit directives of this sort are relatively unusual, and courts are at least somewhat reluctant to infer them. The normal presumption, which has been around for years, is that "statutes are not intended to alter principles of conflict of laws."[29]

To see this presumption at work, think of a state statute that is cast in seemingly universal terms—a statute that uses phrases like "all cases" or "any person."[30] Assume, however, that the statute does not appear to focus on the sorts of questions that choice-of-law rules address, and the legislative history does not reflect any conscious intention to depart from the choice-of-law rules that courts would normally use to determine when the state's law does and does not apply. As a matter of constitutional law, the state legislature may well have the *power* to override those choice-of-law rules (at least as far as the state's own courts are concerned); it might be perfectly constitutional for the state legislature to instruct the state's own courts to apply the statute just as broadly as the statute's words suggest. But in the absence

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this state's substantive law, including the limitation under this chapter, to the issue of successor asbestos-related liabilities."). Some other states have enacted much the same provision. See Fla Stat Ann § 774.007; Ga Code Ann § 51-15-7; Miss Code Ann § 79-33-11; Ohio Rev Code Ann § 2307.97(F); Act No 280 § 3, 2006 SC Acts & Resol 2262, 2267.

[29] Note, *Preserving the Inviolability of Rules of Conflict of Laws by Statutory Construction*, 49 Harv L Rev 319, 319–20 (1935) (acknowledging that this presumption "is in accordance with the balance of probabilities," though arguing that courts tend to give the presumption "undue weight" and advocating a style of interpretation that would make the presumption easier to overcome).

A more recent student note proceeds from the premise that courts do not currently apply such a presumption, but argues that they should. See generally Lindsay Traylor Braunig, Note, *Statutory Interpretation in a Choice of Law Context*, 80 NYU L Rev 1050 (2005). The real disagreement highlighted by this latter note, though, is less about the existence of some sort of presumption than about the interpretive methods that courts should use in determining whether the presumption has been rebutted. See id at 1067–68 (suggesting that courts should not interpret a state statute to deviate from ordinary choice-of-law principles unless the text or legislative history establishes that legislators considered those principles and consciously intended to deviate from them); id at 1065–67 (criticizing efforts to identify a "legislative intent" on this point when "the legislature did not consider choice of law").

[30] I have derived this formulation, though not all of my conclusions, from 50 Am Jur Statutes § 487 (1944) (discussing the interpretation of "statutes using general words, such as 'any' or 'all,' in describing the persons or acts to which the statute applies") (citations omitted).

of some reason to believe that the state legislature really intended the statute to address and override the state's ordinary choice-of-law rules, even the state's own courts are unlikely to interpret the statute as conveying this instruction. Rather than reading the statute to say anything about the overarching topic of choice-of-law analysis, the state's courts will presume that the statute leaves the state's ordinary choice-of-law principles untouched. As a result, even the state's own courts will not look to the statute for a rule of decision when the state's ordinary choice-of-law principles tell them to apply the law of some other state instead.[31]

This logic is so common that state courts often do not even make it explicit; without articulating the presumption that generally worded statutes enacted by their own state's legislature leave room for ordinary choice-of-law analysis, courts move straight to that analysis. For a good example, consider the New Jersey Supreme Court's decision in *P.V. v Camp Jaycee*.[32] In 2003, plaintiff P.V. (a twenty-one-year-old New Jersey resident with Down syndrome) attended a summer program operated by defendant New Jersey Camp Jaycee, Inc (a New Jersey nonprofit corporation). The program took place at a campsite in Pennsylvania. While P.V. was there, another camper sexually assaulted her. P.V. and her parents ultimately sued the defendant in the New Jersey state courts for the tort of negligent supervision.[33] In response, the defendant invoked New Jersey's charitable-immunity statute.[34] Subject to a few specified exceptions, that statute reads as follows:

> No nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes . . .

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[31] See, for example, *McCann v Foster Wheeler LLC*, 225 P3d 516, 527–37 & n 10 (Cal 2010) (rebuffing the plaintiff's attempt to benefit from a California statute of limitations that seemed, on its face, to govern "any civil action for injury or illness based upon exposure to asbestos," and using California's ordinary choice-of-law analysis to determine that the plaintiff's claim was governed instead by Oklahoma's stricter statute of repose); *Viacom, Inc v Transit Casualty Co*, 138 SW3d 723, 725–26 (Mo 2004) (rejecting the defendant's argument that Missouri's receivership statutes supplanted Missouri's ordinary choice-of-law rules, and ultimately applying Pennsylvania law to the issue in dispute). See also *State Farm Mutual Automobile Ins Co v ANC Rental Corp*, 2008 WL 4149006, *2–3 (Ariz App) (acknowledging that the Arizona legislature "can . . . enact a statute that supersedes choice-of-law principles," but observing that the state's courts will read a statute to do so "only where [they] can clearly determine" that the enacting legislature so intended).

[32] 962 A2d 453 (NJ 2008).

[33] Id at 456.

[34] Id.

> shall . . . be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation, society or association, where such person is a beneficiary, to whatever degree, of the works of such nonprofit corporation, society or association.[35]

The blanket language of this statute might seem to immunize the defendant from all suits, including suits about events in Pennsylvania. Notwithstanding the statute's blanket language, though, all seven members of the New Jersey Supreme Court assumed that the statute accommodated New Jersey's ordinary choice-of-law doctrines: the statute applied when those doctrines called for the immunity question to be governed by New Jersey law, but not otherwise.[36] In P.V.'s case, moreover, the majority held that New Jersey's choice-of-law doctrines favored the application of Pennsylvania law (which did not recognize charitable immunity).[37]

The American Law Institute's Restatement (Second) of the Conflict of Laws reinforces the premise that individual state statutes usually do not address, let alone override, the state's ordinary choice-of-law principles. To be sure, § 6(1) of the Second Restatement acknowledges the theoretical possibility of such overrides: "A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."[38] The official comments to § 6 recognize two different ways in which a statute might supplant the ordinary choice-of-law rules that the state's courts would otherwise apply. First, a statute might itself be cast as a choice-of-law rule; it might explicitly tell the state's courts which sovereign's law to apply in which circumstances.[39] Second, a statute might simply set forth some substantive rules that the enacting legislature manifestly intended to govern "out-of-state facts," including transactions that might ordinarily be governed by some other sovereign's law.[40] The latter sort of statute can be thought of as containing an *implicit* choice-of-law directive, to the effect that the state's courts should apply the statute (and hence the state's own law) without regard to the state's ordinary choice-of-law rules. But the official comments to

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35 NJ Stat Ann § 2A:53A-7(a).

36 See, for example, *P.V.*, 962 A2d at 460–61.

37 Id at 467–68.

38 Restatement (Second) of Conflict of Laws § 6(1) (1971).

39 See id at § 6, comment a.

40 Id at § 6, comment b.

§ 6 suggest that neither sort of directive is common: "Statutes that are expressly directed to choice of law . . . are comparatively few in number,"[41] and "[l]egislatures . . . rarely give thought to the extent to which the laws they enact . . . should apply to out-of-state facts."[42] In the usual case, then, the Second Restatement contemplates that state courts will determine the applicability of their own state's statutes according to the ordinary choice-of-law analysis described in the rest of the Second Restatement.

2. Complexities raised by the shift away from traditional choice-of-law analysis.

Although the Second Restatement encourages each state's courts to presume that the state's statutes accommodate the state's ordinary choice-of-law rules, the choice-of-law rules endorsed by the Second Restatement raise some complications for the application of this presumption. Those complications turn out to be greater in theory than in practice: modern courts tend to apply the Second Restatement in a way that allows the presumption to retain some power. To understand these points, however, we must make a detour into the substance of choice-of-law analysis as it has changed over time.

a) The traditional approach. To speak of a "traditional" American approach to choice-of-law questions is obviously to speak somewhat crudely. Scholars agree that American jurists did not begin to systematize the subject until the 1820s[43] and that the systematization did not really take root until 1834, when Justice Joseph Story published the first edition of his acclaimed *Commentaries on the Conflict of Laws*.[44] Over the course

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41 Id at § 6, comment a.

42 Restatement (Second) of Conflict of Laws at § 6, comment c.

43 See Spillenger, *Risk Regulation* at *14 (cited in note 13) ("It was not until the 1820s that American legal commentators began conceiving choice of law more systematically as a general doctrine, rather than a series of *lex loci* principles specific to discrete areas of law like contract and property."); id at *14 n 30 (noting consensus among modern scholars that an 1828 book by Samuel Livermore was "[t]he first systemic treatment of 'conflict of laws' in the United States").

44 Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (Hilliard, Gray 1834). See, for example, R.H. Helmholz, *Continental Law and Common Law: Historical Strangers or Companions?*, 1990 Duke L J 1207, 1222:

> When Story first came upon the subject of conflict of laws . . . he did not find an entirely blank page. Cases on the topic existed. But there were not many, and some of the cases were merely examples of the invocation of "sound judicial instinct." There

of the next century, the field developed both in detail and in theory.[45] Still, the developments remained within the same basic framework: by and large, legal questions about particular transactions, events, people, or property were supposed to be answered according to the law of the place where those transactions, events, people, or property were deemed to be located. According to Justice Story's treatise, the fact that "every nation possesses an exclusive sovereignty and jurisdiction within its own territory" is one of the foundational principles "upon which all reasonings on the subject must necessarily rest."[46] A century later, both the first Restatement of the Law of Conflict of Laws (which the American Law Institute issued in 1934) and the accompanying treatise written by Professor Joseph Beale (who served as reporter for the First Restatement) continued to share this focus. Thus, the opening sentence of Professor Beale's treatise summed up the field as follows: "The branch of the law called for convenience *The Conflict of Laws* deals primarily with the application of laws in space."[47]

As applied to things that had a single definite location, this approach yielded some relatively uncontroversial choice-of-law rules. Even today, for instance, American lawyers think it natural for various issues relating to real property to be adjudicated according to the law of the place where the property is located[48] and for the procedures used by adjudicators to be determined according to the law of the forum where the adjudication is occurring. As applied to cross-border transactions, however, a focus on territorial location does not produce such obvious answers. When sparks from a train traveling in State *A* cause a fire that destroys property in State *B*, which state's law determines the

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was no system. There was no legal order. It was Story's study of the civil law that supplied the system and the order.

[45] Consider Spillenger, *Risk Regulation* at *11 (cited in note 13) (suggesting that cases from this period reflect shifts that modern scholars have tended to overlook, and positing that "the nature of conflicts jurisprudence in any given historical period is determined largely by the *types* of legal disputes that are likely to raise conflicts problems in that period").

[46] Story, *Commentaries on the Conflict of Laws* at 19 (cited in note 44). See also id:

> The direct consequence of this rule is, that the laws of every state affect, and bind directly all property, whether real or personal, within its territory; and all persons, who are resident within it, whether natural born subjects, or aliens; and also all contracts made, and acts done within it.

[47] Joseph H. Beale, 1 *A Treatise on the Conflict of Laws* § 1.1 at 1 (Baker, Voorhis 1935).

[48] See James Y. Stern, *Of Property, Exclusivity, and Jurisdiction* *8–10 (working paper, 2012) (on file with author).

applicable standard of care?[49] When a buyer in State *C* agrees to terms via long-distance communication with a seller in State *D*, which state's law determines the legal effect of their purported contract?[50]

To handle these sorts of problems, the traditional approach to choice-of-law analysis began by dividing legal questions into categories (such as questions about the validity of contracts, or questions about the existence of causes of action in tort, or questions about the internal affairs of corporations, or questions about the admissibility of evidence, or questions about remedies, or questions about marital status). For each category of questions, the traditional approach proceeded to establish rules about where to look for answers. As applied to most legal questions that were classified as matters of substance rather than procedure, those rules typically (1) homed in on a single aspect of the fact pattern that had generated the legal question, (2) treated the larger transaction or relationship at issue as having its "situs" or location at the place of that aspect, and (3) directed courts to apply the law of that place.[51] In tort cases, for instance, courts determined the existence and elements of a cause of action largely according to the law of "the place of wrong," which the First Restatement generally identified as the place where the injury had occurred.[52] Likewise, the First Restatement

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[49] See Joseph H. Beale, 2 *A Treatise on the Conflict of Laws* § 377.2 at 1287 (Baker, Voorhis 1935).

[50] See id at § 326.1 at 1071–72 (addressing telegraph cases).

[51] See, for example, Raleigh C. Minor, *Conflict of Laws* § 4 at 6 (Little, Brown 1901):

> It is of the utmost importance to observe at the outset that every point that may come up before a court for its decision must have a situs somewhere, and each point that arises will in general be governed by the law of the State where that situs is ascertained to be.

See also Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 Yale L J 1191, 1195 (1987) (noting that for Professor Beale, "the law governing a given legal interaction was almost always the law of the place in which certain discrete, specified events in that interaction took place"); Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 Colum L Rev 772, 778 (1983) ("Most traditional choice-of-law doctrine is in the form of rules . . . [that] employ a single specified type of contact with the controversy—usually either the forum or a party's domicile or the place where relevant events occurred or property is situated—to identify the state whose local law should govern all conflicts within a specified substantive field").

[52] Restatement (First) of the Law of Conflict of Laws §§ 378–79, 381, 383–84 (1934) (calling for the law of "the place of wrong" to govern various issues in tort); id at § 377 (defining "[t]he place of wrong" as being "where the last event necessary to make an actor liable for an alleged tort takes place"); id at § 377, comment a (providing rules about "what constitutes the place of wrong in different types of torts," such as the general rule that "where a person sustains bodily harm, the place of wrong is the place where the

advised courts to determine many questions about the legal effect of a purported contract according to the law of "the place of contracting,"[53] by which the First Restatement meant "the place of the principal event, if any, which, under the general law of Contracts, would result in a contract."[54]

Both the traditional approach as a whole and the particular rules that courts and commentators articulated under its rubric had costs as well as benefits.[55] Reasonable people can disagree

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harmful force takes effect upon the body"). Although the First Restatement emphasized the law of "the place of wrong," the law of the place where the defendant had acted could also affect liability in certain ways. See id at § 380(2) (allowing particularized statutes and judicial decisions from "the place of the actor's conduct" to control the application of standards of care identified by the law of the place of wrong); id at § 382(2) ("A person who acts pursuant to a privilege conferred by the law of the place of acting will not be held liable for the results of his act in another state.").

[53] Id at §§ 332–40, 346–48.

[54] Id at § 311, comment d. See also Beale, 2 *Treatise on the Conflict of Laws* § 311.1 at 1045–46 (cited in note 49) (acknowledging divisions of authority about how to define the "place of contracting," but attempting to justify the First Restatement's focus on "the place in which the final act was done which made the promise or promises binding").

[55] On the negative side, rules that ascribe a single situs to multistate transactions, and that do so by focusing on one feature of those transactions to the exclusion of others, will seem "arbitrary." Lea Brilmayer and Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 Iowa L Rev 1125, 1149 (2010). Insofar as different types of legal questions trigger different rules, moreover, outcomes will depend on how courts characterize the questions presented in individual cases. To the extent that certain legal questions can plausibly be characterized in multiple ways, the system will be more manipulable and less predictable than it might seem on its face. See Currie, et al, *Conflict of Laws* at 43–48 (cited in note 13) (noting that in various settings, a single legal question might plausibly be classified as a matter of either tort or contract); id at 44 ("Characterization problems . . . pervaded the traditional choice of law system and often gave rise to conflicting results.").

On the other hand, the traditional rules may well have been more determinate than most plausible alternatives. And their content certainly was not *wholly* arbitrary; many of the traditional rules had some functional or conceptual justifications. See Korn, 83 Colum L Rev at 778 (cited in note 51) (offering examples); Beale, 1 *Treatise on the Conflict of Laws* § 8A.8 at 64 (cited in note 47) (advancing an overarching conceptual rationale that explained many of the traditional rules by reference to "the place where a right arose"). Because most of the traditional rules gave no special weight to the interests of the forum state, moreover, they had the potential to produce the same answers no matter where a case was adjudicated—which helps people identify their legal obligations at the time that they are acting, even if they do not yet know where any litigation about their acts will proceed. See Symeonides, *The American Choice-of-Law Revolution* at 11 (cited in note 15) (criticizing aspects of the traditional system, but praising "its nonpartiality towards the forum" and "its laudable aspiration to produce interstate uniformity and reduce forum shopping"). See also Laycock, 92 Colum L Rev at 310 (cited in note 18) (alluding to the desirability of a system under which "the same law will be applied no matter where a case is litigated"); James D. Sumner Jr, *Choice of Law Rules: Deceased or Revived?*, 7 UCLA L Rev 1, 18 (1960) (calling this "the fundamental goal of conflict of laws rules").

about whether the costs were greater than the benefits.[56] But for better or for worse, the traditional approach held sway across the United States from the nineteenth century until the mid-twentieth century.[57] In each state, then, the presumption that the state legislature's enactments were not intended to supplant ordinary choice-of-law analysis meant that the state's courts tended to use territorially based rules to determine the applicability of the state's statutes.

Commentators of the day summed up this idea with catchphrases such as the following: "[A] statute is prima facie operative only as to persons or things within the territorial jurisdiction of the lawmaking power which enacted it."[58] Exactly what that meant in practice, though, depended on the content of the relevant choice-of-law rules. Under the traditional approach to choice-of-law analysis, the net result was something like this: absent contrary indications from the legislature, state courts tended to determine the applicability of their state's statutes according to the territorial location of the particular facts that controlled "situs" for purposes of the type of legal question that the statute addressed.

By way of example, suppose that a state legislature enacted a generally worded statute prescribing conditions for the validity of contracts. The mere fact that the statute contained no explicit geographic limitations would not usually be enough, on its own, to make the state's courts treat the statute as applying universally, without regard to their ordinary choice-of-law analysis.[59] Even under ordinary choice-of-law analysis, however, the

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[56] See Symeonides, *The American Choice-of-Law Revolution* at 11 (cited in note 15) (expressing no view on "[w]hether the [First] Restatement's flaws surpassed its virtues").

[57] See id at 10 ("Once upon a time, there existed in the United States a choice-of-law *system*.").

[58] 50 Am Jur Statutes at § 487 (cited in note 30). See also id ("Unless the intention to have a statute operate beyond the limits of the state or country is clearly expressed or indicated by its language, purpose, subject matter, or history, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state or country enacting it.") (citations omitted); Joel Prentiss Bishop, *Commentaries on the Written Laws and Their Interpretation* § 141 at 129 (Little, Brown 1882) ("As, under the unwritten rule, and in the absence of special circumstances, the laws of a State are for the government only of persons and things within it, statutes in mere general terms will be construed as not intended to create offences, or otherwise regulate the conduct of persons, beyond its territorial limits.") (citations omitted); Sir Peter Benson Maxwell, *On the Interpretation of Statutes* 119 (William Maxwell & Son 1875) ("Primarily, the legislation of a country is territorial.").

[59] See, for example, *Ewen v Thompson–Starrett Co*, 101 NE 894, 895 (NY 1913) (referring to "the rule that an intention will not be inferred from general language of an act

statute was likely to govern some cross-border transactions. For instance, if the state's courts followed the approach of the First Restatement, they might well apply the statute to all purported contracts that they deemed to have been made within the state, including purported contracts formed by the acceptance within the state of an offer made outside the state. On the other hand, the state's courts probably would *not* apply the statute to contracts that the relevant choice-of-law rules treated as having been made elsewhere (such as contracts formed by the acceptance outside the state of an offer made within the state).[60]

The same analysis played out in tort cases. In the late nineteenth and early twentieth centuries, many states enacted generally worded statutes that made railroads liable for injuries suffered by their employees as the result of a fellow employee's negligence.[61] Because trains cross state lines, courts confronted several cases in which a negligent act by an employee in one state had resulted, some time later, in an injury to another employee in a different state. If a particular state's employer-liability statute explicitly addressed this sort of case, then at least the courts of that state would be bound by its instructions (within constitutional limits).[62] But if the statute was worded

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to give it extra-territorial effect"); *Coderre v Travelers' Ins Co*, 136 A 305, 306 (RI 1927) ("The [statutory] expression 'every policy hereafter written,' though general in its terms, must, in the absence of specific language to the contrary, be assumed to refer to contracts of insurance made in Rhode Island."). See also *State v Lancashire Fire Ins Co*, 51 SW 633, 635 (Ark 1899) ("If it were necessary, hundreds of cases and statutes could be referred to in which general words are thus limited.").

60 See, for example, Restatement (First) of the Law of Conflict of Laws at § 334, comment b (discussing the applicability of statutes of frauds insofar as such statutes were understood to address the substantive validity of contracts).

61 See C.B. Labatt, 5 *Commentaries on the Law of Master and Servant, Including the Modern Laws on Workmen's Compensation, Arbitration, Employers' Liability, Etc., Etc.* §§ 1657–61, 1768–1802 at 5108–23, 5337–5407 (Lawyers Co-operative 2d ed 1913); Edw. J. White, 1 *The Law of Personal Injuries on Railroads* §§ 513–50 at 752–826 (F.H. Thomas Law 1909). Ultimately, the Federal Employers' Liability Act (FELA) preempted many applications of these state statutes. See FELA, Pub L No 60-100, ch 149, 35 Stat 65 (1908), codified as amended at 45 USC § 51 et seq; *Second Employers' Liability Cases*, 223 US 1, 54–55 (1912).

62 For instance, the Indiana Employers' Liability Act purported to give Indiana courts the following instruction:

> In case any railroad corporation [ ] owns or operates a line extending into or through the State of Indiana and into or through another or other States, and a [citizen of Indiana] in the employ of such corporation . . . shall be injured as provided in this act[ ] in any other State where such railroad is owned or operated, and a suit for such injury shall be brought in any of the courts of this State, it shall not be competent for such corporation to plead or prove the decisions or

more generally, courts tended to apply it in light of the traditional rule of *lex loci delicti*, which often was understood to focus on the place of the injury. Using this analysis, courts concluded that their state's statute *did not* govern a railroad's liability for injuries suffered outside the state (even if the negligent act that caused those injuries had occurred within the state),[63] but *did* govern the railroad's liability for injuries suffered inside the state (even if the negligent act that caused those injuries had occurred elsewhere).[64]

To overcome the presumption that any particular state statute left room for the state's courts to apply ordinary choice-of-law rules, the legislature needed to signal that the statute was intended to supplant those rules. In an era when the ordinary rules focused on the situs of particular things or events, one natural way for the legislature to do so was by supplying a more expansive territorial hook than ordinary choice-of-law analysis would have supported. The workers' compensation statutes of the early twentieth century are good examples. Early on, those statutes did not explicitly address their applicability to injuries sustained outside the state by workers who had been hired inside the state, and courts used ordinary choice-of-law

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> statutes of the State where such person shall have been injured as a defense to the action brought in this State.

Employers' Liability Act § 4, 1893 Ind Acts 294. But see *Baltimore & O. S. W. Ry. Co v Read*, 62 NE 488, 490 (Ind 1902) (holding this provision unconstitutional on the ground that if the law of the state of injury recognized a fellow-servant defense, the railroad's right to avoid liability on this basis "vested" at the time of the accident and amounted to a species of property that the Due Process Clause prevented Indiana law from subsequently "confiscat[ing]" when the railroad was sued in Indiana). For discussion of how the Due Process Clause was understood to restrict the geographic reach of state law during this period, see note 21.

63 See *Alabama G. S. R. Co v Carroll*, 11 S 803, 807 (Ala 1892) (reading Alabama's generally worded Employers' Liability Act "in the light of universally recognized principles of private[ ] international, or interstate law," and understanding the statute to matter only "[w]hen a personal injury is received in Alabama"). Compare Conrad Reno, *A Treatise on the Law of Employers' Liability Acts* § 196 at 316–17 (Houghton, Mifflin 1896) (criticizing *Carroll* and arguing that "as the action is based upon negligence, it would seem that more weight should be given to the law of the place of negligence than to the law of the place of injury"), with Frank F. Dresser, *The Employers' Liability Acts and the Assumption of Risks in New York, Massachusetts, Indiana, Alabama, Colorado, and England* § 7 at 44 (Keefe-Davidson 1902) (responding that "the time and place where the negligence was committed are in the majority of cases indefinite and incapable of certain proof," and concluding that "the court [in *Carroll*] was quite right in establishing the plainer rule that the law of the place of injury governed").

64 See *El Paso & N. W. Ry. Co v McComas*, 81 SW 760, 761 (Tex Civ App 1904).

analysis to handle such cases.[65] Later, however, many legislatures added "extraterritoriality" clauses explicitly extending the reach of statutes that would not otherwise have covered out-of-state injuries.[66] For instance, the California legislature made its statute applicable to "injuries suffered without the territorial limits of this state" if "the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state."[67] To the extent that ordinary choice-of-law rules would not have led California courts to apply California law to such injuries,[68] this provision plainly supplanted those rules: for the new provision to have any meaning, California tribunals had to apply the California statute to the out-of-state injuries that the provision described.[69]

Many state legislatures did something similar with respect to statutes defining crimes. Under the prevailing rules of interstate relations, no state would enforce the penal laws of any other state, and so each state's courts entertained criminal prosecutions only under their own state's criminal laws.[70] But each

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65 See Samuel A. Harper, *The Law of Workmen's Compensation: The Workmen's Compensation Act with Discussion and Annotations, Tables and Forms* § 124 at 240–41 (Callaghan 2d ed 1920). As Harper explained, different states had different types of workers' compensation laws. Some states had "Elective Acts," which operated only with the consent of the employer and employee; others had "Compulsory Acts." This distinction affected how courts characterized the statutes for choice-of-law purposes. See id:

> Although the decisions are not altogether in harmony, . . . according to the weight of authority Elective Acts which are held to be contractual extend to injuries sustained outside the State, where the contract of employment is made within the State, while Compulsory Acts, or Acts held not to be contractual in character, do not, in the absence of either express provisions or language clearly indicating a contrary intention, apply to injuries sustained outside the State.

66 See id at 240 (noting that "later statutes have adopted widely different provisions" on this point).

67 Act of June 3, 1915 § 26, 1915 Cal Stat 1079.

68 See *North Alaska Salmon Co v Pillsbury*, 162 P 93, 94 (Cal 1916) (en banc) (holding that the earlier version of California's statute, which was of the compulsory type, did not reach any injuries occurring outside California).

69 See, for example, *Quong Ham Wah Co v Industrial Acc. Commission of California*, 192 P 1021, 1025 (Cal 1920) (en banc). Because the new provision clearly signaled the California legislature's intention to supersede the state's ordinary choice-of-law rules, the key questions in *Quong Ham Wah* were constitutional rather than statutory. See id at 1025–26 (upholding the central aspect of the statute as a valid exercise of the California legislature's power to regulate contracts made within the state); id at 1026–28 (holding that the Privileges and Immunities Clause of the federal Constitution prevented California from giving only California domiciliaries the right to compensation for out-of-state injuries, and concluding that the statutory right therefore extended to all workers hired in California who were citizens of any state).

70 See, for example, *Huntington v Attrill*, 146 US 657, 669 (1892).

state's courts still had to determine the geographic scope of those laws: what exactly did they criminalize, and where? For each type of crime, the traditional approach told courts to think about the "nature" of the crime, to determine the "point of consummation" of that type of crime, and to assume (in the absence of contrary indications) that state law covered the crime only if "this consummation in fact took place within the state."[71] At common law, for instance, the crime of murder was often said to have its situs where the victim was stricken—which meant that if someone standing in North Carolina shot and killed a person standing across the border in Tennessee, the killer was subject to prosecution for murder in Tennessee but not North Carolina.[72] To avoid such results, some state legislatures specified that anyone who committed a crime "in whole or in part" within the state was subject to punishment under the state's laws.[73] Likewise, some specific criminal statutes included territorial hooks that expanded considerably upon the traditional rules.[74]

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71 Note, *Statutory Jurisdiction over Interstate Crime*, 39 Harv L Rev 492, 493 (1926).

72 See *State v Hall*, 19 SE 602, 604–05 (NC 1894) (reversing murder convictions on this basis). Of course, a killer in this position would probably have been subject to prosecution in North Carolina for other crimes, such as *attempted* murder. See Francis Wharton, *Conflict of Criminal Laws*, 1 Crim L Mag 689, 694–95 (1880).

73 Cal Penal Code § 27 (1872). See *People v Botkin*, 64 P 286, 287 (Cal 1901) (en banc) (applying this statute to a woman who mailed poisoned candy from California to a victim in Delaware). For examples of nearly identical provisions in other states, see Minn Penal Code § 14(1) (1886), codified as amended at Minn Stat Ann § 609.025; 2 Nev Rev Laws § 6267 (1912), codified at Nev Rev Stat § 194.020; NY Penal Code § 16(1) (1881), repealed by NY Penal Law § 500.05 (West 1965); Wash Crim Code § 2(1) (1909), codified at Wash Rev Code Ann § 9A.04.030.

Interpretation of these statutes proved challenging: When the statutes spoke of committing a "crime" at least partly within the state, what exactly did they mean? Compare *People v Arnstein*, 105 NE 814 (NY 1914) (reflecting diverse opinions about whether the word "crime" required consideration of the law of the other state where relevant conduct occurred), with *People v Zayas*, 111 NE 465, 466 (NY 1916) (concluding that the statute should be applied "without regard to the law prevailing in the state where the crime was consummated") and *People v Werblow*, 148 NE 786, 789 (NY 1925) (adopting the limiting construction that "a crime is not committed either wholly or partly in this state" within the meaning of the statute "unless the act within this state is so related to the crime that if nothing more had followed, it would amount to an attempt").

74 See, for example, NY Penal Code § 185 (1881) ("A person who, by previous appointment made within the state, fights a duel without the state, and in so doing inflicts a wound upon his antagonist, whereof the person injured dies . . ., is guilty of murder in the second degree, and may be [ ] tried . . . in any county of this state."); NY Penal Code § 676 ("A person who commits an act without this state which affects persons or property within this state, or the public health, morals, or decency of this state, and which, if committed within this state, would be a crime, is punishable as if the act were committed within this state.").

In sum, the territorial focus of traditional choice-of-law analysis had at least two important consequences for the application of statutes. First, it determined the practical effect of the presumption that statutes do not supplant ordinary choice-of-law rules: insofar as those rules focused on territorial location, the presumption operated to limit the geographic reach of generally worded statutes. Second, it also suggested one way in which the presumption could be overcome: to the extent that the ordinary choice-of-law rules were about territorial location, statutes with territorial hooks of their own might well be understood to supersede those rules.

b) The "conflicts revolution." Over time, choice-of-law analysis lost its traditional form. The process started in the 1920s, when law professors associated with "legal realism" started registering sharp disagreements with the orthodoxy represented by Professor Beale.[75]

To begin with, critics argued that the theory advanced by Professor Beale (and echoed by many courts) did not really account for the choice-of-law rules that courts used. As Professor Ernest Lorenzen put the point, "it is a little surprising to find among the American courts and writers of to-day a tendency to accept the doctrine of the territoriality of law as the major premise for the solution of the problems of the Conflict of Laws," because the choice-of-law rules that courts used did not reflect "any uniform theory of territoriality": courts determined the situs of any given event or relationship in different ways for different types of legal questions.[76] Whatever courts might *say*,[77] Professor Lorenzen and other critics concluded that the content of the rules reflected "the social interests involved" in particular cases.[78] According to Professor Lorenzen, moreover, the decisions

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[75] See generally Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 Yale L J 457 (1924); Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 Yale L J 736 (1924).

[76] Lorenzen, 33 Yale L J at 743 (cited in note 75).

[77] See Cook, 33 Yale L J at 460 (cited in note 75) (arguing that it is "necessary to focus our attention upon what courts have *done*, rather than upon the description they have given of the reasons for their action").

[78] Lorenzen, 33 Yale L J at 750 (cited in note 75) (positing that "in the main, though not always consciously," Anglo-American courts "have developed the rules of the Conflict of Laws" with the view "to render a just decision under the circumstances of the particular case"). See also David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 Harv L Rev 173, 181 (1933) (hypothesizing that within the zone of discretion left by existing doctrine, courts often articulated rules that would let them apply the law they

that courts reached in practice were somewhat less "rigid" than either Professor Beale's theory or any other "*a priori* system" would suggest.[79]

In addition to challenging the explanatory power of the orthodox theory, critics also attacked the normative desirability of the rules that the theory purported to explain. In keeping with the intellectual trends of the day, critics questioned the desirability of dividing legal questions into categories and subcategories that would be handled according to prescribed rules.[80] Critics also blasted those rules for fixating on the location of a single event that was only a fragment of a larger transaction or relationship. In any particular case, the critics observed, the event on which the existing rules focused might have occurred where it did by the purest happenstance.[81] Picking the applicable law on the basis of "some single, arbitrarily specified territorial connection" struck the critics as bizarre.[82] In their view, "a considered appraisal of all the factors" would be preferable to "mechanical rule[s]" that "radically restrict[] the range of facts pertinent to [their] application."[83]

By the 1940s, if not before, these criticisms were having some impact on the courts,[84] and in 1952 the American Law Institute

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considered substantively best in the case that they were facing, at the potential cost of having to follow those rules in later cases where they produced less desirable results).

79 Ernest G. Lorenzen and Raymond J. Heilman, *The Restatement of the Conflict of Laws*, 83 U Pa L Rev 555, 557–58, 588 (1935).

80 See id at 574–75, 586–87.

81 See, for example, id at 573–74 (observing that the First Restatement gave overriding significance to the location of the final act necessary to form a contract, even though that act may have taken place in a particular state "by mere accident, perhaps because the acceptor forgot to mail a letter in the state of his business location, and thought of it only upon his arrival in the state of his residence"); Raymond J. Heilman, *Judicial Method and Economic Objectives in Conflict of Laws*, 43 Yale L J 1082, 1097 (1934) (condemning "rules which rest merely upon the fortuitous element of the territorial incidence or connection of some artificially designated fact, isolated from the aggregate of the facts, and bearing no distinctive relation to the case in regard to economic and social consequences"). See also Brilmayer and Anglin, 95 Iowa L Rev at 1136 n 59 (cited in note 55) (tracing this theme in later judicial opinions that departed from the First Restatement).

82 Heilman, 43 Yale L J at 1088 (cited in note 81).

83 Cavers, 47 Harv L Rev at 185, 194–95 (cited in note 78).

84 See *W. H. Barber Co v Hughes*, 63 NE2d 417, 423 (Ind 1945) (rejecting *lex loci contractus* in favor of an approach that considers "all acts of the parties touching the transaction in relation to the several states involved" and identifies "th[e] state with which the facts are in most intimate contact"). See also *Lauritzen v Larsen*, 345 US 571, 583–92 (1953) (using a multifactor approach to identify the law applicable to a maritime tort claim).

In addition to affecting subconstitutional law, the critics' arguments probably influenced the US Supreme Court's understanding of constitutional limitations on each state's legislative and adjudicative authority. In the late 1930s, the Court started relaxing *Lochner*-era

named Professor Willis Reese as the reporter for a project to prepare a Second Restatement that would replace Professor Beale's version.[85] By this time, Professor Reese and others had already hinted at a new approach that would pay more attention to the purposes behind the particular laws that were thought to conflict.[86] At first, however, no one focused single-mindedly on that idea. Then came Professor Brainerd Currie. Starting in 1958, Professor Currie published a series of articles that delivered the "decisive blow" against the traditional approach.[87]

Professor Currie's approach grew out of his understanding of how courts determined the rules of decision for purely domestic cases—cases in which the relevant events had occurred entirely within the forum state. At the time that Professor Currie was writing, courts tended to take a "purposivist" approach to interpreting statutes: if a generally worded statute seemed on its face to cover the situation presented by a case, but the enacting legislature probably had not contemplated this situation and applying the statute would not serve any of the purposes that the legislature had apparently been trying to advance, courts might well infer an exception to the statute.[88] Like most of his

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restrictions on each state's power to apply its own law to cases involving cross-border transactions or events. See notes 21–22; Kramer, 1991 S Ct Rev at 192 (cited in note 14) (linking this relaxation of constitutional doctrine to the "realist critique" of "[t]raditional choice of law theory"). A few years later, the Court also relaxed its understanding of constitutional limitations on the adjudicative jurisdiction that state law can authorize state courts to exercise. See id at 192–93 (noting that Chief Justice Harlan Fiske Stone's famous opinion in *International Shoe Co v Washington*, 326 US 310 (1945), "abandoned the strict territoriality of *Pennoyer*[*v Neff*, 95 US 714 (1878),] for a flexible approach to adjudicatory jurisdiction"); George Rutherglen, International Shoe *and the Legacy of Legal Realism*, 2001 S Ct Rev 347, 353–58 (showing that although "Stone himself was hardly a dogmatic Legal Realist," he was aware of and receptive to the realists' "critique of the formal territorial theories of Beale and the First Restatement").

85 See Stanley H. Fuld, *Willis L.M. Reese*, 81 Colum L Rev 935, 936 (1981). In addition to serving as the reporter for the Second Restatement, Professor Reese was also the main law professor behind the development of the LSAT. See generally Willis Reese, *The Standard Law School Admission Test*, 1 J Legal Educ 124 (1948).

86 See Elliott E. Cheatham and Willis L.M. Reese, *Choice of the Applicable Law*, 52 Colum L Rev 959, 965–68 (1952) (observing that every statute "was passed in order to achieve one or more underlying purposes which should receive consideration when it comes to determining the proper range of the statute's application"). See also William F. Baxter, *Choice of Law and the Federal System*, 16 Stan L Rev 1, 6 n 14 (1963) (citing articles from the 1940s by Professors Paul Freund and Moffatt Hancock).

87 Symeonides, *The American Choice-of-Law Revolution* at 13 (cited in note 15).

88 See, for example, *State v Spindel*, 132 A2d 291, 295 (NJ 1957) ("The manifest policy of a statute is an implied limitation on the sense of general terms."); *Commonwealth v Welosky*, 177 NE 656, 659 (Mass 1931) (conceding that "[s]tatutes framed in general terms" can cover situations that were "not [ ] known at the time of enactment" if those situations "are fairly within the sweep and the meaning of the words and fall[ ]

contemporaries, Professor Currie embraced this approach to statutory interpretation.[89] Similar ideas came into play when courts tried to interpret precedents about the common law. If a previous court had articulated a principle of common law without considering cases of the sort now at hand, and if applying the previous court's formulation to such cases would serve none of the purposes that lay behind the principle, the current court often would adjust the prior formulation so as not to cover cases of this sort.

Professor Currie's central claim was that state courts should take essentially the same approach to choice-of-law problems, and that this approach would be a complete substitute for traditional choice-of-law rules. Insofar as their own state's law purported to supply a rule of decision for the cases that they adjudicated, courts were obliged to apply that rule of decision unless federal law preempted it. But determining whether a particular state statute (or some aspect of the state's unwritten law) really spoke to situations with out-of-state as well as in-state elements was not simply a matter of analyzing the surface language of the statute (or the formulations that past courts had used to describe the relevant legal principle in purely domestic cases). While that language might well be cast in universal terms,[90] its universality was unlikely to be meaningful; legislatures and courts were both used to formulating legal directives with only the domestic context in mind, and the universality of their language usually did not reflect a deliberate decision to reach all possible cases with foreign elements too.[91] In Professor Currie's

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within their obvious scope and purpose," but asserting that "statutes do not govern situations not within the reason of their enactment and giving rise to radically diverse circumstances presumably not within the dominating purpose of those who framed and enacted them").

89 See, for example, Brainerd Currie and Mark S. Lieberman, *Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method*, 1960 Duke L J 1, 2–3 & n 5. See also Larry Kramer, *Rethinking Choice of Law*, 90 Colum L Rev 277, 290 n 35, 300 & n 65 (1990) (linking Professor Currie's approach to the interpretive method now called "imaginative reconstruction," under which " 'the judge should try to put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him' "), quoting Richard A. Posner, *The Federal Courts: Crisis and Reform* 286–87 (Harvard 1985).

90 See Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U Chi L Rev 227, 230 (1958) ("Lawgivers, legislative and judicial, are accustomed to speak in terms of unqualified generality.").

91 See id at 231 ("The important reason why lawgivers speak in such extravagantly general terms is that they ordinarily give no thought to the phenomena which would suggest the need for qualification . . . . In the history of Anglo-American law the domestic case has been normal, the conflict-of-laws case marginal."); Currie and Lieberman, 1960

view, questions about whether and how a particular legal directive might apply to any such case were essentially questions of interpretation, which courts should approach with the same purposivist methods that they used to "determine . . . how a statute applies . . . to marginal domestic situations."[92]

For Professor Currie, the first step was to identify "the governmental policy expressed in the law of the forum"—that is, the interests or purposes that the particular statute or common-law rule in question was designed to advance.[93] The court should then ask whether the case at hand implicated those interests or purposes. If the answer was "yes," the court should go ahead and apply the statute or rule to the case at hand.[94] But if the court concluded that applying the statute or rule to this case would *not* serve any of the interests that lay behind the statute or rule, then the court should stand ready to infer an appropriate limitation that would potentially allow the case to be governed by the law of some other state or foreign country. In particular, "[i]f the court finds that the forum state has no interest in the application of its policy" to the case at hand, but the case *does* implicate

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Duke L J at 5 (cited in note 89) ("'Most statutes are formulated with regard to only the ordinary or internal situations.'"), quoting Elliott E. Cheatham, *Sources of Rules for Conflict of Laws*, 89 U Pa L Rev 430, 449 (1941).

92 Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 Duke L J 171, 178.

93 Id.

94 See id ("If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy."); Currie, 25 U Chi L Rev at 261–62 (cited in note 90) ("[A] court should never apply any other law [than its own] except where there is a good reason for doing so. That so doing will promote the interests of a foreign state at the expense of the interests of the forum state is not a good reason.") (citation omitted). See also Symeonides, *The American Choice-of-Law Revolution* at 21 (cited in note 15) (noting that "under Currie's analysis, almost all roads lead to the *lex fori*").

Professor Currie's position on this point softened somewhat over time. At first, he suggested that courts should apply their own state's law to all cases that implicated the interests behind that law, even if some other state also had interests at stake and even if those interests might be considered more important. See, for example, Currie, 1959 Duke L J at 176 (cited in note 92) ("[W]here several states have different policies, and also legitimate interests in the application of their policies, a court is in no position to 'weigh' the competing interests, or evaluate their relative merits, and choose between them accordingly."). In response to critics, however, Professor Currie modified this position. Although he continued to emphasize that courts were obliged to apply their own state's law wherever they concluded that it had been intended to apply, he acknowledged that they could take account of competing states' interests in deciding how far their own state had really intended its law to go. See, for example, Brainerd Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U Chi L Rev 258, 275 (1961).

the interests behind the law of the other state, then the court should apply the other state's law.[95]

Professor Currie emphasized that his analysis was not distinctively about choice-of-law issues. In his view, questions about whether a state court should apply one of its own state's generally worded laws to a particular case boiled down to questions about the true meaning and scope of the law in question, and the process that courts should use to answer such questions "is essentially the familiar one of construction or interpretation."[96] Given the robust purposivism of his day, Professor Currie saw nothing special about his analysis of underlying interests: "[T]he method I advocate is the method of statutory construction, and of interpretation of common-law rules, to determine their applicability . . . ."[97]

In keeping with his view that the key questions concerned the interpretation of the particular laws that the courts were being asked to apply, Professor Currie conceded that the analysis he proposed would have to "proceed[ ] on an *ad hoc* basis."[98] He acknowledged that by speaking "only in terms of policies and interests," he was "propos[ing] nothing in the nature of a traditional choice-of-law rule."[99] According to Professor Currie, though, that was an affirmative benefit of his approach: "We would be better off without choice-of-law rules."[100] Professor Currie sharply criticized both the form and the content of the traditional approach, with its "mechanistic" rules[101] that sometimes focused on "totally irrelevant" facts[102] and that told courts to ignore the particulars of the laws whose scope they were effectively determining.[103]

While Professor Currie's writings were influential, they did not entirely sweep the field. Even people who accepted Professor Currie's focus on governmental interests and his analysis of "false conflicts" (in which only one state turned out to have relevant

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95 Currie, 1959 Duke L J at 178 (cited in note 92).

96 Id.

97 Currie, 28 U Chi L Rev at 295 (cited in note 94).

98 Id.

99 Currie, 25 U Chi L Rev at 254 (cited in note 90).

100 Currie, 1959 Duke L J at 177 (cited in note 92).

101 Brainerd Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 Stan L Rev 205, 210, 230 (1958).

102 Currie, 25 U Chi L Rev at 235–36 (cited in note 90) (describing cases in which the place where a contract happened to be finalized had "[no]thing whatever to do with the policy" behind the rule of contract law in question).

103 See id at 250.

interests) often balked at his proposed approach to "true conflicts" (in which the interests behind two states' laws really did clash). Specifically, many of Professor Currie's contemporaries thought that courts facing "true conflicts" should not simply apply their own state's law,[104] but instead should ordinarily try to compare the competing states' interests in some way.[105] More fundamentally, a number of critics disagreed with Professor Currie about the feasibility and desirability of scrapping choice-of-law rules completely.[106]

At roughly the same time that Professor Currie was publishing his articles, Professor Reese and the American Law Institute were releasing tentative drafts of portions of the proposed Second Restatement. In many important respects, those drafts took a different approach than Professor Currie advocated. While Professor Reese agreed that "choice of law is too vast and complicated an area to be governed by a relatively small number of simple rules of general application,"[107] he did not think that the solution was to do away with choice-of-law rules entirely and "to pretend that [the court's] only task is one of statutory interpretation."[108] Instead, he advocated developing

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104 See note 94 (describing Professor Currie's position).

105 See, for example, Baxter, 16 Stan L Rev at 18–19 (cited in note 86) (arguing that "a court can and should determine which state's internal objective will be least impaired by subordination in cases like the one before it"—an inquiry that arguably avoids "supervalue judgments" about the desirability and importance of the relevant state policies, and hence steers clear of some of Professor Currie's concerns about interest-balancing). See also Albert A. Ehrenzweig, *A Counter-revolution in Conflicts Law? From Beale to Cavers*, 80 Harv L Rev 377, 389 (1966) ("[A]s far as I can see, *all* courts and writers who have professed acceptance of Currie's interest language have transformed it by indulging in that very weighing and balancing of interests from which Currie refrained.") (citations omitted).

106 See, for example, Sumner, 7 UCLA L Rev at 17, 22–26 (cited in note 55). See also Alfred Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U Chi L Rev 463, 504 (1960) (suggesting that "the traditional learning of the law of conflict of laws" has more to teach us than Professor Currie thought).

107 Willis L.M. Reese, *Conflict of Laws and the Restatement Second*, 28 L & Contemp Probs 679, 681 (1963).

108 Id at 686. Of course, Professor Reese acknowledged that state courts were obliged to follow their own legislature's commands regarding choice-of-law issues. See id at 682 ("If there is any convincing indication, on the face of a statute or otherwise, of the desires of the enacting legislature with respect to the statute's range of application in space, it is the duty of the courts, subject to constitutional restrictions, to give the statute its intended application."). In keeping with the conventional wisdom, though, Professor Reese believed that legislatures usually formed no intentions one way or the other about the geographic reach of their statutes. See id at 684. Because "the legislature never thought about the matter at all," interpreters would not be able to unearth any actual legislative intentions. Id at 686. According to Professor Reese, moreover, if a court merely asked

more choice-of-law rules: "What is needed [ ] is a large number of relatively narrow rules that will be applicable only in precisely defined situations."[109]

Professor Reese himself saw the Second Restatement as a halfway house on the route to this goal. With respect to some categories of legal questions, the Second Restatement did supply crisp and specific rules.[110] In other areas, though, the existing case law and scholarship were in flux, and Professor Reese believed that "it is probably better [for the Second Restatement] to err on the side of a rule that may be too fluid and uncertain in application than to take one's chances with a precise and hard-and-fast rule that may be proved wrong in the future."[111] With respect to issues of tort and contract, for instance, the Second Restatement resorted to a fuzzy formulation: it advised courts to apply the law of "the state which, with respect to [the particular issue in question], has the most significant relationship" to the parties and the relevant transaction or occurrence.[112] To help courts identify that state, the Second Restatement provided a nonexclusive list of contacts that might matter in particular cases,[113] and it told courts to evaluate the significance of those contacts in light of a nonexclusive list of general policies that

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"what the legislature would have intended, or should have intended, had it thought about the problem," the court would naturally assume that "the legislature would have been moved by the same considerations as would have moved the court." Id. Given that the court would be making the key decisions itself, Professor Reese saw nothing to be gained by "pretend[ing] to be effectuating the intentions of the legislature." Id.

109 Id at 681.

110 See id at 699 ("Fairly precise rules have in general been stated in the case of status, corporations, and property.").

111 Reese, 28 L & Contemp Probs at 681 (cited in note 107). See also Symeonides, *The American Choice-of-Law Revolution* at 31–35 (cited in note 15) (observing that the Second Restatement handles a few questions with "black-letter rules," a larger number with "presumptive rules," some others with "mere pointers," and the remainder with "ad hoc analysis").

112 Restatement (Second) of the Law of Conflict of Laws at § 145(1) (addressing tort issues); id at § 188(1) (addressing contract issues in the absence of an effective choice of law by the parties themselves).

113 See id at § 145(2) (indicating that for issues in tort, the relevant contacts include "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered," and advising courts that "[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue"); id at § 188(2) (providing a similar list of contacts relevant to issues in contract, including "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties").

choice-of-law rules were supposed to serve.[114] For a number of specific issues in tort and contract, the Second Restatement also identified a particular state whose law would apply *unless* the court concluded that some other state had a "more significant relationship" to the parties and the relevant transaction or occurrence.[115] Still, Professor Reese himself conceded that the Second Restatement was vague about the proper treatment of tort and contract issues, and he hoped that experience over time would permit a future Restatement to supply "more definite and precise rules."[116]

Not surprisingly, Professor Currie did not like either this aspiration or the Second Restatement.[117] He wanted to give up

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[114] According to § 6 of the Second Restatement, in the absence of contrary statutory directives,

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

Id at § 6. See also Cheatham and Reese, 52 Colum L Rev at 981–82 (cited in note 86) (setting out a similar list).

[115] See, for example, Restatement (Second) of the Law of Conflict of Laws at § 146:

> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties.

See also Nafziger, 58 Am J Comp L at 167 (cited in note 15) (describing provisions of this sort as using "territorialist rules more or less drawn from the first Restatement as a first step in seeking to determine the law that bears the most significant relationship to the parties or a particular event or transaction").

[116] Reese, 28 L & Contemp Probs at 699 (cited in note 107). See also Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 Cornell L Rev 315, 334 (1972) ("We have probably reached the stage where most areas of choice of law can be covered by general principles which are subject to imprecise exceptions. We should press on, however, beyond these principles to the formulation of precise rules."); Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 Mercer L Rev 501, 517 (1983) ("In choice of law . . . a considerable body of scholarly opinion and some judicial authorities favor an ad hoc approach. The Restatement Second is to the contrary; it favors keeping what rules there are and, when possible, developing additional rules.") (citation omitted).

[117] See Brainerd Currie, *Comments on* Babcock v. Jackson*, a Recent Development in Conflict of Law*, 63 Colum L Rev 1233, 1235 (1963) (referring to "the doom of all attempts . . . to solve the problems of conflict of laws by a compendium of choice-of-law rules and in particular of the Restatement (Second)'s attempt to solve them by reference to the 'law of the state which has the most significant relationship with the occurrence and with the parties' ") (emphasis omitted); id at 1239–40 (bemoaning the Second Restatement's "studied avoidance of any suggestion that the answer might be found by construction and interpretation of the respective laws"); Brainerd Currie, *The Disinterested*

on choice-of-law rules entirely, and he complained that Professor Reese "has not changed his basic philosophy of conflict of laws" since 1952 (notwithstanding the intervening scholarship of Professor Currie and others).[118] But while the Second Restatement did not dismantle the field as thoroughly as Professor Currie wanted, its multifactor approach to tort and contract conflicts still represented a significant departure from the First Restatement. Combined with scholarly criticism of the First Restatement, the release of drafts of the Second Restatement inspired a growing number of courts to repudiate the traditional approach to tort and contract cases.[119] That trend continued after the final version of the Second Restatement was promulgated in 1969.[120] Today, only ten states automatically apply the traditional rule of *lex loci delicti* in tort cases, and only twelve automatically apply the traditional rule of *lex loci contractus* in contract cases.[121] Of the many states that have abandoned the traditional approach to tort and contract issues, moreover, well over half purport to follow the Second Restatement.[122]

Unfortunately, exactly what it means to follow the Second Restatement is open to dispute. Especially in the realms of tort and contract, different courts can take its approach in very different directions.[123] By emphasizing the provisions of the Second Restatement that establish starting presumptions for specific issues,[124]

Third State, 28 L & Contemp Probs 754, 755 (1963) ("At this stage we certainly do not need a new Restatement, although we are threatened with one.") (emphasis omitted).

118 Currie, 28 L & Contemp Probs at 761 n 25 (cited in note 117).

119 See, for example, *Babcock v Jackson*, 191 NE2d 279, 280–84 (NY 1963) (abandoning the principle that the law of "the place where both the wrong and the injury took place" should invariably govern the availability of relief in tort, and instead embracing "the approach adopted in the most recent revision of the Conflict of Laws Restatement"). See also Symeonides, *The American Choice-of-Law Revolution* at 40–41 (cited in note 15) (reporting that in the 1960s, a total of fifteen states abandoned the traditional rule of *lex loci delicti*); id at 45–46 (adding that by 1969, nine states had also abandoned the traditional rule of *lex loci contractus*).

120 See Peter Hay, Patrick J. Borchers, and Symeon C. Symeonides, *Conflict of Laws* 81 (West 5th ed 2010) (counting ten departures from the *lex loci delicti* rule in the 1970s, nine more in the 1980s, five in the 1990s, and one in 2000); id at 85 (reporting that departures from the *lex loci contractus* rule occurred slightly later, but counting nine in the 1970s, eleven in the 1980s, and nine more in the 1990s).

121 See id at 81, 85.

122 See id at 95.

123 See Symeon C. Symeonides, *An Outsider's View of the American Approach to Choice of Law* *39 (unpublished SJD dissertation, Harvard Law School, 1980) (observing that the Second Restatement is "broad enough to encompass almost all modern American approaches"), quoted in Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 Md L Rev 1248, 1279 (1997).

124 See note 115 and accompanying text.

courts can end up with results quite similar to those produced by the traditional approach.[125] By focusing instead on the multifactor lists of contacts that appear in §§ 145 and 188 of the Second Restatement,[126] courts can pursue the more open-ended, all-things-considered approach that some commentators before Professor Currie seemed to favor.[127] And by cherry-picking among the policies listed in § 6, courts can approximate either Professor Currie's approach or related forms of interest analysis.[128]

If the courts of a particular state were to adopt Professor Currie's approach in its purest form, they could no longer make much use of the presumption that the state's statutes accommodate the state's normal choice-of-law rules. After all, Professor Currie did not think that states should *have* any normal choice-of-law rules. In the ordinary case, where the state legislature had enacted a generally worded statute without giving any thought to cases with out-of-state elements, Professor Currie wanted courts to identify the purposes behind the particular statute in question, make judgments about how far the statute needed to reach to serve those purposes, and read corresponding limitations into the statute so that it did not apply beyond its purposes in situations where other states had interests at stake. A presumption that the state's statutes accommodate this analysis might help courts explain why they are not bound by the statute's literal text, but it would not itself give courts any pointers about the content of the limitations that they should read into the statute. Those limitations would instead be driven entirely by the purposes that the courts imputed to the particular statute that they were purporting to interpret.

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125 See Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 Md L Rev 1232, 1239–40 (1997).

126 See note 113.

127 Compare Symeonides, 56 Md L Rev at 1262–63 & n 110 (cited in note 123) (citing cases that "use the Restatement (Second) as a camouflage for a 'grouping-of-contacts' approach") (emphasis omitted), with text accompanying note 83.

128 See note 114, quoting Restatement (Second) of the Law of Conflicts of Law at § 6 (calling attention to "the relevant policies of the forum" and "the relevant policies of other interested states"); Reese, 34 Mercer L Rev at 508–09 (cited in note 116) (linking this aspect of § 6 to "the views of Professor Brainerd Currie"). See also Hay, Borchers, and Symeonides, *Conflict of Laws* at 114 (cited in note 120) ("[I]nterest analysis is often heavily employed by states that generally follow the [Second] Restatement.").

In fact, however, no state uses interest analysis across the board,[129] and the scholar who most closely tracks state choice-of-law decisions reports that "judicial support for Currie's approach has decreased dramatically in recent years."[130] While interest analysis is certainly an important part of modern choice-of-law analysis, it plays a greater role in some areas of law than others,[131] and it often operates within a framework supplied by more traditional choice-of-law doctrines.[132] All states retain some generic choice-of-law rules of the sort that Professor Currie pilloried.

Admittedly, the Second Restatement has fewer crisp rules than the original Restatement, and critics accuse it of having little actual content.[133] But even in tort cases, studies suggest that the Second Restatement gives courts *some* guidance.[134] In many other areas of law, moreover, its provisions are considerably more definite.[135] While the presumption that each state's statutes

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[129] See Hay, Borchers, and Symeonides, *Conflict of Laws* at 94–95, 114 (cited in note 120) (identifying no jurisdictions that use pure interest analysis in contract cases and only two—California and the District of Columbia—that use it in tort cases).

[130] Symeonides, *The American Choice-of-Law Revolution* at 22 (cited in note 15). This development is consistent with modern skepticism about the style of statutory interpretation on which Professor Currie's approach rested (and which Professor Currie viewed as a complete substitute for choice-of-law rules). Free-floating purposivism is much less common today than it was when Professor Currie wrote his articles. Consider Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L J 1750, 1844 (2010) (positing that a modified form of textualism is emerging as a consensus methodology in a number of state courts). To be sure, modern judges may not fully appreciate the link between Professor Currie's approach to choice-of-law problems and his faith in purposivist interpretation, and so the decline of strong purposivism may not be directly responsible for any retreat from Professor Currie's views. But the weakening of purposivism probably does make judges less likely to believe that all choice-of-law problems can be solved through the ad hoc analysis that Professor Currie advocated.

[131] See, for example, Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L J 1965, 1998–99 (1997) (predicting that some states "probably will adopt one of the modern approaches to choice of law for marriage cases" but adding that "[a]t present, these approaches generally are confined to tort and/or contract cases in the states that use them").

[132] See Gary J. Simson, *Choice of Law after the Currie Revolution: What Role for the Needs of the Interstate and International Systems?*, 63 Mercer L Rev 715, 722 (2012) (describing how courts that follow the Second Restatement use interest analysis in tandem with "directives [ ] patterned after one or another traditional rule").

[133] See Michael H. Gottesman, *Adrift on the Sea of Indeterminacy*, 75 Ind L J 527, 527 (2000) (calling the Second Restatement "a blend of indeterminate indeterminacy" and "[a] total disaster in practice"); Laycock, 92 Colum L Rev at 253 (cited in note 18) ("Trying to be all things to all people, [the Second Restatement] produced mush.").

[134] See Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 NYU L Rev 719, 757–61, 770–74 (2009).

[135] See, for example, Patrick J. Borchers, *New York Choice of Law: Weaving the Tangled Strands*, 57 Albany L Rev 93, 98 (1993).

accommodate the state's normal choice-of-law rules is likely to operate less predictably in states that follow the Second Restatement than in states that follow the traditional approach, the Second Restatement is not so radically indeterminate as to scuttle the presumption completely.

Of course, generalizations about how state courts do things are treacherous. With multiple levels of courts in fifty separate states, judicial opinions are bound to go in different directions. Some of those opinions reflect considerable confusion about the interaction between state statutes and choice-of-law doctrines. On occasion, for instance, state courts speak as if statutes are exempt from choice-of-law analysis.[136] Especially in areas of state law that have federal counterparts, moreover, state courts sometimes base their analysis upon opinions by federal courts construing the parallel federal statutes—and, as we shall see in the next Section, those federal opinions tend to be cast entirely in terms of statutory interpretation. Under the influence of federal precedents, then, state courts sometimes end up invoking a "presumption against extraterritorial operation of statutes" rather than conducting their normal choice-of-law analysis.[137] Concerns about the constitutionality of state legislation sometimes produce a similar effect: separate and apart from state choice-of-law doctrines, state courts sometimes apply a presumption against extraterritoriality as a matter of statutory interpretation in order to preserve the validity of statutes that might be unconstitutional if they addressed conduct beyond the state's borders.[138]

There are other reasons too why state courts might apply such a presumption in lieu of (or in addition to) their normal choice-of-law doctrines. In some states, a presumption against extraterritoriality was established at a time when it may simply have been a convenient way of expressing the idea that generally worded state statutes should not lightly be construed to override

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[136] See, for example, *Houston v Whittier*, 216 P3d 1272, 1279 (Idaho 2009) ("Because these two causes of action are created by statute, the issue is not choice of law.").

[137] *Union Underwear Co v Barnhart*, 50 SW3d 188, 190–93 (Ky 2001) (addressing state antidiscrimination law). For a similar example, see *Coca–Cola Co v Harmar Bottling Co*, 218 SW3d 671, 682–83 (Tex 2006) (addressing state antitrust law).

[138] See *Abel v Planning and Zoning Commission of the Town of New Canaan*, 998 A2d 1149, 1157–60 (Conn 2010) (discussing cases applying a presumption against extraterritoriality to state statutes, but concluding that the "primary reason" for this presumption at the state level "is that states have limited *authority* to regulate conduct beyond their territorial jurisdiction," and concluding that the presumption does not apply where that constitutional concern is not present).

normal choice-of-law principles, and it lingers today despite changes in the content of choice-of-law doctrine.[139] In the states that have come closest to accepting Professor Currie's views, moreover, the interpretation of individual statutes is an important component of ordinary choice-of-law analysis, and a presumption against extraterritoriality could certainly be part of that component.[140] In sum, one should not be surprised to find some state-court opinions that approach questions about the applicability of generally worded state statutes mostly as a matter of statutory interpretation rather than choice of law.

Still, that approach appears to be significantly less common at the state level than at the federal level.[141] In the mine run of cases, and in the absence of more specific legislative guidance, state courts seem to use their ordinary choice-of-law principles to sort out which state statutes apply to which cross-border transactions.[142]

In general, moreover, state courts seem to think of those principles as operating outside the confines of the statutes themselves. Naturally, determining the content of the legal directives established by any particular statute is an exercise in statutory interpretation. But unless that exercise reveals that the statute itself speaks to the types of questions that choice-of-law

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[139] See, for example, *Avery v State Farm Mutual Automobile Ins Co*, 835 NE2d 801, 852–53 (Ill 2005) (construing the Illinois Consumer Fraud Act, 815 ILCS 505/2, in light of "the long-standing rule of construction in Illinois which holds that a 'statute is without extraterritorial effect unless a clear intent in this respect appears from the express provisions of the statute'"), quoting *Dur–Ite Co v Industrial Commission*, 68 NE2d 717, 722 (Ill 1946). See also note 58 and accompanying text.

[140] See, for example, *Kearney*, 137 P3d at 930–31 (acknowledging a presumption against interpreting California statutes to have "'extraterritorial' application," though concluding that this presumption does not disfavor the application of California statutes "to a multistate event in which a crucial element . . . occurred *in California*").

[141] As a crude measure of frequency, I ran the following search in Westlaw's "Allstates" database: "presumption against" /2 extra-territor!. As of April 17, 2013, only 18 state cases came up. The same search in the "Allfeds" database produced 359 federal cases. Slightly broader searches told a similar story. For instance, the following search—(statut! or legislat!) /10 presumption /10 extra-territor!—generated 47 hits in the "Allstates" database and 276 hits in the "Allfeds" database.

Admittedly, these searches did not pick up state-court cases like *Avery* and *Dur–Ite*, which articulated a presumption against extraterritoriality without using the word "presumption." But plugging the language of *Avery* and *Dur–Ite* into Westlaw changed the picture only modestly. The following search—statut! /s extra-territor! /s inten! /s clear!—generated 45 hits in the "Allstates" database and 168 hits in the "Allfeds" database.

[142] See, for example, *Pounders v Enserch E & C, Inc*, 276 P3d 502, 505–10 (Ariz App 2012); *Jaiguay v Vasquez*, 948 A2d 955, 960–76 (Conn 2008); *Nordhues v Maulsby*, 815 NW2d 175, 186–89 (Neb App 2012); *Padula v Lilarn Properties Corp*, 644 NE2d 1001, 1002–03 (NY 1994). See also notes 31–32 (citing additional examples).

analysis addresses, state courts tend to act as if those questions lie beyond the statute's domain. Thus, state courts routinely use free-standing choice-of-law analysis to determine the effective reach of a statute's directives, without appearing to treat the results as being built into the statute itself.

B. How Courts Approach Analogous Issues Involving Federal Statutes

Just as state courts often must decide whether a particular issue is governed by one of their own state's statutes or instead by the law of some other state, so too courts sometimes must decide whether a particular issue is governed by a federal statute or instead by the law of a foreign country. Indeed, similar questions can come up even when no one is talking about foreign law. After all, the legal rights and duties associated with a transaction sometimes depend on whether a particular federal statute reaches the transaction. To answer that question with respect to transactions involving foreign elements, American courts will have to determine the statute's geographic reach and identify the triggers for its applicability.

As a matter of constitutional law, of course, Congress can act only within the limits of its enumerated powers. But many of Congress's enumerated powers are cast in terms that seem to let Congress regulate transactions and events occurring beyond America's borders.[143] And while some scholars have urged that the Due Process Clause of the Fifth Amendment be interpreted to restrict that authority,[144] courts have been cautious about recognizing such restrictions.[145] Thus, when a federal statute purports

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[143] See, for example, US Const Art I, § 8, cl 3 (authorizing Congress "[t]o regulate Commerce with foreign Nations"); US Const Art I, § 8, cl 10 (authorizing Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations"). See also *Panama Railroad Co v Johnson*, 264 US 375, 386 (1924) (inferring that the Constitution gives Congress substantial power to supply rules of decision for cases of admiralty and maritime jurisdiction); Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 Harv L Rev 1214, 1233–36 (1954) (describing the latter inference as an innovation of the late nineteenth century). In addition to the powers just listed (which specifically address things with foreign elements), the Constitution also gives Congress various powers that are worded in general terms but that might be used to regulate conduct outside the United States. For instance, in the exercise of its power "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States," Congress might prohibit foreign as well as domestic acts of counterfeiting. US Const Art I, § 8, cl 6.

[144] See generally Brilmayer and Norchi, 105 Harv L Rev 1217 (cited in note 19).

[145] See id at 1219–20 n 12.

to reach cross-border transactions or occurrences, American courts usually will go ahead and apply the statute (even if foreign courts would instead apply some other country's law).[146]

Still, the fact that Congress *can* regulate cross-border transactions does not tell courts how to determine whether Congress has actually done so—that is, whether a particular federal statute does indeed supply rules of decision for cases that involve foreign as well as domestic elements. This Section explores changes over time in the federal courts' approach to that topic.

Scholars have already ably demonstrated that the federal courts' bottom line shifted over the course of the twentieth century.[147] At first, the courts' results reflected generic territorialist premises that comported with the general jurisprudence of conflict of laws as it then stood.[148] By the 1940s, that approach was giving way to purposive interpretation of individual federal statutes, and courts seemed increasingly willing to apply federal statutes to transactions that would not otherwise be governed by American law.[149] Ultimately, however, the Rehnquist Court reversed that trend; it articulated a fairly powerful "presumption against extraterritoriality" that harks back to the territorialism of the early twentieth century but that lacks much connection to general choice-of-law jurisprudence as it now stands in the United States.[150]

Rather than simply retelling a story that has already been well told, this Section focuses less on the courts' bottom line than on their conception of the interaction between federal statutes and principles of unwritten law. The leading exemplar of the approach that prevailed at the start of the twentieth century—an opinion by Justice Oliver Wendell Holmes about the territorial

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146 See id at 1218–21.

147 For two leading descriptions of the shift, see Born, 24 L & Pol Intl Bus at 6–59 (cited in note 14); Kramer, 1991 S Ct Rev at 184–201 (cited in note 14). For more recent treatments, see, for example, John H. Knox, *A Presumption against Extrajurisdictionality*, 104 Am J Intl L 351, 361–78 (2010); Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 Vand L Rev 1455, 1462–78 (2008).

148 See, for example, *American Banana Co v United Fruit Co*, 213 US 347, 357 (1909).

149 See, for example, *United States v Aluminum Co of America*, 148 F2d 416, 443–44 (2d Cir 1945) ("Alcoa").

150 See *EEOC v Arabian American Oil Co*, 499 US 244, 248 (1991) ("Aramco"). See also *Morrison v National Australia Bank Ltd*, 130 S Ct 2869, 2877–78 (2010) (confirming this approach); Brilmayer and Norchi, 105 Harv L Rev at 1228 & n 56 (cited in note 19) (observing that "[r]eferences in modern [federal] extraterritoriality cases to state choice of law are few and far between," and concluding that "[t]he state choice of law revolution . . . had virtually no impact on the development of federal choice of law").

reach of the Sherman Act[151]—is unclear on this point: Justice Holmes may have thought that the background choice-of-law principles operated directly unless the Sherman Act overrode them, or he may have considered those principles applicable only because he interpreted the Sherman Act to incorporate them. By the 1940s, though, this ambiguity had vanished; federal courts were casting the relevant questions entirely in terms of statutory interpretation. That has continued ever since, even though the substance of the Supreme Court's answers has changed over time.

1. The early twentieth century.

In *American Banana Co v United Fruit Co*,[152] the Supreme Court held that the Sherman Act did not reach conduct in Panama or Costa Rica by which one American company had allegedly blocked a rival from gaining a source of bananas for export to the United States. Writing for the Court, Justice Holmes emphasized that "the acts causing the damage were done . . . outside the jurisdiction of the United States and within that of other [countries]."[153] Justice Holmes concluded that the case therefore implicated "the general and almost universal rule [ ] that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[154] To be sure, Justice Holmes acknowledged exceptions to this general rule. For instance, "in regions subject to no sovereign, like the high seas," countries were in the habit of "treat[ing] some relations between their citizens as governed by their own law."[155] Likewise, it was not unheard of for a country to threaten that "any one, subject or not, who shall do certain things" inimical to the country's "national interests" would be punished under the country's own law if the country ever got hold of him, notwithstanding the fact that he had acted in another country's territory.[156] But "in case of doubt," Justice Holmes endorsed "a construction of any statute as intended to be

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151 Ch 647, 26 Stat 209 (1890), codified as amended at 15 USC § 1 et seq.

152 213 US 347 (1909).

153 Id at 355.

154 Id at 356.

155 Id at 355–56.

156 *American Banana*, 213 US at 356.

confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."[157]

For Justice Holmes, the seemingly unqualified language of the Sherman Act was not enough to overcome this presumption. As Justice Holmes put the point, "Words having universal scope, such as 'Every contract in restraint of trade,' 'Every person who shall monopolize,' etc., will be taken as a matter of course to mean only every one subject to such legislation"[158]—and people were not subject to the Sherman Act with respect to their conduct in Panama or Costa Rica. Implicitly invoking the traditional rule of *lex loci delicti*, Justice Holmes added that "not only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place and therefore were not torts at all, however contrary to the ethical and economic postulates of that statute."[159] Even if the conspiracy alleged by the plaintiff had been orchestrated from the United States, moreover, "[a] conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law."[160]

As Professor Larry Kramer has observed, "Holmes's analysis of this case is pure conflict of laws."[161] Justice Holmes's emphasis on the location of the acts that damaged the plaintiff resonated with the choice-of-law principles of his day,[162] and his citations tend to confirm that "Holmes saw *American Banana* as a conventional conflict of laws problem."[163]

Still, Justice Holmes's opinion did not specify the mechanism through which choice-of-law principles were operating. His bottom line—"what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is

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157 Id at 357.

158 Id.

159 Id.

160 *American Banana*, 213 US at 359.

161 Kramer, 1991 S Ct Rev at 186 (cited in note 14).

162 See id. Admittedly, a devotee of Professor Beale might have emphasized the location of the plaintiff's injury rather than the location of the acts that caused it. See note 52 and accompanying text. But in *American Banana*, as in most cases, those locations coincided. See *American Banana*, 213 US at 354–55 (reciting allegations indicating that the immediate damage to the plaintiff's property and business had occurred in Panama or Costa Rica). See also *Cuba Railroad Co v Crosby*, 222 US 473, 478 (1912) (Holmes) (citing *American Banana* for the proposition that "[w]ith very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it").

163 Kramer, 1991 S Ct Rev at 186 (cited in note 14).

concerned"[164]—obviously required some interpretation of the Sherman Act. But Justice Holmes's rhetoric was consistent with two possible understandings of the interaction between standard choice-of-law principles and individual federal statutes, and hence with two possible formulations of the key interpretive question.

On one possible understanding, which reflects how state courts seem to think of choice-of-law problems involving state statutes, standard choice-of-law principles could operate directly to tell judges when to look to any given federal statute for rules of decision. In *American Banana*, for instance, unless the Sherman Act provided some instructions of its own about the conflict of laws, that topic would be governed entirely by unwritten principles like *lex loci delicti*, which operated outside the statute and which told courts not to apply American tort law (including the Sherman Act) to the facts that were being alleged. On this view, the key question of statutory interpretation would be whether the Sherman Act expressed or implied any choice-of-law rules of its own, thereby supplanting the unwritten law otherwise applicable to that topic.

The other possible understanding would insist that the applicability of any individual federal statute in American courts is entirely a matter of statutory interpretation: within constitutional limits, American judges have to apply federal statutes where Congress makes those statutes applicable, and each individual federal statute should be thought of as supplying a complete set of rules about its own applicability. On this view, standard choice-of-law principles would not operate directly in cases like *American Banana*, but would matter only to the extent that the Sherman Act implicitly incorporated them. The key question of statutory interpretation would be about the content of the choice-of-law principles that should be read into the Sherman Act: Did the Act implicitly incorporate standard principles like *lex loci delicti*, or did it establish a different trigger for its own applicability?

In theory, these two possible understandings are distinct. But in the early twentieth century, the distinction made little difference to the outcome of cases in federal court. Because choice-of-law principles were still relatively stable, the same principles were likely to govern the applicability of federal statutes whether

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[164] *American Banana*, 213 US at 357.

those principles were thought to operate directly or via implicit incorporation into each individual statute. Under either way of thinking, moreover, federal courts were likely to determine the content of the relevant principles in the same way. To see why, imagine that each individual federal statute that said nothing to deviate from ordinary choice-of-law principles was presumed to incorporate those principles into its text. On that view, the content of the incorporated principles would have been regarded as a matter of federal law on which federal courts owed no deference to the courts of any individual state. Federal courts therefore would have determined each federal statute's applicability according to their own best understanding of the relevant choice-of-law principles. But the same would have been true even if federal courts had thought of choice-of-law principles as operating directly. During the era of *Swift v Tyson*,[165] choice-of-law principles usually were considered matters of "general law" (on which federal courts exercised independent judgment) even when no federal statute was in the picture at all.[166] In cases like *American Banana*, then, the distinction between the two possible understandings of the interaction between federal statutes and choice-of-law principles made no practical difference—which may be why the Supreme Court did not focus on it.

Other opinions from this era resembled *American Banana* both in using choice-of-law principles to determine the reach of federal statutes and in failing to make clear exactly how those principles came into play. In *New York Central Railroad Co v Chisholm*,[167] for instance, a railroad worker on a train from New York to Canada had been fatally injured thirty miles north of the border. The administrator of his estate asserted a cause of action under the following provision of the Federal Employers' Liability Act[168] (FELA):

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165 41 US (16 Pet) 1 (1842).

166 See Charles T. McCormick and Elvin Hale Hewins, *The Collapse of "General" Law in the Federal Courts*, 33 Ill L Rev 126, 138 (1938) ("Before the *Erie* case, the rules for choosing the territorial law to be applied[] apparently were matters of independent determination by Federal courts, unbound by state decisions."). See also *Dygert v Vermont Loan & Trust Co*, 94 F 913, 914–15 (9th Cir 1899) (illustrating this point); *Ex parte Heidelback*, 11 F Cases 1021, 1022 (D Mass 1876) ("When we have ascertained what local law applies to the case, we follow it; but the ascertainment itself is not a local question.").

167 268 US 29 (1925).

168 Pub L No 60-100, ch 149, 35 Stat 65 (1908), codified as amended at 45 USC § 51 et seq.

> [E]very common carrier by railroad while engaging in commerce between any of the several States or Territories, or between . . . any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, . . . or other equipment.[169]

Despite this broad language, the Supreme Court unanimously held that the FELA did not make carriers liable for torts that occurred in Canada. Instead, in keeping with standard choice-of-law principles, "[t]he carrier was subject only to such obligations as were imposed by the laws and statutes of the country where the alleged act of negligence occurred."[170]

In one sense, Justice James McReynolds cast his opinion in *Chisholm* in terms of statutory interpretation. The crux of his analysis was that the FELA "contains no words which definitely disclose an intention to give it extraterritorial effect, nor do the circumstances require an inference of such purpose."[171] But choice-of-law jurisprudence accounts for the importance of this fact: absent congressional override, the Court was unwilling to read a generally worded federal statute to depart from the baseline rule of *lex loci delicti*. Again, moreover, the Court did not specify the legal status of this baseline rule: Was the *lex loci delicti* rule operating directly to make American tort law[172] inapplicable, or was the Court reading the rule into the FELA itself?

Whichever view they took, federal courts would have needed to engage in the kind of statutory interpretation that Justice McReynolds conducted in *Chisholm*. After all, courts that were

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169 FELA § 1, 35 Stat at 65, codified as amended at 45 USC § 51.

170 *Chisholm*, 268 US at 32. Like Justice Holmes's opinion in *American Banana*, this statement arguably departs from Professor Beale by focusing on the place of the defendant's negligence rather than the place of the victim's injury. See note 162. Again, though, that potential subtlety did not matter, because the victim was injured at the scene of the negligence. See Brief for Defendant, Plaintiff in Error, *New York Central Railroad Co v Chisholm*, No 306, *2 (US filed Mar 11, 1925).

171 *Chisholm*, 268 US at 31.

172 According to the Court, "[D]emands under [the FELA] are based wholly upon tort." Id.

being asked to apply a federal statute beyond the limits suggested by general choice-of-law jurisprudence needed to interpret the statute to decide whether it supplied a special trigger for its own applicability. On occasion, the very subject matter of a statute led judges to infer that Congress had intended to regulate behavior no matter where it occurred. (The classic example is *United States v Bowman*,[173] where the Supreme Court interpreted a generally worded federal statute to criminalize certain schemes to defraud the federal government no matter where the relevant acts took place.[174]) In other cases, judges divided about whether laws that addressed their own territorial scope should be understood to displace more fine-grained choice-of-law principles[175] and about the extent of the displacement.[176]

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[173] 260 US 94 (1922).

[174] At the time relevant to *Bowman*, § 35 of the federal criminal code forbade both the knowing presentation of false claims upon the federal government (or any corporation in which the federal government owned stock) and related conspiracies. See Pub L No 65-228, ch 194, 40 Stat 1015, 1015–16 (1918). *Bowman* concerned a false claim upon the government-owned US Shipping Board Emergency Fleet Corporation. The indictment accused three American citizens—the master and the engineer of an American vessel and an agent for the Standard Oil Company in Rio de Janeiro—of working together to seek payment from the Emergency Fleet Corporation for fuel that had not actually been delivered to the vessel. Different counts in the indictment alleged different locations for the conspiracy: aboard the vessel on the high seas, aboard the vessel in Brazilian territorial waters, or ashore in Rio de Janeiro. See *Bowman*, 260 US at 95–96.

A federal district judge quashed the indictment on the ground that § 35 should not be understood to criminalize acts committed beyond American borders. See *United States v Bowman*, 287 F 588, 593 (SDNY 1921). The Supreme Court, however, unanimously disagreed. Given "the nature of the offense" that § 35 covered, the Court inferred that Congress had enacted § 35 as a means of protecting the federal government against fraud "wherever perpetrated," at least if the perpetrators were "[the government's] own citizens, officers or agents." *Bowman*, 260 US at 98. The Court supported this conclusion with references to some of the surrounding provisions in the relevant chapter of the federal criminal code, which had an international flavor. See id at 99–100. In addition, the Court suggested that when Congress had amended § 35 to include corporations in which the federal government owned stock, members of Congress had specifically been thinking about the Emergency Fleet Corporation, and they had known that "vessels of the United States on the high seas and in foreign ports" were a natural location for frauds against the Corporation. See id at 101–02.

[175] During Prohibition, for instance, the Supreme Court had to decide whether foreign-flagged vessels traveling between the United States and foreign ports could carry liquor while they were in the territorial waters of the United States. By its terms, the Eighteenth Amendment forbade "transportation of intoxicating liquors *within . . . the United States and all territory subject to the jurisdiction thereof* for beverage purposes." US Const Amend XVIII, § 1 (emphasis added), repealed by US Const Amend XXI, § 1. Congress had used similar language in the National Prohibition Act. See An Act Supplemental to the National Prohibition Act § 3, Pub L No 67-96, ch 134, 42 Stat 222, 223 (1921). On the other hand, the law of the flag generally governed a vessel's internal affairs wherever the vessel went. See, for example, *Wildenhus's Case*, 120 US 1, 12 (1887). Should the Eighteenth Amendment and the National Prohibition Act be interpreted as

As *American Banana* and *Chisholm* illustrate, however, courts commonly used general choice-of-law rules to determine the applicability of federal statutes that said nothing one way or the other on this topic. In the early twentieth century, moreover, federal courts had little occasion to decide whether those rules were operating directly (unless a particular federal statute overrode them) or only by incorporation into each individual statute (unless the statute incorporated some other choice-of-law rule instead).

2. The shift toward reading each federal statute to encompass all questions about its applicability.

In the mid-twentieth century, federal courts focused on this issue and embraced a particular position: ever since the 1940s, judicial opinions have tended to portray choice-of-law doctrines as being embedded in each federal statute. In this respect, opinions about the applicability of federal statutes in international contexts now take a different form than opinions about the applicability of state statutes in interstate contexts. (As we saw in Part I.A, state courts tend to think of choice-of-law doctrines as operating separate and apart from individual state statutes; while a particular state statute might override the state's ordinary choice-of-law rules, those rules are thought to operate directly unless a statute trumps them.)

Part II speculates about the reasons for the divergence of these two models. As we shall see, the judiciary's increasing "statutification" of the choice-of-law principles that determine the effective scope of federal legislation may have been a response to pressures created by the Supreme Court's decisions in

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overriding this normal choice-of-law principle? Compare *Cunard Steamship Co v Mellon*, 262 US 100, 125–26 (1923) (answering yes), with id at 132–33 (Sutherland dissenting) (answering no).

[176] See, for example, *Sandberg v McDonald*, 248 US 185 (1918). As amended in 1915, a federal statute made it a misdemeanor "to pay any seaman wages in advance of the time when he has actually earned the same" and added that "[t]he payment of such advance wages . . . shall be no defense" if a seaman sued for a second payment after doing his work. Act of Mar 4, 1915 § 11, Pub L No 63-203, ch 153, 38 Stat 1164, 1168, codified as amended at 46 USC § 10505. The statute specified that "this section shall apply as well to foreign vessels while in waters of the United States, as to vessels of the United States." Act of Mar 4, 1915 § 11, 38 Stat at 1169. But what exactly did that mean? Suppose wages had been advanced to foreign seamen in England before they boarded a British vessel bound for the United States. If the seamen sued for payment of wages in an American court while the vessel was in an American port, did the statute prevent the master from using the advance payment in England as a defense? Compare *Sandberg*, 248 US at 196–97 (answering no), with id at 203–04 (McKenna dissenting) (answering yes).

Erie Railroad Co v Tompkins[177] and *Klaxon Co v Stentor Electric Manufacturing Co*.[178] Before we worry about the reasons for the shift, though, we need to document that a shift really did occur. The rest of this Part aims to do so.

Scholars agree that by the 1940s, there were signs of change in the *substance* of the federal courts' approach to questions about the "extraterritorial" application of federal statutes.[179] The classic example is Judge Learned Hand's opinion for the Second Circuit in *United States v Aluminum Co of America*[180] ("Alcoa"). There, Judge Hand held that the Sherman Act reached anti-competitive agreements that were entered into outside American territory, and among foreign corporations, "if they were intended to affect imports [into the United States] and did affect them."[181] Phrased narrowly, this conclusion did not necessarily depart from established doctrine about conspiracies outside the United States that were aimed at producing injury within the United States.[182] To judge from the Second Circuit's opinion, however, the Sherman Act might not require proof that the defendants had been specifically targeting the United States; perhaps it was enough that the defendants had conspired abroad to restrict their exports in general and that the ill effects of this conspiracy had been felt in the American market (as well as elsewhere). In keeping with this focus on the domestic effects of

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177 304 US 64 (1938).

178 313 US 487 (1941).

179 See, for example, Kramer, 1991 S Ct Rev at 192–93 (cited in note 14); Parrish, 61 Vand L Rev at 1471–72 (cited in note 147).

180 148 F2d 416 (2d Cir 1945).

181 Id at 444.

182 Even at the height of territorialist thinking in the criminal law, when treatises recognized "[t]he general proposition . . . that no man is to suffer criminally for what he does out of the territorial limits of the country," the treatise writers added a qualification: someone's actions might be deemed to occur within the country even while he himself is outside the country. Joel Prentiss Bishop, 1 *Commentaries on the Criminal Law* § 577 at 600 (Little, Brown 2d ed 1858) (illustrating this point with the example of a man standing in Canada who shoots and kills someone within the United States). See also note 72 and accompanying text; John Bassett Moore, *Report on Extraterritorial Crime and the* Cutting Case 23 (GPO 1887) (reporting that "the criminal jurisprudence of all countries" recognizes "[t]he principle that a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done"). By the time of *Alcoa*, the Supreme Court had already held that in certain circumstances, the generic federal anti-conspiracy statute reached conspirators who were outside the United States and who had not personally done anything in the United States. See *Ford v United States*, 273 US 593, 619–20 (1927) (affirming convictions of offshore defendants who had conspired with people in the United States to import liquor illegally into the United States).

international conspiracies, Judge Hand put a narrow spin on *American Banana*, citing it only for the proposition that generally worded federal statutes should not be construed to reach "conduct which has no consequences within the United States."[183] *Alcoa* has come to be associated with an "intended effects" test that spread throughout the lower courts and that gave federal antitrust laws substantially farther reach than *American Banana* had suggested.[184]

As many scholars have noted, the shift from *American Banana* to *Alcoa* was consistent with contemporaneous changes in choice-of-law theory.[185] In *Alcoa* itself, indeed, Judge Hand acknowledged that federal statutes should be interpreted in light of "the limitations customarily observed by nations upon the exercise of their powers," and he added that the relevant limitations "generally correspond to those fixed by the 'Conflict of Laws.' "[186] Thus, while *Alcoa* and *American Banana* reached different bottom lines, each arguably reflected the choice-of-law thinking of its day.

For our purposes, though, I am less concerned with the substance of the courts' analyses than with the *form* of those analyses—and, in particular, with the courts' understanding of the interaction between federal statutes and unwritten choice-of-law principles. Unlike *American Banana*, which was ambiguous about precisely why choice-of-law principles affected the applicability of the Sherman Act, Judge Hand's opinion in *Alcoa* seemed to take a position on that question. While Judge Hand acknowledged that the Sherman Act should be interpreted in light of "limitations which generally correspond to those fixed by the 'Conflict of Laws,' "[187] he strongly suggested that the relevant choice-of-law principles did not apply directly. Instead, they had legal effect in cases like *Alcoa* only to the extent that the Sherman Act should be understood to incorporate them. In that sense, Judge Hand saw *Alcoa* and similar cases as being purely about statutory interpretation. As he formulated the issue, "[W]e are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not

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183 *Alcoa*, 148 F2d at 443.

184 See Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption against Extraterritoriality*, 84 Nw U L Rev 598, 611 (1990).

185 See, for example, Kramer, 1991 S Ct Rev at 192 (cited in note 14).

186 *Alcoa*, 148 F2d at 443.

187 Id.

in allegiance to it."[188] Consistent with that view, Judge Hand's rhetoric proceeded from the premise that determining the applicability of a federal statute to cross-border events required the court to "impute to Congress an intent" on the relevant question.[189]

Even in cases that did *not* deem federal statutes applicable to cross-border events, the Supreme Court soon adopted similar rhetoric. Take *Foley Bros., Inc v Filardo*.[190] As enacted in 1912, a federal statute called the Eight Hour Law[191] specified that

> every contract hereafter made to which the United States . . . is a party . . . which may require or involve the employment of laborers or mechanics shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor . . ., shall be required or permitted to work more than eight hours in any one calendar day upon such work.[192]

In 1940, Congress relaxed this requirement somewhat, specifying that "work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay."[193] Later, in 1941, the United States entered into a contract with Foley Brothers to undertake some construction projects on behalf of the United States in Iraq and Iran. The contract obliged Foley Brothers to "obey and abide by all applicable laws . . . of the United States of America," but it did not single out the Eight Hour Law or include any specific requirement that Foley Brothers pay laborers time-and-a-half for overtime.[194] In due course, Foley Brothers hired Filardo, an American citizen, to go to Iraq and Iran and work as a cook at the construction sites. While performing that job, Filardo often worked overtime, but he did not receive extra pay for doing so. He ultimately sued Foley Brothers, alleging that the Eight Hour Law (as revised by the 1940 statute) entitled him to overtime pay.

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188 Id.

189 Id.

190 336 US 281 (1949).

191 Act of June 19, 1912, Pub L No 62-199, ch 174, 37 Stat 137. For predecessors of this statute, see Act of Aug 1, 1892, ch 352, 27 Stat 340; Act of June 25, 1868, ch 72, 15 Stat 77.

192 Act of June 19, 1912 § 1, 37 Stat at 137.

193 Second Supplemental National Defense Appropriation Act, 1941 § 303, Pub L No 76-781, ch 717, 54 Stat 872, 884 (1940).

194 *Foley Bros.*, 336 US at 283 (quotation marks omitted).

But the Supreme Court disagreed. Casting the relevant question entirely in terms of statutory interpretation, the Court concluded that Congress had intended the Eight Hour Law to cover only contracts for work in "places over which the United States has sovereignty or [ ] some measure of legislative control."[195]

This bottom line arguably comported with traditional choice-of-law jurisprudence. After all, even if Foley Brothers and the federal government had made their contract in the United States, the wages that Foley Brothers paid its employees in Iraq and Iran might be characterized as going to "the manner of performance" of that contract, and hence as presumptively being governed by "the law of the place of performance."[196] Without making any explicit references to choice-of-law jurisprudence, however, the Court invoked what it called "[t]he canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[197]

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[195] Id at 285. See also id at 286 n 2 (declining to be more specific about "the precise geographic coverage of the Eight Hour Law" because such specificity "is unnecessary for this decision").

[196] Restatement (First) of the Law of Conflict of Laws at § 358. But consider id at § 332, comment c (noting the difficulty of "deciding whether a question in a dispute concerning a contract is one involving the creation of an obligation or performance thereof").

[197] *Foley Bros.*, 336 US at 285. The case that the Court cited in support of this canon, *Blackmer v United States*, 284 US 421 (1932), also did not refer to choice-of-law jurisprudence. But such references would have been beside the point in *Blackmer* because the statute at issue in that case plainly trumped ordinary choice-of-law analysis.

In *Blackmer*, Congress had explicitly authorized federal courts to issue subpoenas requiring American citizens living abroad to return to the United States to testify in criminal prosecutions. Act Relating to Contempts § 2, Pub L No 69-483, ch 762, 44 Stat 835, 835 (1926). See also Act Relating to Contempts § 3, 44 Stat at 835–36 (prescribing a mechanism for extraterritorial service); Act Relating to Contempts §§ 4–7, 44 Stat at 836 (treating disobedience of such subpoenas as contempt of court and authorizing fines that could be collected by selling the witness's property in the United States). Notwithstanding the plain terms of this statute, an American citizen living in France disobeyed a subpoena and was duly held in contempt. In rebuffing his subsequent attack on the statute's constitutionality, the Supreme Court made the following observation:

> While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power.

Blackmer, 284 US at 437. At first glance, the statement that the relevant question was entirely "one of construction" may seem to anticipate the approach that the Court later took in *Foley Bros.* In context, however, this statement was simply a way of saying that Congress has the constitutional power to authorize American courts to issue subpoenas directed at American citizens abroad. Because the statute at issue in *Blackmer* plainly did so, the Court did not have to consider the ordinary choice-of-law principles that might have come into play if the statute had not explicitly overridden them.

To the extent that the Court was thinking about choice-of-law principles at all in *Foley Bros.*, the Court plainly did not believe that those principles applied of their own force. Instead, the Court's locution suggests that such principles would be relevant only if the federal statute in question incorporated them. As the Court framed the case, determining the geographic reach of the Eight Hour Law required ascribing some intention on that point to the enacting Congress. Thus, the Court described its "canon of construction" as a guide to "unexpressed congressional intent," predicated on "the assumption that Congress is primarily concerned with domestic conditions."[198] In the Court's view, moreover, nothing in the text or legislative history of the Eight Hour Law supported "the belief that Congress entertained any intention other than the normal one in this case."[199] To the contrary, the Court took the legislative history to suggest that the statute had been motivated by "domestic labor conditions," and the Court thought that the statute's failure to distinguish between "laborers who are aliens and those who are citizens of the United States" also suggested "that the statute was intended to apply only to those places where the labor conditions of both citizen and alien employees are a probable concern of Congress."[200]

The same tendency to downplay any independent role for choice-of-law principles and to speak entirely in terms of statutory interpretation continued in *Steele v Bulova Watch Co*.[201] Sidney Steele, a US citizen who resided in Texas, established a watchmaking business in Mexico. He allegedly discovered that the "Bulova" trademark had not been registered in Mexico, and he registered it there himself. His business in Mexico proceeded to stamp the name "Bulova" on the watches that it made and sold in Mexico. All this conduct occurred in Mexico; Steele's business made no sales in the United States. Nonetheless, some of the watches found their way to the United States, where Bulova was a registered trademark of the Bulova Watch Company (a well-known American corporation). Ultimately, Bulova

198 *Foley Bros.*, 336 US at 285.

199 Id.

200 Id at 286. See also id at 287 (drawing a similar inference from the fact that when Congress expanded the statute to cover dredgers, the amendment referred only to people who were employed "to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor *of the United States or of the District of Columbia*") (emphasis added), quoting Act of Mar 3, 1913 § 1, Pub L No 62-408, ch 106, 37 Stat 726, 726.

201 344 US 280 (1952).

sued Steele and his Mexican business in a federal district court in Texas. Bulova argued that by putting the Bulova mark on the watches that they made in Mexico, the defendants were violating the Lanham Act.[202] The district court disagreed and dismissed Bulova's suit, but the circuit court reversed.[203]

While the case was pending in the Supreme Court, Mexico officially nullified Steele's registration of the Bulova mark. With the case in this posture, the Supreme Court held that the Lanham Act did potentially reach the case and authorize the district court to enjoin Steele's manufacture, in Mexico, of watches with the Bulova mark.[204] Again, the Court's analysis sounded entirely in statutory interpretation.[205] As enacted in 1946, the Lanham Act supplied a cause of action against anyone who, "in commerce," used a copy or colorable imitation of a federally registered trademark, without the registrant's consent, in connection with the sale of goods and in a manner "likely to cause confusion . . . or to deceive purchasers as to the source of origin of such goods."[206] The Act also defined "commerce" to mean "all commerce which may lawfully be regulated by Congress."[207] For the Court, this "broad" language, combined with the Act's stated purposes, proved decisive.[208] As the Court noted, Steele had engaged in some relevant activities in the United States: although he had not sold any of the watches in this country, he had bought some of the necessary components here.[209] The Court also emphasized that his activities had harmful "effects" inside the United States: "[S]purious 'Bulovas' filtered through the Mexican border into this country," and the watches made by Steele in Mexico "could well reflect adversely on Bulova Watch Company's trade reputation" in the United States.[210] Given the fact that

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202 Pub L No 79-489, ch 540, 60 Stat 427 (1946), codified as amended at 15 USC § 1051 et seq.

203 *Bulova Watch Co v Steele*, 194 F2d 567, 567–68, 572 (5th Cir 1952).

204 *Steele*, 344 US at 285, 289.

205 See, for example, id at 285 ("The question [ ] is 'whether Congress intended to make the law applicable' to the facts of this case."), quoting *Foley Bros.*, 336 US at 285.

206 Lanham Act § 32(1)(a), 60 Stat at 437.

207 Lanham Act § 45, 60 Stat at 443.

208 See *Steele*, 344 US at 283, 286.

209 See id at 286. See also id at 287 (conceding that "his purchases in the United States when viewed in isolation do not violate any of our laws," but calling them "essential steps in the course of business consummated abroad" and arguing that "acts in themselves legal lose that character when they become part of an unlawful scheme").

210 Id at 286. See also id at 288 (denying that *American Banana* "confer[red] blanket immunity on trade practices which radiate unlawful consequences here, merely because they were . . . consummated outside the territorial limits of the United States").

Steele was an American citizen, reading the Lanham Act to restrict his behavior abroad would not violate international norms about the limits on each country's prescriptive jurisdiction,[211] and the Court thought that an intent to reach Steele's behavior should indeed be imputed to Congress.

Not only did the Court cast this opinion entirely in terms of statutory interpretation, but it did not seem to draw even indirectly on choice-of-law principles. Indeed, the conclusion that it reached is hard to reconcile with those principles. In the wake of *Steele*, some lower courts tried to reintroduce choice-of-law ideas into analysis of the Lanham Act's reach.[212] Some academic work pointed in the same direction. For instance, while agreeing that "[i]n American practice, the question [of a federal statute's applicability to events with both American and foreign elements] ordinarily arises as one of interpretation,"[213] Professor Donald Trautman argued that "conflicts thinking has provided significant informing principles," and he spoke of "an organic relation between 'statutory interpretation' and conflict-of-laws thinking."[214]

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[211] Id at 285–86, citing *Skiriotes v Florida*, 313 US 69, 73 (1941). See also *Bowman*, 260 US at 97–98 (acknowledging that the courts' interpretations of federal criminal statutes should take account of "the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations," but noting that it is consistent with international law for a nation to forbid its own citizens from conspiring to defraud it, even if the fraud occurs abroad). For the seminal case about the interaction between international law and statutory interpretation, see *Murray v Schooner Charming Betsy*, 6 US (2 Cranch) 64, 118 (1804):

> [A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

For discussion of the *Charming Betsy* canon and a sophisticated proposal about how "the international law of legislative jurisdiction" should affect the interpretation of federal statutes in modern times, see Knox, 104 Am J Intl L at 355–61 (cited in note 147).

[212] See, for example, *Vanity Fair Mills, Inc v T. Eaton Co*, 234 F2d 633, 638–40 (2d Cir 1956) (discussing "usual conflict-of-laws principles" in this context, though conceding that the Lanham Act could depart from those principles); id at 642 (holding that while the Constitution might well enable Congress to "provide infringement remedies so long as the defendant's use of the mark has a substantial effect on the foreign or interstate commerce of the United States," *Steele* did not require such an "extreme interpretation" of the Lanham Act); id ("[W]e do not think that Congress intended that the infringement remedies provided in § 32(1)(a) and elsewhere should be applied to acts committed by a foreign national in his home country under a presumably valid trademark registration in that country.").

[213] Donald T. Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation*, 22 Ohio St L J 586, 586 (1961).

[214] Id at 586, 592. See also id at 589 (adding that the "fundamental and desirable change" then taking place in choice-of-law thinking "can be of immeasurable assistance

Nonetheless, the Supreme Court's decision to frame the relevant questions entirely in terms of statutory interpretation certainly facilitated departures from generic choice-of-law ideas.

Contemporaneous developments in choice-of-law theory reinforced this trend. By the end of the 1950s, after all, Brainerd Currie was hard at work urging courts to scrap traditional choice-of-law analysis and to replace it with the purposive interpretation of particular statutes.[215] Professor Currie's vigorous advocacy may have encouraged federal judges to discount the value of generic choice-of-law ideas and to believe that any given federal statute should apply wherever its purposes seemed to warrant.

Whether because of Professor Currie's influence in dismantling traditional choice-of-law analysis or because of the course set by *Alcoa*'s interpretation of the Sherman Act and *Steele*'s interpretation of the Lanham Act, many federal courts were soon taking expansive views of the territorial reach of particular federal statutes. For instance, in a series of cases that began in the 1960s and continued for the next four decades, the Second Circuit held that the antifraud provisions in the Securities Exchange Act[216] covered transactions consummated abroad if they satisfied either an "effects test" or a "conduct test." The effects test allowed the statute to reach fraudulent acts that "were all committed outside the United States" and that related to securities in "foreign compan[ies] doing no business in the United States"[217] if the fraud nonetheless "had a substantial effect in the United States or upon United States citizens."[218] The conduct

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in the process of understanding the context in which Congressional legislation occurs"); Note, *Extraterritorial Application of the Antitrust Laws: A Conflict of Law Approach*, 70 Yale L J 259, 264–66 (1960) (pointing out that the conclusions reached in both *American Banana* and *Alcoa* were "based upon principles of the conflict of laws," but arguing that "[a]n attempt to define the boundaries of permissible extraterritoriality in these terms . . . requires a fresh look at conflict-of-law doctrines" because "[t]raditional conflict-of-laws doctrines . . . are not adequate to deal with the complex problems presented by the interdependent economies of the contemporary world"); id at 286–87 (ultimately advocating an interest-balancing approach).

215 See notes 88–103 and accompanying text.

216 Pub L No 73-291, ch 404, 48 Stat 881 (1934), codified as amended at 15 USC § 78a et seq.

217 *Leasco Data Processing Equipment Corp v Maxwell*, 468 F2d 1326, 1333 (2d Cir 1972) (emphasis omitted).

218 *SEC v Berger*, 322 F3d 187, 192 (2d Cir 2003). For other statements of the effects test, see *Consolidated Gold Fields PLC v Minorco, SA*, 871 F2d 252, 261–62 (2d Cir 1989) (indicating that the federal statutes against securities fraud apply "whenever a predominantly foreign transaction has substantial effects within the United States," and discussing what counts as "substantial"); *Bersch v Drexel Firestone, Inc*, 519 F2d 974,

test allowed the statute to reach some additional frauds that had been perpetrated in part through conduct in the United States, even if the losses occasioned by the fraud were felt entirely overseas.[219] (As applied by the Second Circuit, the conduct test was somewhat easier to satisfy when the overseas victims were "Americans resident abroad" than when they were all foreign citizens, but the test could be applied in either case.[220])

In developing these tests, the Second Circuit acknowledged that "[t]he Securities Exchange Act is silent as to its extraterritorial application" and that the Act's legislative history provided no real guidance either.[221] But the court still framed the issue as being "a question of the interpretation of the particular statute."[222] Faced with generally worded statutory language that might be read to cover all securities transactions worldwide, the court used its sense of "the underlying purpose of the anti-fraud provisions"[223] to try to imagine which "predominantly foreign" transactions the enacting Congress would and would not have wanted to cover.[224] The court then read those judgments into the statute.

At least two things are notable about this line of cases. First, the Second Circuit cast questions that might once have been handled by generic choice-of-law doctrines as being questions about the meaning of the particular federal statute at hand. Second, because that statute said nothing one way or the

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993 (2d Cir 1975) ("[T]he anti-fraud provisions of the federal securities laws . . . [a]pply to losses from sales of securities to Americans resident in the United States whether or not acts . . . of material importance occurred in this country.").

219 See *Alfadda v Fenn*, 935 F2d 475, 478–79 (2d Cir 1991); *Leasco*, 468 F2d at 1334.

220 See *Bersch*, 519 F2d at 993. See also *IIT v Vencap, Ltd*, 519 F2d 1001, 1017 (2d Cir 1975) ("We do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners.").

221 *Alfadda*, 935 F2d at 478. See also *Bersch*, 519 F2d at 993 ("We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond.").

222 *Leasco*, 468 F2d at 1334.

223 *Europe and Overseas Commodity Traders, SA v Banque Paribas London*, 147 F3d 118, 125 (2d Cir 1998).

224 *Bersch*, 519 F2d at 985, 993. See also *Leasco*, 468 F2d at 1337 ("[W]e must ask ourselves whether, if Congress had thought about the point, it would not have wished to protect an American investor if a foreigner comes to the United States and fraudulently induces him to purchase foreign securities abroad."); *Europe and Overseas Commodity Traders*, 147 F3d at 125 (describing past cases as having reached conclusions about what "Congress would want"). The interpretive technique reflected in these passages is the one that Professor Currie favored. See note 89 (associating Professor Currie's approach with "imaginative reconstruction").

other about those questions, the Second Circuit used a purposive style of interpretation to answer them as best it could. The conduct and effects tests, which spread both to other federal circuits[225] and to some other statutes,[226] reflected the court's "best judgment as to what Congress would have wished if these problems had occurred to it."[227]

In the 1970s, two student commentators—including Edith Jones, now a prominent federal circuit judge—criticized this approach for paying too little attention to choice-of-law jurisprudence.[228] In keeping with what seemed to be the trend in choice-of-law analysis, though, neither commentator suggested that courts should use generic choice-of-law rules to help decide when generally worded federal statutes applied to cases with foreign elements. Instead, Jones called for "interest analysis" in the style of Professor Currie,[229] and the other commentator called for "interest-balancing" of the sort favored by some other contemporary scholars.[230] Each of these approaches boiled down to purposive interpretation of the particular federal statute in question, moderated to some extent by the interests that other countries might be trying to promote through their own laws.[231] Thus, even critics of the courts' opinions agreed that the key questions should be cast as matters of statutory interpretation.

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[225] See, for example, *Robinson v TCI/US West Cable Communications, Inc*, 117 F3d 900, 905 (5th Cir 1997); *Tamari v Bache & Co (Lebanon)*, 730 F2d 1103, 1107 (7th Cir 1984); *Grunenthal GmbH v Hotz*, 712 F2d 421, 424–26 (9th Cir 1983); *Continental Grain (Australia) Pty Ltd v Pacific Oilseeds, Inc*, 592 F2d 409, 416–17 (8th Cir 1979); *SEC v Kassar*, 548 F2d 109, 112–15 (3d Cir 1977).

[226] See, for example, *Liquidation Commission of Banco Intercontinental, SA v Renta*, 530 F3d 1339, 1351–52 (11th Cir 2008) (reading the tests into RICO and emphasizing that "[t]his is a question of statutory interpretation . . . not a question of choice of law"), quoting *Orion Tire Corp v Goodyear Tire & Rubber Co*, 268 F3d 1133, 1137 (9th Cir 2001); *Psimenos v E.F. Hutton & Co*, 722 F2d 1041, 1044–46 (2d Cir 1983) (reading the tests into the Commodities Exchange Act).

[227] *Bersch*, 519 F2d at 993.

[228] See generally Edith Hollan Jones, Note, *An Interest Analysis Approach to Extraterritorial Application of Rule 10b-5*, 52 Tex L Rev 983 (1974); Bruce Alan Rosenfield, *Extraterritorial Application of United States Laws: A Conflict of Law Approach*, 28 Stan L Rev 1005 (1976).

[229] Jones, 52 Tex L Rev at 991–92 & n 38 (cited in note 228).

[230] Rosenfield, 28 Stan L Rev at 1025–29 (cited in note 228).

[231] See, for example, Jones, 52 Tex L Rev at 993 (cited in note 228):

> The broad goal of United States securities laws is the promotion of securities markets whose integrity and reliability will protect investors and warrant their confidence. A domestic court should apply these laws if this will advance their broad purpose and will not substantially interfere with the policies of another interested jurisdiction.

3. The modern version of the "presumption against extraterritoriality."

When dealing with federal statutes, modern courts still tend to think of these issues entirely under the rubric of statutory interpretation. The *form* of the courts' analysis has therefore remained stable since the 1940s. To the consternation of some commentators, however, the *substance* of the courts' analysis has shifted back toward old ideas of territoriality.

Chief Justice William Rehnquist set the tone in 1991 with his majority opinion in *EEOC v Arabian American Oil Co*[232] ("Aramco"). Aramco was an American corporation, but it had its principal place of business in Saudi Arabia. A Texas-based subsidiary hired Ali Boureslan, an American citizen, to work for the subsidiary in Texas. Soon thereafter, however, Boureslan transferred to work for Aramco in Saudi Arabia, where he was fired after running into trouble with his supervisor. Alleging that his supervisor in Saudi Arabia had subjected him to discriminatory treatment on the basis of race, religion, and national origin, Boureslan sued Aramco and its subsidiary under Title VII of the Civil Rights Act of 1964.[233] A divided Supreme Court ultimately held that the then-existing version of Title VII should not be interpreted to have any "extraterritorial application"—which, according to the Court, meant that it did not reach discrimination against Boureslan in Saudi Arabia.[234]

As in past cases, the majority formulated the issues entirely in terms of statutory interpretation.[235] With purposive interpretation on the wane, however, the Court did not try to imagine what members of the enacting Congress would have wanted to do about multinational situations that had not occurred to them. Instead, the majority relied heavily on the canon of construction that the Court had articulated in *Foley Bros.* more than four decades earlier. In the majority's words, "It is a longstanding

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[232] 499 US 244 (1991).

[233] Pub L No 88-352, 78 Stat 241, 253–66, codified as amended at 42 USC § 2000e et seq. See *Boureslan v Aramco*, 857 F2d 1014, 1016 (5th Cir 1988), rehg 892 F2d 1271 (5th Cir 1990) (en banc).

[234] *Aramco*, 499 US at 250–59. Congress subsequently amended Title VII to restrict discrimination by American corporations against American citizens in overseas employment. See Civil Rights Act of 1991 § 109, Pub L No 102-166, 105 Stat 1071, 1077–78, codified at 42 USC §§ 2000e, 2000e–1.

[235] See, for example, *Aramco*, 499 US at 248 ("It is our task to determine whether Congress intended the protections of Title VII to apply to United States citizens employed by American employers outside of the United States.").

principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[236] According to the majority, moreover, this "presumption against extraterritorial application" controlled interpretation of Title VII unless there were sufficiently strong indications that members of the enacting Congress had formed an "affirmative [ ] intent [ ] to extend the protections of Title VII beyond our territorial borders."[237] Thus, rather than speculating about what members of the enacting Congress *would have* decided *if* they had considered questions about the statute's geographic reach, the Court looked for signs that they had consciously "intended Title VII to apply abroad"—and in the absence of sufficiently powerful signs to that effect, the Court read an implicit geographic limitation into the statute.[238]

Even the dissenters accepted the structure of this analysis. In their view, however, the presumption against extraterritoriality should be relatively weak in cases like *Aramco* (where reading Title VII to regulate how American employers treat American citizens overseas would not have violated international law or complicated our foreign relations), and the dissenters were persuaded "that Congress did in fact expect Title VII's central prohibition to have an extraterritorial reach."[239] As the dissenters emphasized, § 702 of the statute specified that Title VII "shall not apply to an employer with respect to the employment of aliens outside any State."[240] The dissenters inferred that Congress had intended Title VII to apply worldwide with respect to the employment of American citizens.[241] The majority, on the other hand, suggested that the proper inference might be limited to areas that were not within a "State"[242] but that were still under

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[236] Id at 248, quoting *Foley Bros.*, 336 US at 285.

[237] *Aramco*, 499 US at 249, 258.

[238] Id at 259. See also id at 248 ("We assume that Congress legislates against the backdrop of the presumption against extraterritoriality.").

[239] Id at 264–65, 267 (Marshall dissenting) (emphasis omitted).

[240] Id at 267 (emphasis omitted), quoting Civil Rights Act of 1964 § 702, 78 Stat at 255, codified as amended at 42 USC § 2000e–1.

[241] See *Aramco*, 499 US at 267 (Marshall dissenting) (deeming this inference "more than sufficient to rebut the presumption against extraterritoriality").

[242] Title VII defined "State" broadly to "include[ ] a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act." Civil Rights Act of 1964 § 701(i), 78 Stat at 255, codified at 42 USC § 2000e(i).

American control—such as "leased bases in foreign nations."[243] In any event, the majority thought that the negative inference suggested by § 702 was offset by "other elements in the statute suggesting a purely domestic focus."[244] In the face of what it saw as uncertainty about "[t]he intent of Congress as to the extraterritorial application of this statute,"[245] the majority fell back on the presumption that such applications had not been intended.

The disagreement between the majority and the dissent in *Aramco* should not obscure substantial areas of consensus. All nine Justices cast the case entirely in terms of statutory interpretation.[246] What is more, all nine Justices acknowledged a "presumption against extraterritoriality" that controlled the interpretation of federal statutes absent evidence that the enacting Congress had "inten[ded] that a particular enactment apply beyond the national boundaries."[247] The disagreement among the Justices was simply about the strength of that presumption in cases like *Aramco* and about whether the negative inference supported by § 702 was enough to overcome it.

In the wake of *Aramco*, the Supreme Court has continued to apply "the presumption that Acts of Congress do not ordinarily apply outside our borders,"[248] and the Court has continued to hold that this presumption can be overcome only by "affirmative evidence of intended extraterritorial application."[249] One of the most recent examples is *Morrison v National Australia Bank Ltd*,[250] which swept away the conduct and effects tests that the

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243 *Aramco*, 499 US at 254.

244 Id at 255–56 (discussing the statute's venue provision, the limited reach of the subpoena authority that the statute gave the EEOC, and the absence of provisions about how to handle "conflicts with foreign laws and procedures").

245 Id at 250–51.

246 See, for example, id at 260 (Marshall dissenting) ("Like any issue of statutory construction, the question whether Title VII protects United States citizens from discrimination by United States employers abroad turns solely on congressional intent.").

247 *Aramco*, 499 US at 260–61, 263 (Marshall dissenting).

248 See *Sale v Haitian Centers Council, Inc*, 509 US 155, 173 (1993).

249 Id at 170, 176 (holding that what was then § 243(h)(1) of the Immigration and Nationality Act, which established a general rule that "[t]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion," did not apply to aliens whom the Coast Guard intercepted on the high seas). See also, for example, *Smith v United States*, 507 US 197, 203–04 (1993) (invoking the presumption against extraterritoriality as one of many reasons to conclude that the Federal Tort Claims Act does not waive the federal government's sovereign immunity for torts allegedly committed by federal employees in Antarctica).

250 130 S Ct 2869 (2010).

Second Circuit had developed to determine the transnational reach of the antifraud provisions in federal securities laws. The provision at issue in *Morrison*, § 10 of the Securities Exchange Act, read as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[251]

Though superficially universal, the language of § 10(b) did not specifically address questions of "extraterritorial application."[252] As we have seen, the Second Circuit—in a line of cases dating back to the 1960s—took that fact as an invitation to speculate about which types of multinational fact patterns the enacting Congress would have wanted § 10(b) to reach "if these problems had occurred to it."[253] In *Morrison*, however, the Supreme Court repudiated that approach as being contrary to *Aramco* and the presumption against extraterritoriality. In place of the Second Circuit's approach, Justice Antonin Scalia's majority opinion endorsed a simple rule: "When a [federal] statute gives no clear indication of an extraterritorial application, it has none."[254]

Again, the Court cast the relevant issues entirely in terms of statutory interpretation. In Justice Scalia's words, the presumption against extraterritoriality is "a canon of construction, or a presumption about a statute's meaning."[255] To be sure, the contrary approach taken by the Second Circuit was also rooted in statutory interpretation. But Justice Scalia preferred the

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[251] Securities Exchange Act § 10(b), 48 Stat at 891, codified as amended at 15 USC § 78j. See also SEC Rule 10b-5, 17 CFR § 240.10b-5 (forbidding frauds and material misrepresentations or omissions in connection with the purchase or sale of a security).

[252] *Morrison*, 130 S Ct at 2878.

[253] See *Bersch*, 519 F2d at 993. See also notes 216–27 and accompanying text.

[254] *Morrison*, 130 S Ct at 2878.

[255] Id at 2877.

more rule-like style of interpretation reflected in the presumption against extraterritoriality to the ad hoc speculation necessitated by the Second Circuit's approach.[256] In his view, the presumption against extraterritoriality reflects a "perception [about how] Congress ordinarily legislates," and it also "preserv[es] a stable background against which Congress can legislate with predictable effects."[257] By contrast, the Second Circuit's approach—which required judges to "guess anew" with respect to each statute and each case "what Congress would have wanted if it had thought of the situation before the court"—had proved "unpredictable."[258]

Having reaffirmed the presumption against extraterritoriality, the Supreme Court proceeded to apply it to the language of § 10(b). Without getting precise about the details, the Court suggested that § 10(b) *does* reach overseas transactions in securities that are registered on American exchanges. But the Court held that § 10(b), interpreted in light of the presumption against extraterritoriality, does *not* reach any overseas transactions in securities that are *not* registered on American exchanges, even if those transactions have substantial effects in the United States and even if important aspects of the fraudulent conduct leading up to the transactions occurred in the United States. According to the majority, when § 10(b) refers to "the purchase or sale of . . . any security not so registered," it is implicitly referring only to purchases and sales that occur "in the United States."[259]

As this Article went to print, the Court reached a similar conclusion in *Kiobel v Royal Dutch Petroleum Co*.[260] That case

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[256] Consider Caleb Nelson, *What Is Textualism?*, 91 Va L Rev 347, 376 (2005) (discussing modern-day textualists' view that deviations from the surface meaning of statutory language should be "guided by relatively rule-like principles"); id at 383–98 (discussing the role of canons in textualism).

[257] *Morrison*, 130 S Ct at 2877, 2881.

[258] Id at 2878, 2881.

[259] Id at 2885–88. See also id at 2884 (interpreting § 10(b) to cover "only transactions in securities listed on domestic exchanges, and domestic transactions in other securities").

Shortly after the Supreme Court issued this opinion, Congress amended the Securities Exchange Act in a way that apparently is designed to let the federal government itself (though not private plaintiffs) bring antifraud suits in connection with foreign transactions that satisfy a version of either the conduct test or the effects test. See Dodd-Frank Wall Street Reform and Consumer Protection Act § 929P(b)(2), Pub L No 111-203, 124 Stat 1376, 1865 (2010), codified at 15 USC § 78aa(b). But consider Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Needed or Sufficient?*, 1 Harv Bus L Rev 195 (2011) (noting questions about the meaning of this provision).

[260] 133 S Ct 1659 (2013).

concerned the legal effect of 28 USC § 1350, which reads as follows: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." When the First Congress enacted the precursor of this provision as part of the Judiciary Act of 1789,[261] people would have understood it as simply granting jurisdiction, not as supplying causes of action or other substantive rules of decision for the cases that it described.[262] Reading the statute to be entirely jurisdictional would not have defeated its purpose, because in 1789 causes of action did not need any source other than the general common law; while the common law of that era might have recognized only a "modest number" of violations of the law of nations that would give rise to personal liability for damages,[263] the First Congress would have expected the jurisdiction conferred by the precursor of § 1350 to make it possible for federal courts to entertain some such claims.[264] According to the modern Supreme Court, however, "the prevailing conception of the common law has changed since 1789,"[265] and federal judges might now doubt whether they can derive rules of decision from the common law "without further statutory authority."[266] In *Sosa v Alvarez-Machain*,[267] the Supreme Court expressed concern that this development risked denying all practical effect to § 1350.[268] To avoid that result, the Court took § 1350 as itself inviting courts to recognize certain causes of action as a matter of "federal common law."[269]

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261 Judiciary Act of 1789 § 9, ch 20, 1 Stat 73, 77 (giving the district courts "cognizance . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States").

262 See *Sosa v Alvarez-Machain*, 542 US 692, 712–14 (2003).

263 Id at 724.

264 See id at 712 ("[A]t the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.").

265 Id at 725.

266 *Sosa*, 542 US at 729 (reciting the view that "federal courts have no authority to derive 'general' common law").

267 542 US 692 (2003).

268 See, for example, id at 714 (refusing to accept the position "that the [statute] was stillborn because there could be no claim for relief without a further statute expressly authorizing adoption of causes of action").

269 Id at 729–32. See also id at 730 ("We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism."); Fallon, et al, *The Federal Courts* at 676, 682–83 (cited in note 24) (taking *Sosa* to raise a "question of translation" about

In *Kiobel*, the Court addressed the geographic scope of that invitation. Specifically, the Court asked "[w]hether . . . [§ 1350] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[270] A majority of the Court used the presumption against extraterritoriality to answer this question "no": with the possible exception of claims about piracy, § 1350 should not be understood to give federal courts "authority to recognize a cause of action under U.S. law" for "conduct occurring in the territory of another sovereign."[271] Invoking *Morrison*, the majority held that "the presumption against extraterritoriality applies to claims under [§ 1350], and [ ] nothing in the statute rebuts that presumption" by "evinc[ing] a 'clear indication of extraterritoriality.'"[272]

Although *Aramco*, *Morrison*, and *Kiobel* reflect a different style of statutory interpretation than some of their predecessors, they have not caused the Supreme Court to overrule glosses that it had authoritatively given particular federal statutes before *Aramco*. In *Aramco* itself, for instance, the Court declined to criticize the interpretation of the Lanham Act that it had adopted in *Steele*.[273] Lower courts have therefore continued to apply the Lanham Act to the alleged misuse of American trademarks even when that misuse occurs abroad, if it has a substantial effect on United States commerce (especially if that effect was intended or at least foreseeable).[274] Likewise, *Alcoa*'s interpretation of the Sherman Act[275]—which, by the 1980s, both the Supreme Court

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how modern courts should interpret § 1350 given "the profound shift in jurisprudential assumptions" that has occurred since 1789).

[270] *Kiobel*, 133 S Ct at 1663.

[271] Id at 1666, 1669.

[272] Id at 1665, 1669, quoting *Morrison*, 130 S Ct at 2883.

[273] See *Aramco*, 499 US at 252–53 (distinguishing rather than overruling *Steele*). See also notes 201–11 and accompanying text (describing *Steele*).

[274] See, for example, *Paulsson Geophysical Services, Inc v Sigmar*, 529 F3d 303, 309 (5th Cir 2008). See also id at 307 (suggesting that when the defendant is an American citizen, claims might be able to proceed under the Lanham Act even without evidence of any effect on United States commerce); *McBee v Delica Co*, 417 F3d 107, 111, 120 n 9 (1st Cir 2005) (indicating that the Lanham Act reaches "foreign activities of foreign defendants . . . if the complained-of activities have a substantial effect on United States commerce, viewed in light of the purposes of the Lanham Act," but reserving judgment on "whether a defendant's intent to target United States commerce plays any role[,] . . . either, for example, as a requirement in addition to the substantial effect requirement, or instead as a factor that, if present, may reduce the amount of effects on United States commerce that a plaintiff must show").

[275] See notes 180–89 and accompanying text.

and Congress itself seemed to have accepted[276]—has survived *Aramco*.[277] The principle associated with *United States v Bowman*,[278] to the effect that federal statutes defining certain kinds of crimes either are not subject to the presumption against extraterritoriality or implicitly overcome that presumption by virtue of their subject matter, also remains robust in many circuits.[279] But where the Supreme Court is not constrained by its own pre-*Aramco* precedent, and where there is no solid reason to believe that a particular federal statute was consciously designed to have "extraterritorial application," both the Supreme Court and lower federal courts are likely to read geographic limitations into the statute so that it "appl[ies] only within the territorial jurisdiction of the United States."[280]

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[276] See *Matsushita Electric Industrial Co v Zenith Radio Corp*, 475 US 574, 582 n 6 (1986) ("The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce."); Foreign Trade Antitrust Improvements Act of 1982 § 402, Pub L No 97-290, 96 Stat 1233, 1246, codified at 15 USC § 6a (restricting the application of the Sherman Act to foreign commerce in ways that are easiest to understand if one accepts *Alcoa*). See also *F. Hoffman-La Roche Ltd v Empagran SA*, 542 US 155, 161–75 (2004) (interpreting the 1982 statute).

[277] See *Hartford Fire Ins Co v California*, 509 US 764, 795–96 (1993) ("Although the proposition was perhaps not always free from doubt, see *American Banana*, it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.") (citation omitted). See also id at 814 (Scalia dissenting) (agreeing that "it is now well established that the Sherman Act applies extraterritorially" but observing that "if the question were not governed by precedent, it would be worth considering whether th[e] presumption [against extraterritoriality] controls the outcome here").

[278] See note 173–74 and accompanying text.

[279] See Zachary D. Clopton, Bowman *Lives: The Extraterritorial Application of U.S. Criminal Law After* Morrison v. National Australia Bank, 67 NYU Ann Surv Am L 137, 165–72 (2011) (citing cases that express a range of views about how broadly to read *Bowman* in the wake of *Aramco*). For a recent example, see *United States v Leija-Sanchez*, 602 F3d 797, 798–99 (7th Cir 2010) ("Whether or not *Aramco* and other post–1922 decisions are in tension with *Bowman*, we must apply *Bowman* until the Justices themselves overrule it.").

[280] *Morrison*, 130 S Ct at 2877 (quotation marks omitted). For examples from the lower courts, see *Asplundh Tree Expert Co v NLRB*, 365 F3d 168, 179 (3d Cir 2004) (relying upon the presumption against extraterritoriality to conclude that the National Labor Relations Act does not reach an American employer's alleged decision to fire employees in Canada for complaining about working conditions there, even though the employees were based in the United States and were in Canada only on a short-term assignment); *Nieman v Dryclean U.S.A. Franchise Co*, 178 F3d 1126, 1129 (11th Cir 1999) ("The presumption against extraterritoriality can be overcome only by clear expression of Congress' intention to extend the reach of the relevant Act beyond those places where the United States has sovereignty or has some measure of legislative control.").

As we have seen, that formulation of the canon dates back to *Foley Bros.*,[281] which in turn drew upon language in *Blackmer v United States*,[282] which in turn cited *American Banana*, which in turn quoted nineteenth-century statements to the effect that "[a]ll legislation is *prima facie* territorial."[283] When those statements were made, they comported with the general choice-of-law jurisprudence of the day. Indeed, that jurisprudence was probably expected to supply the details necessary to put the sentiment behind these statements into practical operation.

Such details have to come from somewhere, because abstract statements to the effect that a statute "applies" within certain territorial limits get us only part of the way toward resolving concrete cases. To appreciate the problem, think of a regulatory statute that addresses compound transactions—transactions consisting of more than a single event. The statement that this statute "applies" only within the United States may be adequate to resolve simple cases in which all of the events that might conceivably be relevant occurred outside the United States. But what about cases about transactions in which some of the relevant events occurred in the United States and others occurred abroad?[284] To give practical content to the idea that the typical federal regulatory statute supplies rules of decision only for transactions that occur within the United States, one needs some way of assigning a location to cross-border transactions.

Traditional choice-of-law jurisprudence included various rules for doing just that. When trying to answer any given legal question, courts typically were supposed to start by using the rules associated with that type of question to ascribe a legal situs to the set of events that raised the question in the case at hand. Under the traditional approach, that often entailed focusing on a single component of a broader transaction and treating the whole transaction as being localized at the place where that

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[281] See *Foley Bros.*, 336 US at 285 ("The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained.").

[282] 284 US 421, 437 (1932). See note 197 (discussing *Blackmer*).

[283] *American Banana*, 213 US at 357, quoting *Ex parte Blain*, 12 Ch 522, 528 (1879).

[284] Consider Trautman, 22 Ohio St L J at 592 (cited at note 214) (observing that when courts face such cases, "it is important to be more precise about what is meant when one says that legislation does not apply 'extra-territorially'").

component occurred.[285] Once courts had assigned a legal situs to the relevant set of events, traditional choice-of-law rules usually told courts to apply the law of the situs that they had identified. If a party asked them to apply the law of some other place instead, they might well describe the requested application as "extraterritorial," because the legal situs of the relevant events lay beyond the territory of the sovereign whose law the party was invoking. But what was considered "extraterritorial" depended on the situs-ascribing rules of traditional choice-of-law jurisprudence.

Under the influence of Professor Currie and other critics of the traditional approach, choice-of-law jurisprudence lost this cast. At least in tort and contract cases, the dominant American approaches to choice-of-law questions no longer start by ascribing a single legal situs to the relevant transaction or occurrence. While modern courts still take note of the locations of the various components of that transaction or occurrence, their analysis is no longer purely territorial, and it often includes substantial attention to the purposes behind each of the potentially applicable laws.[286]

In theory, the concept of "extraterritoriality" that the Supreme Court uses to give content to the presumption against extraterritoriality could simply have tracked these changes. Assuming that it remains possible to speak of a general American approach to the conflict of laws, or at least of patterns in the choice-of-law principles that various American jurisdictions recognize, courts could piggyback upon those principles to determine the presumptive reach of federal statutes. Specifically, courts could understand "extraterritoriality" as a term of art that connotes applying American law beyond the limits suggested by general American choice-of-law jurisprudence. The upshot of the presumption against extraterritoriality would then be something like this: if general American choice-of-law jurisprudence would not ordinarily call for a particular issue in a particular case to be governed by American law, then the typical federal statute should not be interpreted to reach that issue unless there are signs that the enacting Congress intended the statute to apply notwithstanding normal choice-of-law principles.

When the modern Supreme Court invokes the "presumption against extraterritoriality," however, it does not appear to have

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[285] See notes 51–54 and accompanying text.

[286] See notes 110–35 and accompanying text.

current choice-of-law jurisprudence in mind. Perhaps that is because current choice-of-law jurisprudence in the United States has become so fragmented that it can no longer supply any unified principles for interpreting federal statutes. (In Dean Symeonides's words, the choice-of-law principles currently recognized by the various American states may no longer "share sufficient common denominators and similarities as to constitute . . . a single law susceptible to meaningful treatment as such."[287]) Or perhaps the Supreme Court's reluctance to define "extraterritoriality" in terms of current American choice-of-law jurisprudence simply reflects distaste for the content of that jurisprudence. (After all, modern choice-of-law jurisprudence requires courts to make more ad hoc, all-things-considered judgments than many members of the current Supreme Court might like. To the extent that modern choice-of-law jurisprudence continues to show the influence of Professor Currie, moreover, it encourages a style of statutory interpretation that a majority of the current Court has repudiated.) But for whatever reason, the modern presumption against extraterritoriality that courts use to interpret federal statutes does not draw its content from current American jurisprudence about the conflict of laws. Instead of using *current* choice-of-law jurisprudence to determine the presumptive reach of federal statutes, the modern Supreme Court continues to quote the territorially based formulation of the canon that *Foley Bros.* articulated in 1949.

To be sure, the modern Court does not use the situs-ascribing rules of the original Restatement of the Law of Conflict of Laws to flesh out the concept of extraterritoriality. Instead of treating "extraterritoriality" as a legal term of art that refers to either old or new doctrines about the conflict of laws, the Court approaches it as a commonsense concept that simply refers to physical facts. As a result, the Court ends up relying upon its own intuitions about what amounts to extraterritorial application of American law.[288] Often those intuitions match what traditional choice-of-law analysis would suggest,[289] but sometimes

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[287] Symeonides, *The American Choice-of-Law Revolution* at 5 (cited in note 15). See also id at 64–65.

[288] See, for example, *Quality King Distributors, Inc v L'Anza Research International, Inc*, 523 US 135, 145 n 14 (1998).

[289] Compare *Small v United States*, 544 US 385, 387–89 (2005) (concluding that 18 USC § 922(g)(1), which restricts the possession of firearms by "any person . . . who has been convicted in any court of[ ] a crime punishable by imprisonment for a term exceeding one year," refers only to convictions in *American* courts and does not attach legal

they arguably do not.[290] Still, the general thrust of the Court's presumption against extraterritoriality has much more in common with traditional choice-of-law rules than with modern interest-balancing approaches—which is why the most prominent modern choice-of-law scholar who defends interest analysis has condemned *Aramco* for "slipp[ing] back to the nineteenth century."[291] As with pre-*Aramco* cases like *Steele*, which had moved doctrine in the opposite direction by giving federal statutes a *more* expansive reach than contemporary choice-of-law jurisprudence suggested,[292] this slippage was facilitated by the Court's having framed the relevant issues entirely in terms of statutory interpretation rather than choice of law.

II. EXPLAINING THE EMERGENCE OF THE FEDERAL MODEL

Part I established that while modern American courts use freestanding choice-of-law principles to determine the applicability of the typical *state* statute, they frame parallel questions about the applicability of *federal* statutes entirely in terms of statutory interpretation. When the typical state legislature enacts a statute that does not say anything about the kinds of questions that choice-of-law jurisprudence addresses, those questions are understood to lie beyond the statute's domain. But when Congress does the same thing, courts assume that the statute itself controls all questions about its applicability. As we have seen, the answers that courts have read into the typical

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consequences in the United States to *foreign* convictions), with *Logan v United States*, 144 US 263, 303 (1892) (indicating that "[a]t common law, and on general principles of jurisprudence, when not controlled by express statute," a conviction in another jurisdiction "can have no effect, by way . . . of personal disability or disqualification, beyond the limits of the State in which the judgment is rendered") and Bishop, 1 *Commentaries on the Criminal Law* § 647 at 661 (cited in note 182) (noting disagreements about whether the rule barring testimony by convicted criminals extends to people who were convicted in "a foreign tribunal," but suggesting that the weight of authority opposes giving foreign convictions this legal consequence, and explaining that "laws do not have extraterritorial force").

290 See, for example, *Pasquantino v United States*, 544 US 349, 359–72 (2005) (reading the federal wire-fraud statute to reach "a scheme to defraud a foreign sovereign of tax revenue" and arguing that this application of federal law does not offend either the presumption against extraterritoriality or the common-law rule against "the enforcement of tax liabilities of one sovereign in the courts of another sovereign"); *Smith*, 507 US at 203–04 (suggesting that if the Court were to read the Federal Tort Claims Act as waiving the federal government's sovereign immunity from being sued in federal court for torts allegedly committed by federal employees in Antarctica, the Court would be reading the Act to have "extraterritorial application").

291 Kramer, 1991 S Ct Rev at 202 (cited in note 14).

292 See text accompanying notes 201–12.

federal statute have gone through some cycles: the canon of construction endorsed by *Foley Bros.* gave way to more purposive interpretation, before being revived (and arguably strengthened) in the form of the modern presumption against extraterritoriality. Ever since the 1940s, though, each federal statute has been interpreted as implicitly or explicitly providing instructions on these matters. This Part tries to explain the federal courts' "statutification"[293] of choice-of-law jurisprudence.

A. The Practical Pressures Created by *Erie* and *Klaxon*

The key moment in the transition may have come in 1938, in a case that was not about the scope of federal statutes at all. In *Erie Railroad Co v Tompkins*,[294] the Supreme Court overthrew its prior understanding of the relationship between state and federal courts with respect to matters of general law. The Court's actual holding in *Erie* was something like this: on issues that lie within the prescriptive jurisdiction of an individual state, federal courts must apply rules of decision reflected in the settled decisions of the state's highest court to the same extent that federal courts would apply identical rules contained in a statute enacted by the state legislature. In the course of reaching this conclusion, however, Justice Louis Brandeis's majority opinion made some broad statements about unwritten law in our federal system.

To begin with, Justice Brandeis agreed with Justice Holmes that "law in the sense in which courts speak of it today does not exist without some definite authority behind it."[295] So far as domestic law was concerned, the relevant authority had to be either the federal government or an individual state. But according to Justice Brandeis, "There is no federal general common law"[296]—which meant, for the most part, that the unwritten law

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[293] Here and throughout, I use this term with apologies to Judge Guido Calabresi. See Guido Calabresi, *A Common Law for the Age of Statutes* 1–2 (Harvard 1982) (discussing "[t]he 'statutorification' of American law"). To avoid confusion, I should note that what Judge Calabresi meant by "statutorification" (the accretion of written laws on topic after topic) is not exactly what I am discussing (an expansion in the presumed domain of each individual statute to encompass issues that the statute does not specifically address and that the unwritten law might once have been thought to govern directly).

[294] 304 US 64 (1938).

[295] Id at 79, quoting *Black and White Taxicab and Transfer Co v Brown and Yellow Taxicab and Transfer Co*, 276 US 518, 533 (1928) (Holmes dissenting).

[296] *Erie*, 304 US at 78.

in force in each state "'exist[s] by the authority of that State.'"[297] To be sure, the Constitution might mark out some special enclaves in which states cannot legislate and in which the rules of decision articulated by courts have the status of federal law.[298] Within the limits of its enumerated powers, Congress might also enact particular federal statutes that produce similar effects in other areas.[299] But outside the enclaves marked by the Constitution and particular federal statutes or treaties, any rules of unwritten law that apply domestically are matters of state rather than federal law. After *Erie*, moreover, federal courts lack authority to disagree with the highest court of the relevant state about the content of those rules.[300]

As soon as the Court issued its decision in *Erie*, Professor Herbert F. Goodrich—a prominent choice-of-law scholar who was then Dean of the University of Pennsylvania Law School[301]—took the decision to have important consequences for the choice-of-law rules applied in federal court. Before *Erie*, Professor Goodrich observed, federal courts had felt free to follow their own understandings of the general law, and hence they "have often applied a Conflict of Laws rule which differed from that of the courts of the state in which they sat."[302] According to Professor Goodrich, however, *Erie* "has abolished this doctrine." As he put the point, "[T]oday the federal courts have no independent rules of common law and therefore Conflict of Laws, but must follow the rules established in the state courts of their district."[303]

At least in the view of modern scholars (and in the view of some of his contemporaries too), Professor Goodrich reached this

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297 Id at 79, quoting *Black and White Taxicab*, 276 US at 533 (Holmes dissenting).

298 See, for example, *Hinderlider v La Plata River & Cherry Creek Ditch Co*, 304 US 92, 110 (1938) (Brandeis) ("[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."). See also Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 Colum L Rev 1024, 1030–68 (1967) (discussing *Hinderlider* as an example of "areas that are federalized by force of the Constitution itself").

299 See Hill, 67 Colum L Rev at 1028–30 (cited in note 298).

300 See *Erie*, 304 US at 78–80.

301 See Roger K. Newman, ed, *The Yale Biographical Dictionary of American Law* 227–28 (Yale 2009) (noting that after his deanship, Professor Goodrich went on to the Third Circuit and was almost nominated to the Supreme Court).

302 Herbert F. Goodrich, *Handbook of the Conflict of Laws* § 12 at 24 (West 2d ed 1938). See also note 166.

303 Goodrich, *Conflict of Laws* § 12 at 24 (cited in note 302).

conclusion too hastily.[304] Even when the substantive rules of decision for a case come entirely from state law, the logic of *Erie* does not necessarily extend to the choice-of-law rules that federal courts use to determine *which* state's law is relevant. Perhaps the choice-of-law rules applied in federal court fall into one of the enclaves that the Constitution itself federalizes. (In this sense, choice-of-law questions might be like questions of procedure or evidence, which state law does not control of its own force in federal court.[305]) In any event, no matter how federal courts decide whether to apply the law of one American state or the law of another American state in the typical diversity case, it seems natural for federal courts to use a federalized version of choice-of-law principles when deciding whether to apply the law of the United States or the law of a foreign country in cases that implicate federal statutes.

Without getting into these subtleties, however, the Supreme Court soon unanimously endorsed Professor Goodrich's view. In *Klaxon*, the Court rebuked the Third Circuit for having determined the applicable law in a diversity case without reference to the choice-of-law doctrines applied in the courts of the forum state. Justice Stanley Reed's brief opinion treated choice-of-law questions exactly like the substantive questions of tort law that had been at issue in *Erie*.[306] Citing Professor Goodrich, Justice Reed declared that "[t]he conflict of laws rules to be applied by

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304 For references to scholarship from the 1950s on, see Fallon, et al, *The Federal Courts* at 565–68 (cited in note 24) (canvassing various criticisms of the "simplistic" extension of *Erie* to choice-of-law rules); Larry L. Teply and Ralph U. Whitten, *Civil Procedure* 446 n 123 (Foundation 4th ed 2009) (citing modern authors who oppose requiring federal district courts to follow the choice-of-law doctrines of the state in which they happen to sit). For earlier criticisms, see Note, *Congress, the Tompkins Case, and the Conflict of Laws*, 52 Harv L Rev 1002, 1005, 1007 (1939) (describing Professor Goodrich as having "casually assumed that the *Tompkins* doctrine extends to this sphere," but noting strong arguments against his position); Walter Wheeler Cook, *The Federal Courts and the Conflict of Laws*, 36 Ill L Rev 493, 497–504 (1942) (agreeing that the matter is "not so simple" and arguing that neither Justice Holmes nor Justice Brandeis ever suggested that their criticisms of *Swift v Tyson* extended to the choice-of-law rules used by federal courts).

305 See, for example, Amy Coney Barrett, *Procedural Common Law*, 94 Va L Rev 813, 815 (2008) ("Federal procedure, like the traditional enclaves addressed by substantive federal common law, is a matter that the constitutional structure places beyond the authority of the states.").

306 See *Klaxon*, 313 US at 496 ("We are of opinion that the prohibition declared in *Erie*, against such independent determination by the federal courts, extends to the field of conflict of laws.") (citation omitted).

the federal court in Delaware must conform to those prevailing in Delaware's state courts."[307]

Because *Klaxon* was a standard diversity case, it did not necessarily tell federal courts how to approach choice-of-law questions when federal statutes were in the picture. But *Klaxon* certainly left room for the possibility that if those questions fell beyond the domain of the particular federal statute at issue, then federal district judges should handle them according to the choice-of-law doctrines of the state in which they sat. Indeed, even today—when *Erie* is not always read as aggressively as it was in *Klaxon*, and when *Klaxon* itself has come in for considerable criticism[308]—some distinguished federal judges might take this view.[309]

Most lawyers and judges, though, would surely think it odd to let the local law of an individual state determine the applicability of a *federal* statute. To avoid the possibility that *Erie* and *Klaxon* might produce that result, judges might well be tempted to hold that choice-of-law questions lie within the domain of the typical federal statute. After all, if each federal statute implicitly federalized all questions about its own applicability (including questions of the sort that choice-of-law doctrines address), courts could confidently explain why they did not have to answer those questions according to the choice-of-law doctrines of the forum state. While there might have been other routes to the same conclusion, treating the questions as matters of statutory interpretation (rather than freestanding common law) was one way to ensure that the answers had the status of federal law—which, notwithstanding *Klaxon* and *Erie*, certainly seems like the sensible result.[310]

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[307] Id at 496 & n 2.

[308] See note 304.

[309] See, for example, *A.I. Trade Finance, Inc v Petra International Banking Corp*, 62 F3d 1454, 1463–64 (DC Cir 1995) (suggesting that in general "a federal court applies state law when it decides an issue not addressed by federal law, regardless of the source from which the cause of action is deemed to have arisen for the purpose of establishing federal jurisdiction," and adding that "[a] choice-of-law rule is no less a rule of state law than any other"). But see *Edelmann v Chase Manhattan Bank, NA*, 861 F2d 1291, 1294 n 14 (1st Cir 1988) ("When jurisdiction is not based on diversity of citizenship, choice of law questions are appropriately resolved as matters of federal common law.").

[310] A recent paper by Professor Abbe Gluck about the jurisprudential status of the canons that courts use to interpret federal statutes argues that classifying questions as matters of statutory interpretation does not automatically eliminate the need to worry about *Erie*. As Professor Gluck observes, many current canons of interpretation reflect policy-tinged ideas that have been articulated more by courts than by Congress. See Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of*

I suspect, then, that the statutification of these questions—which, as we have seen, apparently occurred in or around the 1940s—was a response to the pressures created by *Erie* and *Klaxon*. Admittedly, that is speculation; I am not aware of any direct statements in which members of the Supreme Court even acknowledged a transition in how they were treating these questions, let alone any statements in which they used *Erie* and *Klaxon* to explain that transition. But the timing of the transition is suggestive. As the next Section argues, moreover, other circumstantial evidence also supports my speculation.

B. An Instructive Exception: Determining the Reach of Federal Statutes about Maritime Law

One indirect sign that the statutification of choice-of-law principles may be the fruit of *Erie* and *Klaxon* comes from admiralty and maritime law. That field is distinctive because *Erie* and *Klaxon* play relatively little role in it.[311] Two decades before *Erie*, the Supreme Court began speaking as if the baseline rules of unwritten law in this area have the status of federal rather than state law,[312] and the Court has persisted in that view ever since.[313] While Congress is said to have broad power to deviate

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Statutes, 54 Wm & Mary L Rev 753, 760–69 (2013). Without necessarily endorsing the content of all these canons, Professor Gluck herself is comfortable classifying them as matters of "federal common law" insofar as they bear on the interpretation of federal statutes, but she notes that people who read *Erie* broadly might resist this way of talking. See id at 760–75. Still, as Professor Gluck explains, no one is likely to argue that *Erie* obliges federal courts to determine the meaning of federal statutes according to whatever canons the courts of a particular state have adopted for the interpretation of state statutes. See id at 773. Where federal statutes are concerned, then, questions that are classified as matters of statutory interpretation will be thought of as having federal answers.

311 See, for example, Ernest A. Young, *Preemption and Federal Common Law*, 83 Notre Dame L Rev 1639, 1671 (2008) (calling admiralty "the land that *Erie* forgot").

312 See *Southern Pacific Co v Jensen*, 244 US 205, 215 (1917) (declaring that unless displaced by Congress, "the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction"); *Panama Railroad Co v Johnson*, 264 US 375, 386 (1924) (asserting that once the Constitution took effect, the general maritime law "was not regarded . . . as being only the law of the several States, but as having become the law of the United States," subject to Congress's power "to alter, qualify or supplement it as experience or changing conditions might require").

313 See, for example, *Exxon Shipping Co v Baker*, 554 US 471, 489–90 (2008) ("Exxon raises an issue of first impression about punitive damages in maritime law, which falls within a federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result."); *Norfolk Southern Railway Co v James N. Kirby, Pty Ltd*, 543 US 14, 22–23 (2004) ("When a contract is a maritime one, and the dispute is not inherently local, federal law

from the general maritime law, states have only limited legislative competence in this area; they can affect the general maritime law "to some extent," but they cannot "work[ ] material prejudice to [its] characteristic features . . . or interfere[ ] with the proper harmony and uniformity of that law in its international and interstate relations."[314] In keeping with the idea that the general maritime law is what is now called "federal common law,"[315] moreover, state courts are supposed to defer to the federal Supreme Court about its content[316]—which is the opposite of the pattern that *Erie* established for questions of unwritten law on topics that lie beyond the domains of federal statutes in other areas.

When Congress enacted statutes in the maritime field, then, the Supreme Court did not have to worry that choice-of-law questions would be relegated to state law unless Congress's statutes were read to encompass them. And the Court's 1953 opinion in *Lauritzen v Larsen*[317]—the leading modern case about the relationship between federal statutes and choice-of-law doctrines in the maritime context—took a correspondingly different form than opinions about similar questions in other fields.

Evald Larsen was a citizen of Denmark and a member of the Danish Seaman's Union. While he was in New York, he joined the crew of a ship that was owned by another Danish citizen (Lauritzen) and that sailed under the Danish flag. Later, while the ship was in Havana, Larsen suffered an injury allegedly caused by the negligence of a fellow crewman. After being taken back to New York for treatment, Larsen sued Lauritzen in a federal district court under the so-called Jones Act,[318] which

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controls the contract interpretation."). See also *Pope & Talbot, Inc v Hawn*, 346 US 406, 410 (1953) ("[F]ederal power . . . is dominant in this field.").

[314] *Jensen*, 244 US at 216. The *Jensen* Court conceded that "it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation." Id. See also David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 S Ct Rev 158, 167, 220 (noting "inconsistencies" and "diverging lines of precedent" on this topic).

[315] *Texas Industries, Inc v Radcliff Materials, Inc*, 451 US 630, 641 (1981) (observing that "absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in [ ] narrow areas," but identifying "admiralty cases" as one of those areas).

[316] See David W. Robertson, *Our High Court of Admiralty and Its Sometimes Peculiar Relationship with Congress*, 55 SLU L J 491, 495 (2011) (observing that subject to the possibility of congressional override, "[t]he federal courts, led by the Supreme Court, are in charge of the field of admiralty and maritime law").

[317] 345 US 571.

[318] Merchant Marine Act, 1920 ("Jones Act"), Pub L No 66-261, ch 250, 41 Stat 988.

gives injured seamen the same sort of cause of action for damages that the FELA makes available to injured railway employees. The relevant statutory language was broad:

> [A]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply.[319]

But the Supreme Court refused to read this general language to supplant the choice-of-law principles by which American courts "accommodat[e] the reach of our own laws to those of other maritime nations."[320] In the Court's view, generally worded federal statutes about shipping had long "been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law,"[321] and the Jones Act was no different: the enacting Congress must have known that "in the absence of more definite directions," the statute "would be applied by the courts to foreign events, foreign ships and foreign seamen only in accordance with the usual doctrine and practices of maritime law."[322] The Court proceeded to identify and discuss what it called "the connecting factors which either maritime law or our municipal law of conflicts regards as significant in determining the law applicable to a claim of actionable wrong."[323] Ultimately, the Court concluded that the Jones Act did not govern Larsen's rights against Lauritzen.

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319 *Lauritzen*, 345 US at 573 n 1, quoting Jones Act § 33, 41 Stat at 1007, codified as amended at 46 USC § 30104.

320 *Lauritzen*, 345 US at 577.

321 Id.

322 Id at 581.

323 Id at 592. The Court's laundry list of factors included the flag that the ship flew, the nationality or domicile of the victim, and the nationality or domicile of the shipowner. See id at 584–88. The Court also identified some factors that it viewed as less significant, including the location of the wrongful act (which the Court described as being of "limited" relevance in the maritime context), the place where the seaman had signed his contract (which the Court suggested was relatively unimportant in tort cases, and which was further marginalized by the fact that the contract that Larsen had signed in New York specifically provided for Danish law to govern his rights), and the forum in which the plaintiff had chosen to sue (which the Court discounted because "[t]he purpose of a conflict-of-laws doctrine is to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum"). Id at 583–84, 588–91.

That conclusion rested on statutory interpretation in at least the following sense: despite the superficial generality of the statutory language, the Court did not read the Jones Act to displace the choice-of-law doctrines supplied by "either maritime law or our municipal law of conflicts." Indeed, in an effort to claim doctrinal support for his own preferred approach to choice-of-law problems, Professor Currie portrayed the Court's opinion as being *entirely* about the proper construction of the Jones Act.[324] But in discussing the factors relevant to choice-of-law analysis in the maritime field, the Court did not tie its analysis to the Jones Act in particular. Instead, the Court seemed to be approaching its task in the same way that state courts determine the applicability of state statutes—by applying "ordinary conflict of laws rules" except to the extent that the legislature had superseded those rules.[325]

Admittedly, the Court's opinion in *Lauritzen* was not explicit about this point: Did the ordinary rules operate directly (because the Court did not interpret the Jones Act to supplant them), or were they relevant only insofar as the Court read them into the statute? But this ambiguity in *Lauritzen* is itself reminiscent of pre-*Erie* decisions about federal statutes in other areas.[326] And while definitive resolution of the ambiguity in *Lauritzen* may not be possible, the content of the Court's analysis is at least suggestive. Leading scholars agree that *Lauritzen*'s multifactor analysis reflected the choice-of-law ideas of the Court's day rather than the doctrines that had prevailed in 1920, when

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[324] See Currie, 28 U Chi L Rev at 276–77 (cited in note 94) (asserting that in *Lauritzen*, the Court "approached the problem as one of statutory construction"); Brainerd Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U Chi L Rev 1, 65–66 (1959) ("In *Lauritzen* there was only a construction of the Jones Act."); Brainerd Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U Chi L Rev 341, 344 (1960):

> [T]he Supreme Court . . . did not [ ] resort to a detached, international science of law in space to determine the scope of the [Jones] act; it *construed the act*, striving to ascertain the congressional policy and the circumstances in which the act must be applied to effectuate the policy, as well as the circumstances in which the policy requires no such application. . . . The construction is parcel of the act.

[325] *Lauritzen*, 345 US at 579 & n 7, quoting Cheatham and Reese, 52 Colum L Rev at 961 (cited in note 86). See also *Lauritzen*, 345 US at 581–82 (appearing to link the applicable choice-of-law ideas to "a non-national or international maritime law of impressive maturity and universality," which the Court described as having "the force of law" in its own right).

[326] See Part I.B.1.

Congress enacted the Jones Act.[327] At the very least, then, the Court did not read the Jones Act to incorporate (and freeze into place) the choice-of-law doctrines that might have been familiar to members of the enacting Congress.

A few years after *Lauritzen*, moreover, the Court made clear that "[t]he broad principles of choice of law and the applicable criteria of selection set forth in *Lauritzen*" operated even in the absence of any statute that could be read to incorporate them—meaning that they mattered not only to claims under the Jones Act but also to claims under "the maritime law of the United States" more generally.[328] As the Court explained, "While *Lauritzen* v. *Larsen* involved claims asserted under the Jones Act, the principles on which it was decided did not derive from the terms of that statute."[329]

In 1970, Justice William Douglas's terse opinion for the Court in *Hellenic Lines Ltd v Rhoditis*[330] redescribed *Lauritzen* as having shoehorned its multifactor analysis into the Jones Act itself.[331] But whatever the Justices' current views on this point, the statutification of choice-of-law doctrines occurred significantly later in the maritime field than in other fields that federal statutes address. That contrast tends to support the hypothesis that in the 1940s and 1950s, when the Supreme Court started reading generally worded federal statutes in other fields to encompass choice-of-law questions, the Court may have been concerned that *Erie* and *Klaxon* would otherwise cause those questions to be governed by state law.

III. OTHER EXAMPLES OF THE FEDERAL MODEL

The statutification of choice-of-law doctrine at the federal level is a window into a broader phenomenon. In the aftermath of *Erie*, federal courts had to decide how to handle a host of topics

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327 See, for example, Kramer, 1991 S Ct Rev at 180 & n 7 (cited in note 14) (describing *Lauritzen* as having jettisoned prior ideas about extraterritoriality in favor of "a more flexible analysis of state interests").

328 *Romero v International Terminal Operating Co*, 358 US 354, 381–82 (1959).

329 Id at 382.

330 398 US 306 (1970).

331 Id at 308 ("The Jones Act speaks only of 'the defendant employer' without any qualifications. In *Lauritzen*, however, we listed seven factors to be considered in determining whether a particular shipowner should be held to be an 'employer' for Jones Act purposes.") (citation omitted). Contrary to Justice Douglas's suggestion, the Court's opinion in *Lauritzen* did not quote the portion of the Jones Act that uses the word "employer," and the Court gave no indication that it was construing that word.

that involved the implementation of federal statutes, but on which courts had previously drawn the necessary rules of decision from general law. This issue arose in various contexts and proved remarkably complex; many articles could be written about all the topics that it affected and all the different ways in which courts responded. One common response, though, was to interpret the relevant federal statutes as themselves covering certain topics that they did not explicitly address in any way, but that courts were reluctant to handle according to the law of individual states.

It would be a mistake to attribute this development entirely to *Erie*. Changes in doctrine about the dormant Commerce Clause are also part of the story. As Professor Stephen Gardbaum has explained, cases from the early twentieth century had held that when Congress enacted a regulation of interstate commerce, the Constitution itself displaced state law throughout the field that Congress had addressed.[332] Starting around the 1930s, however, doctrine under the dormant Commerce Clause moved toward its current form.[333] Under modern doctrine, the extent to which federal regulatory statutes occupy particular fields to the exclusion of state law is a matter of statutory interpretation, not an automatic consequence of the Constitution.[334] As a result, where courts think it inappropriate for states to have prescriptive jurisdiction over some issue connected with a federal statute, the courts have an incentive to interpret the statute as federalizing the issue.

In the years before *Erie*, though, courts often did not need to worry about whether states had prescriptive jurisdiction over any particular issue. To be sure, if a particular state had addressed the issue by statute, courts would have to decide whether the issue really did come within the reach of state law. But if

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[332] See Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L Rev 767, 801–02 (1994). For an illustration of Professor Gardbaum's point, see *Southern Railway Co v Railroad Commission of Indiana*, 236 US 439, 446 (1915) ("Under the Constitution the nature of [the power to regulate interstate commerce] is such that when exercised it is exclusive, and *ipso facto*, supersedes existing state legislation on the same subject.").

[333] See Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich L Rev 1091, 1093–94 (1986). See also id at 1206–87 (observing that in "movement-of-goods" cases, modern doctrine treats the Commerce Clause as establishing an "anti-protectionism principle" that forbids states from acting for certain purposes, but that does not otherwise limit the states' prescriptive jurisdiction).

[334] See Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U Chi L Rev 483, 536 (1997); Gardbaum, 79 Cornell L Rev at 806 (cited in note 332).

no written state law was in the picture, and if the federal courts categorized the issue as a matter of "general" law rather than "local" law, federal courts would apply their own understanding of the applicable rule of decision. That was true whether or not the issue came within the prescriptive jurisdiction of individual states. As a result, federal courts often had no need to classify the issue as being one of state law or one of federal law.

Erie created many more occasions on which federal courts had to decide whether particular issues lay within the reach of the states' lawmaking powers. Even when no written state law was in the picture, *Erie* told federal courts to defer to state courts about the content of the unwritten law on all matters over which the states had lawmaking authority. Conversely, on matters that either the Constitution or Congress had federalized, the relationship between state and federal courts was reversed: state courts were supposed to accept what the federal Supreme Court said about the content of the applicable rules of decision, even if those rules were not spelled out in any written law.[335] That accounts for what Professor Henry Hart once called "the sharpened sense of state-federal relations induced by *Erie*."[336]

As courts focused on whether states had lawmaking authority over particular issues connected with the implementation of federal statutes, they frequently concluded that the answer was "no." The Supreme Court set the pattern shortly after *Erie*, declaring that "the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law . . . ."[337] But given the contemporaneous changes in doctrine about the dormant Commerce Clause, the easiest way for the Court to explain this conclusion was to read the federal statutes themselves as encompassing the relevant issues. In a variety of

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[335] See, for example, Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 NYU L Rev 383, 407 (1964) ("Just as federal courts now conform to state decisions on issues properly for the states, state courts must conform to federal decisions in areas where Congress, acting within powers granted to it, has manifested, be it ever so lightly, an intention to that end.").

[336] Henry M. Hart Jr, *The Relations between State and Federal Law*, 54 Colum L Rev 489, 533 (1954).

[337] *Sola Electric Co v Jefferson Electric Co*, 317 US 173, 176 (1942). For another example of the same point, see *Prudence Realization Corp v Geist*, 316 US 89, 95 (1942) ("In the interpretation and application of federal statutes, federal not local law applies.").

cases, the Court therefore held that the domains of federal statutes extend beyond the statutes' explicit provisions. As the Court put it,

> When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.[338]

To illustrate this expansion in the recognized domains of federal statutes, the remainder of this Part offers an array of examples. Part III.A considers the concept of "implied" causes of action to enforce duties created by federal statutes. Part III.B discusses the subsidiary details of federal causes of action. Part III.C addresses uncodified defenses to federal criminal statutes. Part III.D briefly contrasts the situation in the states.

A. "Implied" Causes of Action for Damages

Imagine that a private plaintiff wants to seek damages for losses caused by the defendant's violation of a federal statute. Before *Erie*, there were three primary categories of domestic American law that might give the plaintiff a private cause of action. First, the federal statute might itself be interpreted as creating a cause of action for people in the plaintiff's position. Second, the local law of an individual American state might create a generic cause of action into which the plaintiff could slot the duties created by the federal statute. Third, the general law might be understood to do the same thing.

To understand the second and third categories, consider how the common law of torts might interact with statutes. In many contexts, the common law has long made defendants liable to plaintiffs for injuries proximately caused by the defendants'

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[338] *Sola Electric*, 317 US at 176. The Court used essentially identical language in *Deitrick v Greaney*, 309 US 190, 200–01 (1940). According to Justice Robert Jackson, "the source materials of the common law" could also sometimes guide the Court's answers to federal questions that federal statutes themselves did not answer. *D'Oench, Duhme & Co v FDIC*, 315 US 447, 469–70 (1942) (Jackson concurring) (indicating that at least in the purer enclaves of federal common law, the Court could use the common law as "an aid to, or the basis of, decision of federal questions," and the Court did not need to attribute all of those answers to federal statutes).

negligence.[339] At common law, moreover, what counts as negligence for this purpose can sometimes include the violation of statutory duties that a legislature validly imposed upon the defendant in order to protect people like the plaintiff against harms of the sort that the defendant's violation has caused.[340] That is so even though the statute does not itself create any private causes of action. As long as the statute is not interpreted to preclude other sources of law from giving private plaintiffs remedial rights of this sort, plaintiffs often can use the duties established by the statute to help make out the elements of a cause of action supplied by the common law.

This sort of argument unquestionably requires some interpretation of the relevant statute. Not only do courts have to identify the duty that the statute created, but they also have to think about why the legislature created it: Was the statute designed to protect people like the plaintiff, as individuals, against the harm that the defendant has caused?[341] Even if they answer that question "yes," so that the duty created by the statute might be seen as running to the plaintiff in the sense necessary for the common law to attach liability, courts must ask a further interpretive question: To the extent that the statute creates enforcement mechanisms of its own, does it implicitly supplant

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[339] Scholars generally agree that something like the modern concept of negligence emerged as an organizing principle for American tort law in the nineteenth century, though they disagree about what came before. Compare Morton J. Horwitz, *The Transformation of American Law, 1780–1860* 85–99 (Harvard 1977) (arguing that negligence supplanted concepts of strict liability and thereby operated to subsidize economic growth), with Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 Ga L Rev 925, 959 (1981) (arguing to the contrary that "negligence law developed, in the nineteenth century, out of a continuing struggle with the principle of no-liability") and Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L Rev 641, 678–79 (1989) (finding little evidence to support Professor Horwitz's thesis, but taking issue with Professor Rabin too).

[340] See W. Page Keeton, et al, *Prosser and Keeton on the Law of Torts* 220–33 (West 5th ed 1984) (discussing the doctrine of "negligence per se"). For one take on the history of this doctrine, see H. Miles Foy III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 Cornell L Rev 501, 540–46 (1986) (discussing nineteenth-century developments, but presenting negligence doctrine as having replaced a stricter form of liability for losses caused by statutory violations). See also note 339 (reporting disagreements among scholars about the nature of tort law before the nineteenth century).

[341] See Keeton, et al, *Law of Torts* at 222–26 (cited in note 340) (discussing the relevance of this question and providing citations dating back to the nineteenth century); Restatement (First) of the Law of Torts §§ 286, 288 (1934) (similarly describing conditions under which the violation of a statute will and will not support civil liability on this theory).

whatever causes of action might otherwise be available at common law?[342]

As one might expect, courts did not always speak with precision about exactly where these questions of interpretation stopped and the common law picked up. Writing in 1914, Professor Ezra Ripley Thayer observed that when courts discussed the availability of private causes of action for damages caused by the violation of state criminal statutes, they sometimes seemed to take the interpretive questions too far: they engaged in "speculation as to unexpressed legislative intent" regarding whether the statute itself "was intended to give [private individuals] a right of action."[343] According to Professor Thayer, however, when a state statute made certain conduct a crime without addressing private remedies, the availability of such remedies "has not been passed on one way or the other as a question of legislative intent."[344] In his view, the proper approach for the courts was "to ascertain the legislature's expressed intent, to refrain from conjecture as to its unexpressed intent (except insofar as that inquiry is necessary in order to give effect to what is expressed), and then to consider the resulting situation in the light of the common law."[345] Later commentators shared this understanding of the relevant framework. As Professor Charles Lowndes put the point in 1932, "There are two problems which are not always clearly distinguished: the statute must be construed; and the construed statute must be fitted into the framework of the common law."[346]

In the years leading up to *Erie*, opinions from the US Supreme Court reflect uncertainty about these issues as they related to federal statutes.[347] As Professor Miles Foy has already

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342 For discussion of the different implications of different enforcement provisions, see Restatement (First) of the Law of Torts at § 287.

343 Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 Harv L Rev 317, 320 (1914).

344 Id.

345 Id.

346 Charles L.B. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 Minn L Rev 361, 361 (1932).

347 Compare *Texas & Pacific Railway Co v Rigsby*, 241 US 33, 39–40 (1916) (appearing to hold that the Safety Appliance Act implicitly created a private right of action in favor of railroad employees who suffered injury because of violations of the Act), with *Moore v Chesapeake & Ohio Railway Co*, 291 US 205, 215–16 (1933) (indicating that although the Safety Appliance Act prescribed a duty, "the right to recover damages sustained by the injured employee through the breach of duty sprang from the principle of the common law . . . and was left to be enforced accordingly," except where other relevant

noted, however, questions about the legal sources of remedial rights for violations of duties created by federal law came into sharper focus after *Erie*.[348] In the immediate aftermath of *Erie*, the Supreme Court suggested broadly that when written federal law creates a substantive entitlement without specifically addressing "the nature and extent of relief in case loss is suffered through denial of [this entitlement]," the written law can be understood as having "left such remedial details to judicial implications," and the details that courts articulate are "ultimately attributable to the Constitution, treaties or statutes of the United States."[349] Lower courts, moreover, soon applied this idea to questions about the existence of private causes of action to enforce duties created by federal statutes.

Some of the earliest cases in this vein may have reflected the continuing influence of old views about the dormant Commerce Clause. To the extent that the Constitution was still thought to strip the states of lawmaking power over all issues

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state or federal statutes supplied a cause of action) and *Minneapolis, St. Paul & Sault Ste. Marie Railway Co v Popplar*, 237 US 369, 372 (1915):

> The action [for death of a railroad employee allegedly caused by noncompliance with the Safety Appliance Act] fell within the familiar category of cases involving the duty of a master to his servant. This duty is defined by the common law, except as it may be modified by legislation. The Federal statute, in the present case, touched the duty of the master at a single point and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the State.

For a modern debate about *Rigsby*, compare Foy, 71 Cornell L Rev at 552–54 (cited in note 340) ("The Court held . . . that the Act implicitly created a federal right of action for damages."), with John E. Noyes, *Implied Rights of Action and the Use and Misuse of Precedent*, 56 U Cin L Rev 145, 172 (1987) ("[T]he Supreme Court viewed the existence of a private cause of action in *Rigsby* as a general common law issue.").

348 See Foy, 71 Cornell L Rev at 549 (cited in note 340) (claiming that federal courts had traditionally recognized a broad principle to the effect that "wrongs defined by legislation were supposed to give rise to private remedies by implication of law," but observing that "during the mid-twentieth century . . . the federal judges were becoming increasingly sensitive to questions" about "where [ ] this 'law' [was] to be found in the federal system"); id at 550 (arguing that *Erie* is "the key to the development of the modern federal law of implied private actions," because the idea that "there was no federal general common law" led the federal courts "to view their role in American government as one of upholding and enforcing the specific decisions of federal legislative authority").

349 *Board of County Commissioners of the County of Jackson, Kansas v United States*, 308 US 343, 349–52 (1939) (distinguishing *Erie* on this basis, though ultimately concluding that equitable considerations supported "absorb[ing]" one particular aspect of state law "as the governing federal rule" in the case at hand). See also *Steele v Louisville & Nashville Railroad Co*, 323 US 192, 207 (1944) (concluding that the Railway Labor Act not only gives unions a duty to represent their members without discriminating on the basis of race but also "contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty").

that lay in the same field as a federal statute regulating interstate commerce,[350] questions about private remedial rights within that field might be classified as matters of "federal common law" even if those questions fell outside the domain of the statute itself.[351] By the mid-1940s, though, federal courts were explaining the federalization of these questions by reading the relevant statutes to have more expansive domains. In various cases involving different federal statutes, courts construed the statutes themselves as creating private causes of action by implication.[352] Even when courts spoke of "federal common law" as determining the details of the resulting liability, moreover, they made clear that "the statute created the liability."[353] Later cases continued to speak of "read[ing] into the statute by implication a Federal cause of action."[354]

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[350] See note 332 and accompanying text (describing the dormant Commerce Clause doctrine of the early twentieth century).

[351] See, for example, *O'Brien v Western Union Telegraph Co*, 113 F2d 539, 541 (1st Cir 1940) (describing "the . . . liability or immunity of [a] telegraph company" for transmitting a defamatory message interstate as a matter of "federal common law"); id (explaining that "questions relating to the duties, privileges and liabilities of telegraph companies in the transmission of interstate messages must be governed by uniform federal rules" because the Communications Act of 1934 "occupied the field" to the exclusion of state law, but supporting this conclusion with precedents from the early twentieth century about the legal effect of federal statutes regulating interstate commerce).

[352] See, for example, *Reitmeister v Reitmeister*, 162 F2d 691, 694 (2d Cir 1947) (Learned Hand) (invoking "the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal," and concluding that "the Communications Act of 1934 . . . imposes a civil, as well as a criminal, liability upon anyone who 'publishes' a telephone message"); *Baird v Franklin*, 141 F2d 238, 244 (2d Cir 1944) (Clark dissenting, in part from the opinion, and from the judgment) ("Our considered opinion is that the [Securities Exchange] Act itself grants the right of action [in favor of investors who suffered losses because of the New York Stock Exchange's breach of duties imposed by § 6(b)]."). Although Judge Clark's opinion in *Baird* bears the caption of a partial dissent, he was speaking for the panel on this point. See id at 246 (losing colleagues' votes only with respect to the mechanics of proving damages); *Goldstein v Groesbeck*, 142 F2d 422, 427 (2d Cir 1944) ("[W]e have recently upheld broadly the private rights of action impliedly granted by the Securities Exchange Act.").

[353] *Remar v Clayton Securities Corp*, 81 F Supp 1014, 1017 (D Mass 1949) (concluding that § 7(c) of the Securities Exchange Act "created [a] liability by implication" and that "once the liability was created, its extent was to be measured by what is sometimes called a federal rather than a state common law").

[354] *Wills v Trans World Airlines, Inc*, 200 F Supp 360, 367 (SD Cal 1961) (addressing § 404(b) of the Civil Aeronautics Act of 1938). See also *Fitzgerald v Pan American World Airways*, 229 F2d 499, 501–02 (2d Cir 1956) (addressing the same provision and reaching the same conclusion); *Laughlin v Riddle Aviation Co*, 205 F2d 948, 949 (5th Cir 1953) (recognizing an implied cause of action under a different provision of the same statute and attributing this conclusion to "[t]he implications and intendments of [the] statute");

The courts' opinions in these cases tended to make two major arguments.[355] First, they invoked the general principle that the violation of a statutory duty amounts to a tort (supporting liability at common law) if the duty was designed to protect the individual interests of people like the plaintiff and if the defendant's violation proximately caused the plaintiff to suffer the type of harm that the legislature was trying to avoid.[356] Admittedly, advancing this argument required some finesse: to the extent that courts were slotting statutory duties into causes of action supplied by the common law of torts, *Erie* might lead one to expect the operative tort law to vary from state to state. But to keep the enforcement of federal duties from depending on potentially idiosyncratic rules of state law, courts often concluded that individual federal statutes implicitly brought the general law of torts into the statutes' own domains, effectively creating federal causes of action based on conventional principles of tort law.[357] Second, and independently of these arguments about the relationship between federal statutes and the general law of torts, courts frequently portrayed private causes of action as an appropriate means of effectuating "the object or purposes of a particular statute."[358] In keeping with the era's purposivist approach to statutory interpretation, courts reasoned that certain remedial rights were necessary to help advance Congress's chosen policies, that Congress would not have wanted the effectiveness of those policies to depend on whether individual states happened to recognize suitable causes of action, and that the relevant federal statutes should therefore be interpreted as implying some federal

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Brown v Bullock, 194 F Supp 207, 217 (SDNY 1961) (speaking of the relevant issues as "pos[ing] a problem of statutory interpretation").

355 See Foy, 71 Cornell L Rev at 559 (cited in note 340).

356 See note 340 and accompanying text. Many decisions about implied causes of action to enforce federal statutory duties cited § 286 of the first Restatement of the Law of Torts, which stated a version of this principle. See, for example, *Fitzgerald*, 229 F2d at 501; *Fischman v Raytheon Manufacturing Co*, 188 F2d 783, 787 n 4 (2d Cir 1951); *Reitmaster*, 162 F2d at 694 n 2; *Remar*, 81 F Supp at 1017; *Kardon v National Gypsum Co*, 69 F Supp 512, 513 (ED Pa 1946). Other cases invoked the same principle without citing the Restatement. See, for example, *Laughlin*, 205 F2d at 949; *Baird*, 141 F2d at 245 (Clark dissenting, in part from the opinion, and from the judgment).

357 See, for example, *Fitzgerald*, 229 F2d at 501–02 (asserting that "[n]o federal common law of torts exists" and concluding that the statute itself should be understood to create a cause of action "by implication").

358 *Wills*, 200 F Supp at 364.

remedial rights that state law might be able to supplement but could not eliminate.[359]

In 1964, the Supreme Court embraced this purposivist approach in *J. I. Case Co v Borak*.[360] But as interpretive methodology changed, so did the Court's conclusions about the existence of federal causes of action to enforce duties created by federal statutes. Under current doctrine, even if judges believe that private enforcement would help effectuate the purposes behind a federal statute, judges are not supposed to recognize a private cause of action as a matter of federal law unless they conclude that Congress itself intended to create one. In the Supreme Court's words,

> The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. . . . Statutory intent on this latter point is determinative. . . . Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.[361]

At the same time, the Court seems to have come to terms with the idea that the existence of private causes of action to recover damages caused by violations of federal statutes can depend on varying rules of *state* law. The upshot of current doctrine is that when a federal statute imposes duties without

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[359] See, for example, *Laughlin*, 205 F2d at 949 ("Congress did not intend to create a mere illusory right, which would fail for lack of means to enforce it."); *Baird*, 141 F2d at 244–45 (Clark dissenting, in part from the opinion, and from the judgment) ("One of the primary purposes of Congress in enacting the Securities Exchange Act of 1934 was to protect the general investing public. . . . [I]f the investing public is to be completely and effectively protected, § 6(b) must be construed as granting to injured investors individual causes of action to enforce the statutory duties imposed upon the exchanges.").

[360] 377 US 426, 433 (1964) ("[U]nder the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.").

[361] *Alexander v Sandoval*, 532 US 275, 286–87 (2001). See also *Stoneridge Investment Partners, LLC v Scientific-Atlanta, Inc*, 552 US 148, 164 (2008) ("Though the rule once may have been otherwise, see *J. I. Case Co.* v. *Borak*, it is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one.") (citation omitted); *Transamerica Mortgage Advisors, Inc (TAMA) v Lewis*, 444 US 11, 15–16 (1979) (observing that "[t]he question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction," and indicating that "our recent decisions" have taken a different approach than *Borak*); *Touche Ross & Co v Redington*, 442 US 560, 578 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.").

saying anything one way or the other about private causes of action for damages, that topic is usually presumed to lie beyond the statute's domain: the statute typically is not understood to imply a private cause of action as a matter of federal law, but it also typically is not understood to preempt the application of generic causes of action supplied by state law.[362] Thus, modern courts no longer consider it bizarre for "divergent rules of state law"[363] to control the availability of private remedies for losses occasioned by violations of federal statutes. But during the period when courts were struggling to avoid that result, the jurisprudence of implied causes of action fit precisely the same pattern that Part I describes: issues that might otherwise have been handled according to crosscutting principles of tort law were shoehorned into individual federal statutes and treated as matters of interpretation.

B. Details of Causes of Action

Even when federal statutes do create causes of action, they often fail to specify all the associated details. Does the cause of action survive the death of the original claimant and the original defendant? Can it be assigned? Is prejudgment interest available? Under what circumstances can a defendant be held vicariously liable for someone else's misconduct?

The old case of *Schreiber v Sharpless*[364] illustrates how the Supreme Court handled these sorts of questions before *Erie*. Francis Schreiber and his sons were photographers in Philadelphia, where Charles Sharpless ran a dry-goods store. Without the Schreibers' permission, Sharpless allegedly caused one of their copyrighted photographs to be reprinted in labels for his

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[362] See, for example, *Wigod v Wells Fargo Bank, NA*, 673 F3d 547, 581 (7th Cir 2012):

> The absence of a private right of action from a federal statute provides no reason to dismiss a claim under a state law just because it refers to or incorporates some element of the federal law. . . . To find otherwise would require adopting the novel presumption that where Congress provides no remedy under federal law, state law may not afford one in its stead.

See also *Hofbauer v Northwestern National Bank of Rochester, Minnesota*, 700 F2d 1197, 1201 (8th Cir 1983) ("Even though the [plaintiffs] cannot assert a private cause of action arising under federal law, the federal statutes may create a standard of conduct which, if broken, would give rise to an action for common-law negligence [under state law]."); *Iconco v Jensen Construction Co*, 622 F2d 1291, 1296–99 (8th Cir 1980) (holding that federal law does not preempt state-law claims of unjust enrichment based on standards supplied by the federal Small Business Act).

[363] *O'Brien*, 113 F2d at 541.

[364] 110 US 76 (1884).

goods.[365] If this allegation was true, a federal statute made Sharpless liable to "forfeit one dollar for every sheet of the [infringing copies] found in his possession," with half of this penalty going to the Schreibers and the other half to the United States.[366] The Schreibers sued Sharpless in a federal district court to collect this penalty, but Sharpless died while the suit was pending. The Schreibers argued that their suit could continue against his estate by virtue of a Pennsylvania statute to that effect.[367] Ultimately, however, the Supreme Court held that such state statutes "can have no effect on suits in the courts of the United States for the recovery of penalties imposed by an act of Congress."[368] In the absence of any relevant *federal* statute addressing survival and abatement, the matter was controlled by the common law, and "[a]t common law actions on penal statutes do not survive."[369]

Other questions of the same sort frequently arose in actions under the FELA—the federal statute making interstate rail-

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365 Petition of Plaintiff for a Rule for a Mandamus, *Schreiber v Sharpless*, No 14 (Orig), *2 (US filed Dec 17, 1883).

366 See Rev Stat § 4965 (1874).

367 See Act of Feb 24, 1834 § 28, 1834 Pa Laws 70, 78 (providing that with the exception of "actions for slander, for libels, and for wrongs done to the person," the executor or administrator of a decedent's estate "shall be liable to be sued in any action . . . which might have been maintained against such decedent if he had lived"). See also Rev Stat § 955 (1874) ("When either of the parties . . . in any suit in any court of the United States[] dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment.").

368 *Schreiber*, 110 US at 80.

369 Id. In keeping with this analysis, lower courts of this era routinely invoked their understanding of the common law to determine the survival or abatement of causes of action created by federal statutes. See, for example, *Sullivan v Associated Billposters and Distributors*, 6 F2d 1000, 1004 (2d Cir 1925):

> [T]he statutes of a state are plainly without application to cases which originate under an act of Congress. A cause of action which is given by a federal statute, if no specific provision is made by act of Congress for its survival, survives or not according to the principles of the common law.

See also *Van Choate v General Electric Co*, 245 F 120, 121 (D Mass 1917) ("In causes of action which arise solely under the laws of the United States, survivorship is determined according to the principles of the common law."); *Imperial Film Exchange v General Film Co*, 244 F 985, 987 (SDNY 1915) ("There is no statute of the United States either preventing or permitting the survival of such a cause of action as this. Therefore the rules of the common law become applicable."). But consider *Van Beeck v Sabine Towing Co*, 300 US 342, 351 (1937) (noting that the "legislative policy" reflected in statutes can itself be "a source of law, a new generative impulse transmitted to the legal system," and concluding that the cause of action that the Jones Act gave the mother of a deceased seaman to compensate her for the pecuniary loss that she suffered because of her son's death should not be held to abate on the mother's own death).

roads liable in damages for injury or death suffered by their employees in interstate commerce as a result of the negligence of the railroad's officers, agents, or other employees.[370] In certain respects, the FELA specifically overrode traditional rules of tort law.[371] But it said nothing one way or the other about burdens of proof, measures of damages, or various other topics connected with the liability that it created. Whether by virtue of the statute itself or the combination of the statute and the dormant Commerce Clause, the Supreme Court quickly held that states lacked legislative competence over those topics.[372] Rather than "piec[ing] out this act of Congress by resorting to the local statutes of [a] State,"[373] the Court used the general common law to answer questions that the FELA put beyond the reach of state law but that the FELA did not itself address. As the Court repeatedly noted, the upshot was that "[i]n proceedings brought under the Federal Employers' Liability Act[,] rights and obligations depend upon it and applicable principles of common law as interpreted and applied in federal courts."[374] And while the Court did not specify whether the common law operated directly or only through incorporation into the statute, its rhetoric was generally consistent with the former view.[375]

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370 See FELA § 1, 35 Stat at 65. See also text accompanying note 169.

371 See, for example, FELA § 1, 35 Stat at 65 (creating a cause of action for wrongful death and abrogating the fellow-servant rule); FELA § 3, 35 Stat at 66 (substituting a principle of comparative negligence for the traditional defense of contributory negligence); FELA § 4, 35 Stat at 66 (specifying that a railroad employee "shall not be held to have assumed the risks of his employment in any case where the violation by [the railroad] of any statute enacted for the safety of employees contributed to the injury or death of such employee").

372 See, for example, *New Orleans & Northeastern Railroad Co v Harris*, 247 US 367, 371 (1918) (refusing to apply a state statute about the burden of proof); *Michigan Central Railroad Co v Vreeland*, 227 US 59, 67 (1913) (refusing to apply state statutes about the survival of personal-injury claims). See also *Second Employers' Liability Cases*, 223 US 1, 54–55 (1912) ("[N]ow that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded.").

373 *Vreeland*, 227 US at 66.

374 *Harris*, 247 US at 371. For examples of other cases using much the same formulation, see *Chesapeake & Ohio Railway Co v Kuhn*, 284 US 44, 46–47 (1931); *Missouri Pacific Railroad Co v Aeby*, 275 US 426, 429 (1928); *Chicago, Milwaukee & St. Paul Railway Co v Coogan*, 271 US 472, 474 (1926); *Southern Railway Co v Gray*, 241 US 333, 338–39 (1916).

375 See, for example, *Seaboard Air Line Railway v Horton*, 233 US 492, 507 (1914) (holding that to the extent that the FELA did not address the traditional defense of assumption of risk, "the necessary result . . . is . . . to leave the matter . . . open to the ordinary application of the common law rule"). See also *Walsh v New York, N. H. & H. R. Co*, 173 F 494, 495 (CC D Mass 1909) (noting that the FELA as originally enacted "says nothing" about whether its cause of action for personal injuries survives the death of the

In the immediate aftermath of *Erie*, a few judges took a fresh look at the states' ability to supply interstitial details for federal causes of action. In one case from 1941, for instance, Judge Alfred P. Murrah concluded that "the rectifying doctrine of Erie Railroad Co. v. Tompkins" had cut back on the implications of cases like *Schreiber*.[376] Noting that "[t]he Sherman Anti-Trust Act is silent" about whether the causes of action created by the Act are assignable, Judge Murrah decided that the local law of individual states governed that question.[377] Another federal court similarly held that in reparations cases under the Interstate Commerce Act,[378] "Erie . . . now compels conformity by this Court with the [relevant state's] law" about the availability of prejudgment interest.[379] But these decisions proved to be blips. In modern times, courts overwhelmingly hold that "the question of how to fill in the gaps of a federal right of action is governed by federal rather than state law."[380] As they did before *Erie*, moreover, courts often draw the content of the necessary rules from a

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injured worker, and concluding that courts were therefore "remitted to the common law"); McCormick and Hewins, 33 Ill L Rev at 143 (cited in note 166) (speaking of the common law as governing matters "not covered by the statute itself").

Admittedly, the principles of judicial federalism that governed articulation of the common law in FELA cases differed from the principles of judicial federalism that governed articulation of the common law in many other legal realms. During the era of *Swift v Tyson*, state and federal courts usually could exercise independent judgment on questions of general law. In FELA cases, by contrast, state courts were supposed to follow the federal judiciary's lead. See *Kuhn*, 284 US at 46 (noting that the federal courts' understanding of the common law applied to FELA cases "wherever brought"). One way to explain this arrangement is to speculate that the relevant principles of common law were being read into the FELA itself, so that questions about their content were really questions about the meaning of a federal statute. See Nelson, 106 Colum L Rev at 520 (cited in note 17) (leaping to this conclusion); *Central Vermont Railway Co v White*, 238 US 507, 512 (1915) (appearing to speak in these terms). But an alternative explanation is equally plausible: the role of federal precedents in FELA cases in state court may simply have reflected the realities of appellate jurisdiction. Whatever the precise relationship between the FELA and the general law, judgments rendered by state courts in FELA cases could be appealed to the federal Supreme Court, and everyone would save time if state courts followed Supreme Court precedent in those cases. Consider Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan L Rev 817, 823–25 (1994) (noting that doctrines of precedent ordinarily follow lines of direct appeal).

[376] *Momand v Twentieth–Century Fox Film Corp*, 37 F Supp 649, 654–55 (WD Okla 1941).

[377] Id at 651, 655–56.

[378] Ch 104, 24 Stat 379 (1887).

[379] *City of Danville v Chesapeake & O. Ry. Co*, 34 F Supp 620, 636 (WD Va 1940).

[380] Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 Va J Intl L 513, 536 (2002).

species of common law.[381] Nowadays, though, courts often explicitly cast this conclusion in terms of statutory interpretation.

The Supreme Court's treatment of prejudgment interest in FELA cases provides a clear illustration of this shift. The FELA does not itself say anything one way or the other about prejudgment interest. Before *Erie*, courts therefore "[t]reat[ed] the question . . . as one of general law."[382] Shortly after *Erie*, however, they began reading the answer into the FELA itself. In the Fifth Circuit's words, "[T]he silence of [the FELA] upon the subject of interest may not be construed as leaving the subject unlegislated upon in the Act, but is indicative of the considered purpose that no interest should be allowed in such actions prior to verdict."[383] The Supreme Court has now endorsed this interpretation of the statute. In *Monessen Southwestern Railway Co v Morgan*,[384] the Court emphasized that "[i]n 1908, when Congress enacted the FELA, the common law did not allow prejudgment interest in suits for personal injury or wrongful death."[385] Because the FELA said nothing to deviate from this rule, the Court argued that the statute should be understood to incorporate (and freeze into place) the background principle of common law that existed at the time of enactment.[386]

Cases about the interaction between federal causes of action and principles of agency law have followed a similar sequence. Imagine that a federal statute prohibits certain behavior and backs up the prohibition with a private cause of action for damages. If *A* engages in the prohibited behavior during the course of working for *B*, under what circumstances should *B* be held either to have violated the statute himself or to be responsible for *A*'s violation? Many federal statutes that create private causes of action do not specifically address this sort of question: they may say that anyone who violates the statute is subject to suit,[387] but they do not provide rules about when one person's acts should be attributed to another person or entity. Before *Erie*, federal

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381 See Nelson, 106 Colum L Rev at 520–21, 545–49 (cited in note 17).

382 *Chicago, M., St. P. & P. R. Co v Busby*, 41 F2d 617, 619 (9th Cir 1930).

383 *Louisiana & Arkansas Ry. Co v Pratt*, 142 F2d 847, 848–49 (5th Cir 1944) (noting that "[a]t the time the Act was enacted, interest was not allowable on claims for personal injuries until the amount of damages had been judicially ascertained," and reading the FELA to absorb this principle).

384 486 US 330 (1988).

385 Id at 337.

386 See id at 337–39 & n 9.

387 See, for example, 17 USC § 501 (creating a private cause of action against "[a]nyone who violates any of the exclusive rights of the copyright owner").

courts said that "[t]he rule of the common law applies" to this issue, and they proceeded to articulate their understanding of the relevant common-law principles.[388] Although these courts were imprecise about the mechanism through which the common law was operating, their rhetoric was generally consistent with the notion that the common law operated directly on matters that the written federal law did not address.[389]

After *Erie*, a few judges have argued that in cases of this sort, when a federal statute creates a cause of action without addressing the circumstances in which a defendant is responsible for other people's conduct, the statute leaves that topic to be handled according to the local law of individual states. For instance, in a prominent modern case about a company's liability to an employee for sexual harassment by her boss,[390] Judge Frank Easterbrook of the Seventh Circuit took this position with respect to Title VII of the Civil Rights Act of 1964. Because Title VII "is silent" about questions of agency law and because *Erie* established that "there is no free-floating common law," Judge

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[388] *M. Witmark & Sons v Calloway*, 22 F2d 412, 414 (ED Tenn 1927) (invoking the principle that "the master is civilly liable in damages for the wrongful act of his servant in the transaction of the business which he was employed to do," and applying this principle to determine responsibility for acts of copyright infringement by the person whom a theater had hired to operate its player piano). See also *M. Witmark & Sons v Pastime Amusement Co*, 298 F 470, 475 (ED SC 1924) (holding that even where a performer is an independent contractor, "[h]e who employs a musician to perform in an exhibition for profit, under a contract by which the musician has authority to play whatever compositions are, in accordance with her judgment, appropriate and fitting, must be held responsible" for the performance on the theory that "the employer acquiesces in and ratifies" it), affd 2 F2d 1020 (4th Cir 1924). Consider Peter S. Menell and David Nimmer, *Unwinding* Sony, 95 Cal L Rev 941, 998 (2007) (noting that "courts developed the law of indirect copyright liability based upon general tort principles," though adding that the application of those principles to copyright cases produced some "distinct copyright doctrines").

[389] For an example involving agency-law principles of vicarious liability, see *McDonald v Hearst*, 95 F 656, 658 (ND Cal 1899):

> The principle [of agency law] which protects the master against liability for punitive damages will, unless it is otherwise expressly provided by the statute, also protect him against liability for a statutory penalty when the action to recover such penalty from him is founded upon the wrongful act of the servant, done without the knowledge, authority, or consent of the master.

For examples involving tort-law principles of joint liability for acts undertaken as part of a common design, see *Cramer v Fry*, 68 F 201, 205 (CC ND Cal 1895) ("What is the nature of an action for an infringement of a patent? Undoubtedly a tort, and the rule [of joint and several liability for all who participate in the wrong] necessarily applies, unless the statute relieves from it."); *Fishel v Lueckel*, 53 F 499, 500 (SDNY 1892) ("The defendants procured the infringing act to be done. They are therefore liable as joint tort feasors.").

[390] *Jansen v Packaging Corp of America*, 123 F3d 490 (7th Cir 1997) (en banc) (per curiam), affd *Burlington Industries, Inc v Ellerth*, 524 US 742 (1998).

Easterbrook thought that courts should use state law to determine whether the boss's acts counted as those of the company.[391] Most of Judge Easterbrook's colleagues, however, concluded that the attribution of responsibility in Title VII cases was a matter of federal law.[392] To fit that conclusion into our post-*Erie* world, then–Chief Judge Richard Posner argued that the necessary principles of agency law could be imported into Title VII itself under the rubric of statutory interpretation. In his words,

> Deciding what agency principles shall govern liability under a liability-creating statute such as Title VII is not free-wheeling common-law rulemaking; it is filling a statutory gap, a standard office of interpretation. There is no novelty in formulating federal principles of agency law in interpreting federal statutes that are silent on agency.[393]

The Supreme Court agreed: it decided the case in light of " 'the general common law of agency, rather than [ ] the law of any particular State,' " and it read the relevant principles of agency law into Title VII.[394] Not a single Justice took Judge Easterbrook's more limited view of the statute's domain.[395]

In the specific context of Title VII, Congress had provided a textual hook for the Court's approach. Although the statute did not supply any substantive principles of agency law, its definition of "employer" included "any agent of such a person,"[396] and the Court took this definition as explicitly "direct[ing] federal

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391 *Jansen*, 123 F3d at 553 (Easterbrook concurring in part and dissenting in part) ("Relations such as agency that are undefined by federal statute, like other elements of the background against which federal rules operate, come from state law—either directly, when the Rules of Decision Act . . . requires, or indirectly when federal law absorbs a needed rule from state law.").

392 See id at 493–94 (per curiam) (summarizing the common conclusions set forth in various separate opinions). See also id at 506–07 (Posner concurring in part and dissenting in part) (noting that "the question of agency is central to [Title VII's] administration" and refusing to accept the "striking geographical disuniformities" that could result from Judge Easterbrook's position). But see id at 571 (Wood concurring in part and dissenting in part) (siding with Judge Easterbrook).

393 Id at 507 (Posner concurring in part and dissenting in part). See also id at 523 (Coffey concurring in part and dissenting in part) (endorsing Judge Posner's position).

394 *Burlington Industries*, 524 US at 754–55, quoting *Community for Creative Non-violence v Reid*, 490 US 730, 740 (1989).

395 See, for example, *Burlington Industries*, 524 US at 766–74 (Thomas dissenting) (agreeing that the relevant agency principles are matters of federal law in this context but disagreeing with the majority about their content).

396 42 USC § 2000e(b).

courts to interpret Title VII based on agency principles."[397] But even in the absence of such a hook, the modern Court routinely reads general principles of agency law into individual federal statutes. Indeed, the Court has recently articulated a canon to that effect: "[G]eneral principles of . . . agency law . . . form the background against which federal tort laws are enacted,"[398] and each individual federal statute that creates a tort-like cause of action should be presumed to "incorporate" the general common law with respect to vicarious liability (in the absence of contrary guidance from Congress).[399]

In keeping with the idea that these questions come within the domain of each individual federal statute that creates a cause of action, the courts' answers in the years since *Erie* have tracked changes in styles of statutory interpretation. When judges embraced purposivism, they sometimes stood ready to attribute unusually broad doctrines of vicarious liability to individual federal statutes that said nothing explicit about that topic.[400] The modern Supreme Court has cut back on that approach; in its view, "Congress' silence, while permitting an inference that Congress intended to apply *ordinary* background tort principles, cannot show that it intended to apply an unusual modification of those rules."[401] But when the Court uses the general common law to determine vicarious liability for violations of federal statutes,

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397 *Burlington Industries*, 524 US at 754. For a contemporaneous case using different principles to attribute responsibility in the context of the implied cause of action under Title IX of the Education Amendments of 1972, Pub L No 92-318, 86 Stat 235, 373–75, and distinguishing Title VII partly on the basis that "Title IX contains no comparable reference to an educational institution's 'agents,'" see *Gebser v Lago Vista Independent School District*, 524 US 274, 283 (1998).

398 *Staub v Proctor Hospital*, 131 S Ct 1186, 1191 (2011).

399 *Meyer v Holley*, 537 US 280, 285 (2003). See also id at 285–87 (using this canon to conclude that even though the Fair Housing Act "says nothing about vicarious liability," it implicitly "provides for vicarious liability" in line with "ordinary rules" of agency law); id at 287–88 (treating the administering agency's view that "ordinary vicarious liability rules apply in this area" as an "interpretation of [the] statute").

400 See, for example, *American Society of Mechanical Engineers, Inc v Hydrolevel Corp*, 456 US 556, 574–76 (1982) (invoking "the purposes of the antitrust laws" to support holding an organization liable for treble damages because of the anticompetitive behavior of agents acting with apparent authority); *Shapiro, Bernstein & Co v H. L. Green Co*, 316 F2d 304, 307 (2d Cir 1963) (asserting that "the open-ended terminology" of the Copyright Act has forced courts to make case-by-case determinations about the "business relationships which would render one person liable for the infringing conduct of another," and arguing that "[w]hen the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials[,] . . . the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation").

401 *Meyer*, 537 US at 286.

the Court does not think of the common law as operating directly. Instead, the Court speaks as if "Congress . . . imported common law principles" into each statute that creates a federal cause of action.[402]

Admittedly, modern federal judges do not all speak in exactly the same way about issues of the sort canvassed in this Section—issues that courts consider so tightly connected to federal causes of action as to lie beyond the reach of state law, but that the statutes creating the causes of action do not explicitly address. Some opinions refer to such issues as matters of statutory interpretation, but others use the label "federal common law."[403] That label seems to be especially prevalent in modern opinions about whether federal causes of action survive a party's death,[404] but it also crops up in lower-court opinions about prejudgment interest[405] and vicarious liability.[406] Still, the judges who use this label may not mean anything very different than the judges who speak in terms of statutory interpretation; in modern jargon, the phrase "federal common law" is both capacious and imprecise,[407] and some judges use it to refer to gap-filling constructions of

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[402] *Kolstad v American Dental Assn*, 527 US 526, 537 (1999). For an example of the same locution at the circuit-court level, see *American Telephone and Telegraph Co v Winback and Conserve Program, Inc*, 42 F3d 1421, 1428–29 (3d Cir 1994) ("[T]his appeal requires us to decide a question of statutory construction, namely, the extent to which federal courts interpreting federal statutes may import into such statutes common law doctrines of secondary liability.").

[403] See Meltzer, 42 Va J Intl L at 536 (cited in note 380) (noting both usages).

[404] See *James v Home Construction Co of Mobile*, 621 F2d 727, 729 (5th Cir 1980) ("[T]he question of survival of a federal cause of action has usually been described as a question of federal common law, in the absence of an expression of contrary intent."). But see *Mallick v International Brotherhood of Electrical Workers*, 814 F2d 674, 676 (DC Cir 1987) ("[T]he Supreme Court has stated that the question of whether a federal statutory claim survives the death of one of the parties is essentially a question of how to interpret the statute that provides for the action.").

[405] See, for example, *William A. Graham Co v Haughey*, 646 F3d 138, 144 (3d Cir 2011); *Rivera v Benefit Trust Life Ins Co*, 921 F2d 692, 696 (7th Cir 1991).

[406] See, for example, *Browne v Signal Mountain Nursery, LP*, 286 F Supp 2d 904, 915 (ED Tenn 2003); *Newman v CheckRite California, Inc*, 912 F Supp 1354, 1371 (ED Cal 1995).

[407] See Meltzer, 42 Va J Intl L at 536 (cited in note 380) (noting that the line between statutory interpretation and federal common law is "indistinct"); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U Chi L Rev 1, 3–5 & n 19 (1985) (noting the difficulty of defining "federal common law," and using the phrase broadly to refer to any rule of decision that has the status of federal law and "is not explicitly set forth in a textual command").

individual federal statutes.[408] In any event, the modern Supreme Court has tended to use the rhetoric of statutory interpretation for the questions discussed in this Section, and it has attributed the answers to the individual federal statute that creates the cause of action.

C. Common-Law Defenses to Statutory Crimes

Federal criminal law provides many additional examples of courts reading crosscutting doctrines of common law into individual federal statutes or statutory provisions. The most famous illustration is *Morissette v United States*,[409] where the Supreme Court confronted a provision making it a crime for anyone to "embezzle[ ], steal[ ], purloin[ ], or knowingly convert[ ] to his use . . . any . . . thing of value" belonging to the federal government.[410] Describing the crimes defined by this provision as "larceny-type offenses" of a sort familiar to the common law, the Court interpreted the provision as implicitly incorporating the intent requirement associated with such offenses at common law.[411] As Justice Robert Jackson explained,

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.[412]

While the content of the intent requirement that the Court enforced in *Morissette* came from the common law, the Court plainly did not think of the common law as operating of its own force. To the contrary, the intent requirement suggested by the common law governed Morissette's case only because the Court understood the statutory provision in question to adopt it. Two considerations may have made that way of thinking seem especially natural. First, the Court was trying to identify the elements of a crime created by Congress, and that topic might seem

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[408] See, for example, *Jansen*, 123 F3d at 506–07 (Posner concurring in part and dissenting in part) (referring interchangeably to "federal common law" and "filling a statutory gap, a standard office of interpretation").

[409] 342 US 246 (1952).

[410] Id at 249 n 2, quoting 18 USC § 641.

[411] *Morissette*, 342 US at 260–63.

[412] Id at 263.

to lie entirely within the domain of the provision defining the crime. Second, to the extent that the words chosen by Congress really were terms of art at common law, the provision supplied a textual hook for the importation of common-law concepts.[413]

Even when neither of these considerations is at work, though, the Court still uses *Morissette*'s locution: the Court speaks of the common law of crimes as operating in federal criminal law only through incorporation into individual statutes. The most telling examples involve principles that served as affirmative defenses at common law and that were not limited to one particular type of crime. Think, for instance, of self-defense, or defense of others, or duress, or "public authority" (the defense for undercover operatives engaging in conduct that would otherwise be criminal[414]). These defenses were generic, in the sense that they could defeat liability for a broad array of crimes. In practice, moreover, the typical federal statute that defines a crime does not explicitly address these generic defenses.[415] Nonetheless, the Supreme Court has imported these defenses into federal criminal law entirely under the rubric of individual statutes. As the Fourth Circuit recently concluded, Supreme Court precedent suggests that "any inquiry into whether a common-law defense to a federal criminal statute may be recognized must focus on the particular circumstances and in the end turn on whether it can be said that Congress contemplated the defense when it enacted the statute."[416]

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[413] See, for example, *McCann v United States*, 2 Wyo 274, 298 (1880) (asserting, with respect to a predecessor of the statute at issue in *Morissette*, that "[l]arceny is a technical common law term" and "stealing is its technical common law synonym"). For a subsequent case attempting to distinguish *Morissette* on this basis, see *Carter v United States*, 530 US 255, 265 (2000) (asserting that "a 'cluster of ideas' from the common law should be imported into statutory text only when Congress employs a common-law *term*").

[414] Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 Stan L Rev 155, 169–71 (2009).

[415] See, for example, *United States v Mooney*, 497 F3d 397, 403 (4th Cir 2007) ("[Federal] statutes rarely enumerate the defenses to the crimes they describe, and defenses continue to remain doctrines of the common law, the background against which Congress enacts federal crimes.").

[416] *United States v Gore*, 592 F3d 489, 492–93 (4th Cir 2010) (discussing how 18 USC § 111, which criminalizes forcibly assaulting or resisting a federal officer while the officer is performing official duties, should be understood to handle self-defense).

Casting the question in these terms does not necessarily dictate a particular answer.[417] Many interpreters are willing to read common-law defenses into individual federal statutes even in the absence of any textual hook. In *United States v Bailey*,[418] for instance, the Supreme Court seemed receptive to the idea that 18 USC § 751(a), which criminalizes escaping from federal custody, implicitly incorporates a narrow defense of duress or necessity. To be sure, the statute makes no mention of any such defense, and the Court acknowledged that "we are construing an Act of Congress, not drafting it."[419] Citing *Morissette*, however, the Court asserted that because "Congress . . . legislates against a background of Anglo-Saxon common law" when it enacts federal criminal statutes, "a defense of duress or coercion may well have been contemplated by Congress when it enacted § 751(a)."[420] The Court ruled against the defendants in *Bailey* not because it refused to read a duress or necessity defense into § 751(a) but because the defendants did not satisfy what the Court took to be the prerequisites for that defense in this context.[421]

With the rise of modern textualism, some members of the Court may now be less willing to read implied exceptions into federal criminal statutes. Thus, Justice Clarence Thomas's majority opinion in *United States v Oakland Cannabis Buyers' Cooperative*[422] reserved judgment on "whether necessity can ever be a defense when the federal statute does not expressly provide for it."[423] But rather than signaling a general reluctance to read any common-law defenses into federal criminal statutes, the Court's skepticism may have been specific to the necessity defense.[424] In

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417 Consider *United States v Baker*, 523 F3d 1141, 1143 (10th Cir 2008) (McConnell dissenting from denial of rehearing en banc) ("[T]he current state of our jurisprudence regarding implicit affirmative defenses is in disarray.").

418 444 US 394 (1980).

419 Id at 415–16 n 11.

420 Id. See also id at 425 (Blackmun dissenting) ("Given the universal acceptance of these defenses in the common law, I have no difficulty in concluding that Congress intended the defenses of duress and necessity to be available to persons accused of committing the federal crime of escape.").

421 See id at 412–13.

422 532 US 483 (2001).

423 Id at 491.

424 See id at 490 ("Even at common law, the defense of necessity was somewhat controversial."). See also Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 Tulane L Rev 191, 194–96, 198–200 (2007) (arguing that academics have overstated both the scope and the ubiquity of the necessity defense).

any event, *Oakland Cannabis* continued to portray these questions as matters of statutory interpretation.

The Court confirmed that way of thinking in *Dixon v United States*.[425] The Omnibus Crime Control and Safe Streets Act of 1968[426] made it a federal crime "for any person who is under indictment . . . [for] a crime punishable by imprisonment for a term exceeding one year . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."[427] The same federal statute also forbade false statements in connection with the purchase of a firearm.[428] When Keshia Dixon was prosecuted for these crimes, the district court allowed her to assert a duress defense,[429] but the judge held that she bore the burden of persuasion with respect to that defense, and the jury concluded that she had failed to carry this burden. On appeal, the Supreme Court cast its analysis entirely in terms of the meaning of the 1968 statute: because "federal crimes 'are solely creatures of statute,'" the Court said that "we are required to effectuate the duress defense as Congress 'may have contemplated' it in the context of these specific offenses."[430] In a bow to *Oakland Cannabis*, the Court did not definitively hold that the statute accommodated a duress defense.[431] But the Court agreed with the district judge that if such a defense was indeed available, the burden of persuasion lay with the defendant. The Court reasoned that in 1968, when Congress enacted the statute, the common law had long been understood to give defendants the burden of proving affirmative defenses, and the Supreme Court had already applied this principle to federal

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425 548 US 1 (2006).

426 Pub L No 90-351, 82 Stat 197.

427 Omnibus Crime Control Act § 902, 82 Stat at 231, codified as amended at 18 USC § 922(n).

428 Omnibus Crime Control Act § 902, 82 Stat at 229, codified as amended at 18 USC § 922(a)(6).

429 Duress and necessity are closely related defenses. See *Bailey*, 444 US at 409–10 (indicating that at common law, "the defense of duress covered the situation where the coercion had its source in the actions of other human beings" while "the defense of necessity . . . covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils").

430 *Dixon*, 548 US at 12, quoting *Liparota v United States*, 471 US 419, 424 (1985) and *Oakland Cannabis*, 532 US at 491 n 3.

431 See *Dixon*, 548 US at 13–14 & n 7. The Court framed the question that it was deciding as follows: "Assuming that a defense of duress is available to the statutory crimes at issue, . . . we must determine what that defense would look like as Congress 'may have contemplated' it." Id at 13, quoting *Oakland Cannabis*, 532 US at 491 n 3.

crimes in *McKelvey v United States*.[432] According to the majority in *Dixon*,

> Even though the Safe Streets Act does not mention the defense of duress, we can safely assume that the 1968 Congress was familiar with both the long-established common-law rule and the rule applied in *McKelvey* and that it would have expected federal courts to apply a similar approach to any affirmative defense that might be asserted as a justification or excuse for violating the new law.[433]

Dixon begged to differ; in her view, "it has been well established in federal law that the Government bears the burden of disproving duress beyond a reasonable doubt."[434] But the majority emphasized that her briefs "cite[d] only one federal case decided before 1968 for th[is] proposition," and that case was distinguishable.[435] To be sure, the Model Penal Code (promulgated by the American Law Institute in 1962) had proposed to put the burden of disproving excuses like duress on the government, but "no [ ] consensus existed [on this point] when Congress passed the Safe Streets Act in 1968," and "there is no evidence that Congress endorsed the Code's views or incorporated them into the Safe Streets Act."[436] In dicta, indeed, the Court opined that even today, federal courts are not so unified in support of the Model Penal Code's approach as to warrant reading recently enacted federal statutes to deviate from the traditional common-law rule.[437] In any event, the Court thought that the proper background rule for understanding the 1968 statute was apparent: "In the context of the firearms offenses at issue—as will usually be the case, given the long-established common-law rule—we presume that Congress intended the petitioner to bear the burden of proving the defense of duress by a preponderance of the evidence."[438]

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[432] 260 US 353 (1922).

[433] *Dixon*, 548 US at 13–14.

[434] Id at 14 (describing petitioner's argument).

[435] Id (explaining that in the disputed case, duress had not been operating as an affirmative defense, but instead had gone to the specific-intent requirement of the crime with which the defendant had been charged—an issue on which the government bore the burden of proof).

[436] Id at 15–16.

[437] See *Dixon*, 548 US at 14–15.

[438] Id at 17. In separate opinions, five Justices distanced themselves from the Court's emphasis on the date of the particular statute under which Dixon was being prosecuted. See *United States v Leahy*, 473 F3d 401, 407 (1st Cir 2007) (concluding as a

Admittedly, the lower federal courts do not use the rhetoric of statutory interpretation quite so consistently. Opinions addressing crimes created by federal statutes often refer to "common-law defenses" and "federal common law."[439] But the courts that use this locution may simply mean that the content of the principles they are applying is not dictated by statutory text. Rather than suggesting that the common law applies of its own force in this context, these courts may well see themselves as imputing common-law principles to particular statutes.[440] In any event, that is the view suggested by the Supreme Court,[441] and most lower federal courts seem to accept its framing of the issue.[442] Thus, standard doctrine about common-law defenses to

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result that there was not a true majority for "the date-centric methodology employed in [the Court's] opinion"). But most of these Justices still approached the key questions under the rubric of statutory interpretation. Justice Samuel Alito, joined by Justice Scalia, argued that each federal criminal statute should be understood against the backdrop of the pattern that Congress had implicitly established "when Congress began enacting federal criminal statutes." *Dixon*, 548 US at 19–20 (Alito concurring). Justices Anthony Kennedy, Stephen Breyer, and David Souter seemed to envision a more dynamic incorporation of the common law, but they too cast their positions in terms of "congressional intent." Id at 17–18 (Kennedy concurring); id at 21–22 (Breyer dissenting).

439 See, for example, *United States v Desinor*, 525 F3d 193, 199 (2d Cir 2008) (asserting, in the context of a prosecution under 21 USC § 848(e)(1)(A) for a narcotics conspiracy resulting in murder, that "the law pertaining to self-defense is a matter of federal common law"); *United States v Dodd*, 225 F3d 340, 345 (3d Cir 2000) (asserting, before *Dixon*, that "[w]here courts have engrafted a traditional common-law defense onto a statute that itself is silent as to the applicability of traditional defenses, it is within the province of the courts to determine where the burden of proof on that defense is most appropriately placed," and adding that "[t]his is a question of federal common law"); *United States v Newcomb*, 6 F3d 1129, 1134 (6th Cir 1993) ("In *Bailey*, the Court . . . firmly stated that common-law defenses may be employed as defenses to a statutory crime.").

440 See notes 407–08 and accompanying text. See also *Dodd*, 225 F3d at 345 (observing that in the context of a prosecution for being a felon in possession of a firearm, necessity "is a judge-made defense," but indicating that courts "have engrafted [it] . . . onto [the] statute").

441 In addition to the cases already discussed in this Section, see, for example, *Brogan v United States*, 522 US 398, 406 (1998) (indicating that the public-authority defense reflects "a background interpretive principle of general application"—one that applies to each federal criminal statute as a matter of "assumed legislative intent").

442 See, for example, *Leahy*, 473 F3d at 405 ("[T]he question turns on what is essentially a matter of statutory interpretation—what Congress intended."). See also Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum L Rev 1433, 1517 (1984) ("Since Congress legislated against a common law background and generally adopted the common law approach to criminal liability, the federal courts have generally assumed that Congress intended to carry forward the traditional common law defenses."); John F. Manning, *The Absurdity Doctrine*, 116 Harv L Rev 2387, 2467–70 (2003) (noting that textualists offer this account of a host of generic defenses, which they justify in terms of interpretive presumptions applicable to each individual criminal statute).

federal crimes is another manifestation of what I am calling the "federal model" for the interaction between statutes and the common law, under which principles of unwritten law operate through incorporation into individual statutes.

Where federal criminal law is concerned, indeed, this way of talking long predates *Erie*.[443] That should come as no surprise. In other fields, pre-*Erie* federal courts could apply principles of general law (and could exercise independent judgment about the content of those principles) without having to attribute the resulting rules of decision to federal statutes. But when courts were addressing the law of federal crimes, federal statutes arguably were the only game in town. Ever since the early nineteenth century, courts have held that the definition of federal crimes is a matter of *written* federal law; there are no federal common-law crimes.[444] And if the common law does not operate of its own force to define crimes against the United States, one might well conclude that it also does not operate of its own force to supply defenses to the crimes that Congress defines. On that way of thinking, whenever federal courts wanted to give effect to longstanding principles from the common law of crimes, they had to read those principles into particular federal statutes.

Of course, federal courts were not always eager to preserve common-law defenses. Take the defense of marital coercion: at common law, married women were excused from criminal responsibility for most things done under their husband's constraint, and whatever a wife did in her husband's presence was usually presumed to be the product of such constraint.[445] Starting in the late nineteenth century, some jurists expressed reluctance to read federal criminal statutes as accommodating this defense. In the words of one federal judge,

> This statute against counterfeiting says "*every* person who falsely makes, forges, or counterfeits any coin," etc., shall be punished. It makes no exception in favor of married women, and it may well be doubted if the courts can engraft an

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[443] See, for example, *The William Gray*, 29 F Cases 1300, 1302 (CC D NY 1810) (considering whether to declare a forfeiture under one of the federal Embargo Acts, and speaking of the necessity defense as an implied exception that operates "in the interpretation of penal statutes").

[444] See, for example, *United States v Hudson*, 11 US (7 Cranch) 32, 34 (1812).

[445] See Bishop, 1 *Commentaries on the Criminal Law* §§ 276–82 (cited in note 182). See also Anne Coughlin, *Excusing Women*, 82 Cal L Rev 1, 30–43 (1994) (analyzing both the legal excuse and the evidentiary presumption).

> exception on the statute. I am inclined to believe it is the logical result of the doctrine that our crimes are statutory, and that we have no common law of crimes, except so far as the statutes have adopted it, in matters of evidence and practice, that no exemption exists unless congress defines and declares it.[446]

As one might expect, though, when common-law defenses seemed less musty, judges worked harder to read them into federal statutes.[447]

D. Contrasting State Approaches

This Part's main goal has been to trace the development, in an array of different fields, of what I am calling the "federal model" for the interaction between federal statutes and the unwritten law. But it is also worth considering how state courts have handled parallel questions about state statutes. Generalizations about state law are tricky, and I certainly cannot claim that each of the fifty states neatly follows the "state model" in each of the fields that this Part has surveyed. Still, the state model retains considerable force.

With respect to private causes of action for damages caused by the violation of statutory duties (the issue considered in Part III.A), Professor Foy has already noted that state jurisprudence differs significantly from federal jurisprudence.[448] To be sure, many state courts cite federal precedents when deciding whether to interpret individual state statutes as creating private causes of action by implication.[449] Even in the absence of a statutory cause of action, however, many state courts also recognize the possibility that common-law doctrines like "negligence per se" might operate directly to supply relevant causes of action as a

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[446] *United States v De Quilfeldt*, 5 F 276, 279 (CC WD Tenn 1881) (citations omitted). Despite his inclination, the judge refused to rule against the defendant on this theory "without consultation with my brother judges on this bench." Id. In later cases, however, federal courts followed his inclination. See, for example, *United States v Swierzbenski*, 18 F2d 685, 685 (WDNY 1927); *United States v Hinson*, 3 F2d 200, 200 (SD Fla 1925).

[447] See, for example, *The William Gray*, 29 F Cases at 1302.

[448] See Foy, 71 Cornell L Rev at 566–68 (cited in note 340).

[449] Different states have emphasized different federal precedents. Compare *Bennett v Hardy*, 784 P2d 1258, 1261–62 (Wash 1990) (borrowing the test from *Cort v Ash*, 422 US 66 (1975), and proceeding to infer a private cause of action), with *Baldonado v Wynn Las Vegas, LLC*, 194 P3d 96, 101–02 (Nev 2008) (citing post-*Cort* federal precedents too and refusing to infer a private cause of action).

matter of unwritten law.[450] That possibility reflects the difference between the state model and the federal model. Even where principles of negligence per se seem relevant, modern courts usually can recognize private causes of action for damages as a matter of federal law only by reading them into particular federal statutes. By contrast, courts often can recognize such causes of action as a matter of state law unless a particular statute is properly interpreted to eliminate them.

The state model applies less neatly with respect to the details of whatever causes of action statutes do create (the issue considered in Part III.B). But that is partly because most state legislatures have enacted generic statutes to handle some of those details. For instance, almost all states have long had crosscutting "survival statutes" that make most state-law causes of action survive the deaths of the original parties.[451] Likewise, because of dissatisfaction with the common law's traditional stinginess toward interest, most states have enacted crosscutting statutes about the kinds of claims that do or can bear interest before judgment.[452] When courts entertaining causes of action created by state law face questions about survival or prejudgment interest, they look to these crosscutting statutes rather than the unwritten law. Nonetheless, the state model on these matters remains distinct from the federal model in the following sense: state courts typically do *not* treat questions about either survival or prejudgment interest as lying within the domain of each individual statute that creates a cause of action.

Crosscutting statutes also affect the states' treatment of criminal defenses (the issue considered in Part III.C). Although many states have enacted statutes explicitly abolishing common-law

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[450] See, for example, *Bob Godfrey Pontiac, Inc v Roloff*, 630 P2d 840, 844 (Or 1981) (noting a distinction between "cases in which liability would be based upon violation of a statutory duty when there is also an underlying common law cause of action" and "cases in which liability would be based upon violation of a statute when there is no underlying common law cause of action"). For rhetoric that is less tethered to traditional views of the common law, see *National Trust for Historic Preservation v City of Albuquerque*, 874 P2d 798, 801 (NM App 1994) (arguing that unlike federal courts, "[a] state court . . . may look beyond legislative intent in exercising common-law authority to recognize a private cause of action").

[451] See Dan B. Dobbs, 2 *Dobbs Law of Remedies: Damages–Equity–Restitution* 423 (West 2d ed 1993) ("Almost all states appear to have both [wrongful] death and survival statutes in some form."); Anthony J. Sebok, *The Inauthentic Claim*, 64 Vand L Rev 61, 75 (2011) (noting that "the advent of survivorship statutes in the nineteenth century essentially suspended the common law doctrine" that personal claims died with the person).

[452] See Anthony E. Rothschild, Comment, *Prejudgment Interest: Survey and Suggestion*, 77 Nw U L Rev 192, 193 & n 6 (1982) (citing generic statutes from most states).

crimes,[453] only a few have explicitly abolished common-law defenses too.[454] In most states, though, the legislature has codified the principal generic defenses that were recognized at common law.[455] Where such codification has occurred, these defenses need not be thought of as operating through incorporation into each individual criminal statute, but they also do not operate as a matter of common law.

In states that have not comprehensively codified the generic defenses, however, it remains possible for common-law defenses to survive as such. Some of these states' courts may not have a consistent position about whether common-law defenses operate directly or only by incorporation into individual statutes.[456] But the former possibility seems to be alive and well in many states. Rather than reading each statute that defines a crime as implicitly

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[453] See Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U Pa L Rev 335, 338–39 (2005) (providing a partial list).

[454] See Ariz Rev Stat § 13-103 ("All common law offenses and affirmative defenses are abolished."); Tenn Code Ann § 39-11-203(e)(2) ("Defenses available under common law are hereby abolished."). In contrast to Arizona and Tennessee, some states that have abolished common-law crimes have explicitly preserved the possibility of common-law defenses. See, for example, Conn Gen Stat § 53a-4 ("The provisions of this chapter shall not be construed as precluding any court from recognizing . . . other defenses not inconsistent with such provisions."); NJ Stat Ann §§ 2C:2-5, 2C:3-2 (preserving defenses where "neither the code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the [defense] claimed does not otherwise plainly appear"); Wis Stat § 939.10 ("Common law crimes are abolished. The common law rules of criminal law not in conflict with chs. 939 to 951 are preserved."); Wyo Stat § 6-1-102 ("Common-law defenses are retained unless otherwise provided by this act.").

[455] See Paul H. Robinson, 1 *Criminal Law Defenses* vii–viii (West 1984).

[456] Compare *People v Riddle*, 649 NW2d 30, 38 (Mich 2002) (concluding that when Michigan codified the common-law crime of murder in 1846, it implicitly codified the then-existing concept of self-defense too) and *People v Reese*, 815 NW2d 85, 93 (Mich 2012) (following *Riddle*'s view that "[w]hen the Legislature codifies a common law offense [it] thereby adopts the common law defenses to that offense" as they were understood at the time of codification), with *People v Dupree*, 788 NW2d 399, 405–06 (Mich 2010) (noting that Michigan's felon-in-possession statute "does not address the availability of common law affirmative defenses, including self-defense," and concluding that "the affirmative defense of self-defense remains available"). Going forward, much of Michigan's law of self-defense is definitely statutory, because the state legislature enacted a broad self-defense act in 2006. See 2006 Mich Pub Act No 309, codified at Mich Comp Laws § 780.971 et seq. But that very statute suggested that the common-law defense had previously operated directly (and would continue to do so in certain respects). See Mich Comp Laws at § 780.974 ("This act does not diminish an individual's right to use deadly force or force other than deadly force in self-defense or defense of another individual as provided by the common law of this state in existence on October 1, 2006."); *Dupree*, 788 NW2d at 407 (noting that with respect to conduct that occurred in 2005, "the traditional common law affirmative defense of self-defense in existence before the enactment of the [Self-Defense Act] governs").

incorporating common-law defenses, many state-court opinions are cast as if the common law can directly supply defenses to statutory crimes (unless a particular statute abrogates those defenses).[457]

CONCLUSION

The central thesis of this Article is twofold. First, federal courts have changed how they think about various questions that are connected with the implementation of federal statutes but that the statutes do not explicitly address; individual federal statutes are now presumed to encompass many questions that might once have been thought to lie beyond their domains. Second, the statutification of these questions is at least partly attributable to pressures created by the *Erie* doctrine (or, where penal statutes are concerned, by the doctrine that there is no federal common law of crimes).

As a practical matter, the consequences of treating more questions as matters of statutory interpretation depend on the interpretive techniques that courts proceed to use. The Supreme Court's opinion in *Oakland Cannabis*, which suggested that the typical federal criminal statute might leave no room for the common-law defense of necessity,[458] raises one possibility: courts might hew closely to the literal language of the individual statute in question and refuse to infer any exceptions or embellishments on the strength of general principles of unwritten law. To the extent that courts take this approach, the statutification of issues at the federal level is very significant indeed. But if courts decide instead to read federal statutes against the backdrop supplied by principles of unwritten law, so that each individual federal statute is understood as implicitly incorporating those principles into its text, the practical consequences of the federal model will be less dramatic. In this situation, indeed, the difference between

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[457] See, for example, *Smith v State*, 424 S2d 726, 732 (Fla 1982) (indicating that "the common-law defense of withdrawal" from joint criminal activity can be a valid defense in a prosecution for premeditated murder); *State v Hastings*, 801 P2d 563, 564–65 (Idaho 1990) (concluding that the defendant should have been allowed "to introduce evidence relating to the common law defense of necessity," and tracing the validity of that defense to Idaho's reception of the common law rather than to the individual statute under which the defendant was being prosecuted); *Humphrey v Commonwealth*, 553 SE2d 546, 550 (Va App 2001) (noting that the common law applies in Virginia unless abrogated by the legislature, and concluding that the state statute forbidding convicted felons to possess firearms "does not indicate an intention to abrogate the common law defense of necessity").

[458] See text accompanying note 423.

the state and federal models may seem largely theoretical: the key difference is not about whether principles of unwritten law matter, but simply about whether courts should think of those principles as operating directly or only through incorporation into individual statutes.[459]

Even that difference, however, has some practical consequences. When courts think of the unwritten law as operating directly, the rules of decision that they apply will naturally keep up with changes in the content of that law. But if courts think of the unwritten law as operating only because a particular statute implicitly incorporates it, another option becomes perfectly plausible: courts may well read the statute as adopting (and freezing into place) the background rules of unwritten law that existed when the statute was enacted.

Of course, that conclusion is not inevitable; even if courts interpret a statute to incorporate the unwritten law on some point, they are capable of deciding that the incorporation is dynamic rather than static. For instance, the federal Supreme Court has said that in certain respects the Sherman Act of 1890 incorporates *evolving* principles of common law,[460] and the Court has indicated that the same might be true of the statute that we know as 42 USC § 1983 (which Congress enacted as part of the Revised Statutes of 1874 and which traces back to the Civil Rights Act of 1871).[461] Even under those so-called "common-law

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[459] Compare *Microsoft Corp v i4i LP*, 131 S Ct 2238, 2245–47 (2011) (holding that when the Patent Act of 1952 declared that "[a] patent shall be presumed valid" and "[t]he burden of establishing invalidity . . . shall rest on a party asserting such invalidity," Congress implicitly incorporated the established standard of proof for satisfying this burden, which required clear and convincing evidence), with id at 2254 (Thomas concurring in the judgment) (arguing that the statute does not address the standard of proof, but reaching the same result as the majority on the theory that "the common-law rule" operates of its own force).

[460] See *Business Electronics Corp v Sharp Electronics Corp*, 485 US 717, 732 (1988) ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890."); *Leegin Creative Leather Products, Inc v PSKS, Inc*, 551 US 877, 888 (2007) (quoting and reaffirming this passage from *Business Electronics*).

[461] See, for example, *Smith v Wade*, 461 US 30, 34–35 n 2 (1983) (criticizing the dissent's "unstated and unsupported premise that Congress necessarily intended to freeze into permanent law whatever [tort] principles were current in 1871, rather than to incorporate applicable general legal principles as they evolve," and adding that "if the prevailing view on some point of general tort law had changed substantially in the intervening century (which is not the case here), we might be highly reluctant to assume that Congress intended to perpetuate a now-obsolete doctrine").

statutes,"[462] however, the Court often has emphasized the particular understandings of the common law that existed when the statutes were enacted.[463] This tendency is even more pronounced with respect to other old statutes, like the FELA. As we saw in Part III.B, the Court has held that the FELA implicitly incorporates early twentieth-century conceptions of the proper measure of damages, with the result that prejudgment interest is unavailable on FELA claims even today.[464] Likewise, in determining

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[462] See *Leegin*, 551 US at 899 (using this label for the Sherman Act); William N. Eskridge Jr, *Public Values in Statutory Interpretation*, 137 U Pa L Rev 1007, 1052 (1989) (noting that the category of "common law statutes" also includes § 1983). See also Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are "Common-Law Statutes" Different?* *1, in Shyamkrishna Balganesh, ed, *Intellectual Property and the Common Law* (forthcoming 2013), online at http://ssrn.com/abstract=2042146 (visited May 9, 2013) (agreeing that the Sherman Act and § 1983 are often described as "common-law statutes" but observing that this category lacks clear boundaries).

[463] For examples involving the Sherman Act, see *Copperweld Corp v Independence Tube Corp*, 467 US 752, 775 n 24 (1984) ("[I]t is far from clear that intracorporate conspiracies were recognized at common law in 1890."); *Texas Industries, Inc v Radcliff Materials, Inc*, 451 US 630, 644 n 17 (1981) ("[W]hen the Sherman Act was adopted the common law did not provide a right to contribution among tortfeasors participating in proscribed conduct. One permissible, though not mandatory, inference is that Congress relied on courts' continuing to apply principles in effect at the time of enactment."). For an example involving § 1983, see *Filarsky v Delia*, 132 S Ct 1657, 1662–66 (2012) (identifying the immunities and defenses that § 1983 should be understood to recognize by applying a two-step approach that "begins with the common law as it existed when Congress passed § 1983 in 1871" and then asks whether anything specific to § 1983 "counsels against carrying forward the common law rule"). See also *Rehberg v Paulk*, 132 S Ct 1497, 1502–05 (2012) (suggesting that history does affect the Court's understanding of immunities under § 1983, but at a fairly high level of abstraction); David Achtenberg, *Immunity under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 Nw U L Rev 497, 500–01 (1992) (identifying five different approaches that have been used in different opinions by different Justices: (1) a "literalist" approach that refuses to recognize any immunities because the text of § 1983 does not mention any, (2) a modified form of literalism that recognizes only those immunities that were "so deeply entrenched in the common law [at the time of enactment] and so consistent with the purposes of § 1983 that it was impossible to believe that Congress . . . intended to abrogate them," (3) a "static incorporation" approach that reads in "every immunity which was recognized in common-law tort actions in 1871" unless a particular immunity would subvert the statute's purposes, (4) a "dynamic incorporation" approach that tracks developments in "the general common law of torts," and (5) a "delegation" approach that reads the statute as implicitly "authoriz[ing] the Court to develop principles of immunity under § 1983 based solely on its own view of sound public policy").

[464] See text accompanying notes 384–86 (discussing *Monessen*). For a case discussing the logical implications of *Monessen*'s theory of static incorporation, see *Wickham Contracting Co v Local Union No. 3, International Brotherhood of Electrical Workers AFL–CIO*, 955 F2d 831, 837 (2d Cir 1992) (holding that *Monessen*'s interpretation of the FELA does not foreclose the award of prejudgment interest in a suit under § 303(b) of the Labor-Management Relations Act of 1947, Pub L No 80-100, ch 120, 61 Stat 136, 159, and explaining that "[b]y the 1940s, the common law rule against prejudgment interest in cases of unliquidated damages and tort actions had eroded severely"). See also

the scope of liability under the FELA for negligent infliction of emotional distress, the Court has chosen among tests that were familiar to the common law in 1908 rather than applying the test that is most widely used now.[465]

Reading each federal statute to incorporate common-law principles as they were understood at the time of enactment is one possible response to the interpretive challenge posed by the federal model: now that individual federal statutes are routinely presumed to encompass issues that they do not specifically address, courts need some way of figuring out what the statutes say about those issues. But the presumption against extraterritoriality illustrates another possible response to the statutification of such issues. When courts apply the presumption against extraterritoriality, they are not hewing to the literal meaning of statutory language; they are inferring geographic limitations that the text does not make apparent. But they also are not reading each individual federal statute to incorporate (on either a static or a dynamic basis) exactly the same kinds of principles of unwritten law that might once have been thought to operate of their own force. Instead, courts are deploying a different kind of interpretive technique: in the absence of contrary guidance from Congress, they are using a specialized canon of construction to impute meaning to the statute.

At first glance, one might wonder whether this technique is really any different from static incorporation of the common law. After all, while the content of the presumption against extraterritoriality departs from the kinds of choice-of-law rules that are most prevalent today, it can certainly be seen as the interpretive analogue of *traditional* choice-of-law rules.[466] By articulating a canon separate and apart from the underlying choice-of-law

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Kansas v Colorado, 533 US 1, 10–11 (2001) (describing changes over time in doctrines about prejudgment interest).

[465] See *Consolidated Rail Corp v Gottshall*, 512 US 532, 554–55 (1994) ("As we did in *Monessen*, we begin with the state of the common law in 1908, when FELA was enacted."). Admittedly, *Gottshall* ultimately read the FELA to incorporate the "zone of danger" test rather than the stricter "physical impact" test, even though the latter was still the majority rule in 1908. But the Court emphasized that "the zone of danger test had been adopted by a significant number of jurisdictions" by 1908, and the Court argued that it would have been considered "more consistent . . . with FELA's broad remedial goals" because "it was recognized [in 1908] as being a progressive rule of liability." Id at 555. While the Court added that "the physical impact test has considerably less support in the current state of the common law than the zone of danger test," the majority specifically refused to apply the test that currently has the most such support, in part because "it was not developed until 60 years after FELA's enactment." Id at 556.

[466] See note 14.

rules, however, courts have gone a step beyond static incorporation of the common law. Instead of gauging the applicability of each federal statute according to the choice-of-law principles that were widely accepted when that particular statute was enacted, courts use the same canon across the board. Thus, courts apply the presumption against extraterritoriality even to recently enacted federal statutes. As Part I suggested, this interpretive approach has the potential to produce significantly different results than the courts would reach if they treated the relevant issues as matters of unwritten law and used some version of modern choice-of-law rules to answer them.

Experience with the presumption against extraterritoriality also illustrates a more subtle consequence of thinking of these issues under the rubric of statutory interpretation. When courts apply the presumption against extraterritoriality to a statute, they do not always simply read the statute as they otherwise would and then excise the specific applications that they deem extraterritorial. Instead, the presumption against extraterritoriality can affect the glosses that courts put on language in the statutory text, and those glosses can affect how the statute operates even in settings where its application would not be considered extraterritorial.

For a nice example, we can return to the Supreme Court's interpretation of the Securities Exchange Act in *Morrison*. Recall that § 10(b) of the Act broadly prohibits deceptive behavior "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered."[467] Justice Scalia's majority opinion in *Morrison* applied the presumption against extraterritoriality to that linguistic formulation and came up with the following gloss: § 10(b) covers only (1) the purchase or sale of any security registered on an American stock exchange and (2) the purchase or sale *in the United States* of any security not so registered.[468] In defense of this gloss, Justice Scalia argued that the statute's text focused on "purchase-and-sale transactions" and that his application of the presumption against extraterritoriality reflected this focus.[469] By contrast, he emphasized, there was no "textual support" for the

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[467] See note 251 and accompanying text.

[468] See *Morrison*, 130 S Ct at 2884, 2888.

[469] See id at 2884. See also id at 2886 (describing the Court's gloss as a "transactional test" that asks "whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange").

test proposed by the government,[470] under which § 10(b) would apply "whenever a securities fraud includes significant conduct in the United States that is material to the fraud's success."[471]

Even if a particular sale ends up being consummated overseas, of course, reading § 10(b) to forbid fraudulent conduct in the United States would not necessarily be causing the statute to operate extraterritorially. As deployed by the Court in *Morrison*, then, the presumption against extraterritoriality had a spillover effect: the implied limitation that the Court read into § 10(b) averted the possibility of extraterritorial applications of the statute, but it also affected what § 10(b) meant for other situations. That effect grew out of the Court's approach. In keeping with the fact that the Court was thinking of the key issues entirely under the rubric of statutory interpretation, the Court was trying to attribute rules of applicability to the statute itself, and it gravitated toward reading those rules into the framework that the text supplied. If the Court had instead conceived of itself as using general choice-of-law analysis to determine when American anti-fraud laws do and do not apply, the Court might well have ended up drawing different lines. Again, then, the statutification of the relevant issues affected not only the style of the Court's analysis but also the substance of its conclusions.

In calling attention to the practical consequences of using the rubric of statutory interpretation for such issues, I am making an analytical point rather than a normative one. I consider it significant that modern courts read individual federal statutes to encompass issues that might previously have been thought to lie within the province of unwritten law. But I have made no arguments about whether the emergence of this federal model is good or bad. My point is simply that it deserves notice from people who want to understand the architecture of our legal system. The interaction between statutes and the unwritten law has been a constant subject of academic inquiry in the United States, drawing sophisticated commentary from distinguished scholars and jurists alike.[472] We should be aware that from the

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[470] Id at 2886.

[471] Brief for the United States as Amicus Curiae Supporting Respondents, *Morrison v National Australia Bank Ltd*, No 08-1191, *8 (US filed Feb 26, 2010) (available on Westlaw at 2010 WL 719337). See also notes 219–20 and accompanying text (describing the Second Circuit's "conduct test").

[472] For a taste, see Bishop, 1 *Commentaries on the Written Laws* §§ 123–25, 131–44 (cited in note 58); Daniel A. Farber and Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 Mich L Rev 875 (1991);

mid-twentieth century on, the federal model for this interaction has diverged from the state model.

Roscoe Pound, *Common Law and Legislation*, 21 Harv L Rev 383 (1908); Harlan F. Stone, *The Common Law in the United States*, 50 Harv L Rev 4 (1936); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 S Ct Rev 429.