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INTRODUCTION

In the last few years, the Supreme Court has applied the presumption against extraterritoriality to narrow the reach of U.S. securities law in *Morrison v. National Australia Bank, Ltd.*[1] and international-law tort claims in *Kiobel v. Royal Dutch Petroleum Co*.[2] By their terms, these decisions are limited to the interpretation of ambiguous federal statutes and claims under the Alien Tort Statute.[3] A potential unintended consequence of these decisions, therefore, is that future plaintiffs will turn to common law causes of action derived from state and foreign law, potentially filing such suits in state courts.[4] These causes of action may include "human rights claims that arise from multinationals' corporate activity," as well as "a range of claims by U.S. citizens when they are injured abroad, such as when they are victims of foreign terrorist activity."[5]

Professor Jeffrey A. Meyer's important study observes that debates about extraterritoriality are likely to turn to common law causes of action, particularly as plaintiffs turn to these options in the wake of *Kiobel*. The thrust of Meyer's article is a concern that future courts may consider applying the presumption against extraterritoriality to common law claims, an outcome Meyer believes is unwarranted. On Meyer's account, courts apply the presumption to statutes to avoid the "intrusion on the coequal regulatory authority of foreign sovereign states."[6] Meyer argues that several features of common law justify insulating it from the presumption: common law is "common" in its universal content, "commoner" in its bottom-up origins, and "constrained" in its development.[7]

Meyer's article raises appropriate concern over an under-studied issue. Recognizing that a focus on statutory interpretation has obscured the relevance of common law to many debates about extraterritoriality, Meyer rightly focuses on post-*Kiobel* (and post-*Morrison*) state law claims. He also points out that conflict of laws has a role in these cases alongside the presumption against extraterritoriality. Meyer's account is insufficient, however, when it comes to the comparison between common law and statutory law, and more importantly when it comes

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1. 561 U.S. 247, 130 S. Ct. 2869, 2881 (2010).

2. 133 S. Ct. 1659, 1669 (2013).

3. See *Morrison*, 130 S. Ct. at 2881; *Kiobel*, 133 S. Ct. at 1669.

4. For an excellent series of papers on these issues, see Symposium*, Human Rights Litigation in States Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1 (2013).

5. Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 GEO. L.J. 301, 314 (2014).

6. *Id.* at 307.

7. *Id*. at 334–49.

to the normative consequences of those comparisons for extraterritoriality.[8] Meyer acknowledges many potential virtues of common law, but he does not consider judicial lawmaking *in comparison* to the legislative alternative. Even if Meyer is correct in his praise of common law, his analysis does not establish that all common law causes of action deserve extraterritorial treatment (subject to choice of law) while statutory ones do not. A review of Meyer's three features of common law—that it is "common," "commoner" and "constrained"—reveals why these comparative institutional considerations are necessary for a complete picture of extraterritoriality, and indeed present perhaps the best hope for achieving Meyer's goals of consistency, access to justice in U.S. courts, and regulatory harmony between co-equal sovereigns.[9]

Our comments in this essay are agnostic on the prescriptive reach of U.S. law—we take no position here on the merits of territoriality, universality, and all options in between.[10] Instead, our question is whether judge-made common law should receive systematically different (indeed, more expansive) treatment than its statutory analog.[11] By reviewing Meyer's three features of common law, we hope to question the distinction with statutory law and call for further research on extraterritorial lawmaking across institutions.

I. COMMON LAW AS "COMMON"

Meyer's first claim is that the common law is more "common" than statutes in that it draws from principles that transcend geographic boundaries.[12] Applying truly "common" laws extraterritorially should not create conflicts with foreign sovereigns or subject defendants to unfair surprise.[13] Therefore, Meyer attempts to introduce a qualified measure of certainty by

8. It would be a different story if Meyer took as given a presumption against extraterritoriality for statutes and expressly tried to prevent a similar fate for common law. But this does not seem to be his purpose in *comparing* common law to statutory law. *See, e.g.*, *id.* at 335 (asserting that "general differences between the common law and statutes suggest . . . that common law sometimes has (and should have) a broader geographical reach than statutory law").

9. As Katherine Florey has explained, due process and interstate harmony exhibit a "basic unity," and thus courts should not "separat[e] the constitutional treatment of state courts' choice-of-law decisions from that of extraterritorial state regulation." 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, 1134 (2009).

10. Prescriptive (or legislative) jurisdiction is defined as power "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(a) (1987). Here we are dealing with the related issue of the prescriptive reach of a law, not the inherent authority of the lawmaker to regulate.

11. Meyer's analysis implies that state statutes are subject to the presumption against extraterritoriality and common law causes of action receive choice of law analysis. In fact, state laws (common law or statutory) typically receive choice-of-law analysis, while federal courts apply only the presumption to federal statutes. *See generally* Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657 (2013). At any rate, our critique turns on the branch that makes the law (judges versus legislatures), not whether the law would be subject to choice-of-law analysis.

12. Meyer, *supra* note 5, at 336–40.

13. For example, Meyer suggests that "[t]he common law of torts protects many rights that are so basic—for example, a right to be free from arbitrary physical violence and imprisonment—that it is reasonable absent contrary evidence to presume that the same protections apply in foreign lands." Meyer, *supra* note 5, at 337. Anthony Colangelo makes a similar argument for his "unified approach," in which the presumption against extraterritoriality

arguing that courts should apply a presumption of worldwide applicability to common law (subject to choice-of-law rules) because common law is common.[14]

As an empirical matter, it is possible that there is greater worldwide commonality among common law sources than statutory sources.[15] But whether common law causes of action are more "common" on average than statutory ones is beside the point. The potential harms to international relations or due process do not arise from a lack of universality in general but from the lack of universality in specific cases. Why, then, would we look to average levels of universality instead of asking whether in a given case the cause of action is universal, or to use Meyer's vocabulary, whether it accords with the law of the co-equal state also possessing jurisdiction and a regulatory interest?

Brainerd Currie's approach to conflict of laws highlights the shortcomings of Meyer's "common law as common" approach. In Currie's analysis, situations in which the laws of both states would produce the same outcome are a type of "false conflict," in which courts need not resolve conflicting instructions.[16] On the other hand, Currie honed in on "true conflicts," in which two sets of laws point in different directions. True conflicts thus present the more challenging task for courts. What does Currie's analysis tell us here? First, both true and false conflicts can arise between two statutes, two common law sources, or a mix. The true-false distinction does not turn on whether the state has a common law or statutory rule for battery, for example, but instead looks to see if the two states with interests in the case have the same rule in substance. Meyer's claim that "common law is common" is thus less precise at identifying commonality than a case-by-case analysis.

Second, by separating true and false conflicts, we can think more clearly about Meyer's recommendations. For the type of false conflicts described above, Meyer's concern about a presumption against extraterritoriality is misplaced, because no matter which law applies, the outcome is the same. For true conflicts, which may arise from common law or statutory sources, Meyer's account simply does not help with the admittedly difficult task of resolving conflicting instructions. That is, of course, unless Meyer can establish that common law has an advantage over statutory law independent of the degree of commonality.

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should never apply when the underlying source of the law is international law (that should apply everywhere). *See generally* Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019 (2011).

14. More precisely, Meyer acknowledges that modern choice-of-law rules, in their design and application, exhibit a preference for forum law. He worries about the marginal group of cases to which forum law would apply under conflict-of-laws analysis, but for which the presumption against extraterritoriality would defeat the application of forum law. Meyer, *supra* note 5, at 305.

15. Were we to accept that a generalizable distinction should apply, it may be that other distinctions would serve Meyer better. For example, perhaps private law is typically more universal than public law. This distinction would lump common law and statutory battery together but treat separately several of the examples Meyer cites: federal labor law, Civil Rights Act employment provisions, federal criminal law, and securities law. Meyer, *supra* note 5, at 311–12. Or perhaps we should assess the cause of action's relationship to common law independent of its current form, thus including statutory codifications of common law norms with other common law causes of action. Still another approach would differentiate cases by type. For example, one of us has suggested different presumptions for criminal, civil, and administrative cases. *See generally* Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. REV. 1 (2014).

16. *See generally* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAW 107–10 (1963).

II. COMMON LAW AS "COMMONER" AND "CONSTRAINED"

Meyer's second and third arguments seek to explain why common law might be normatively preferable to statutory law overall. Both of these claims overstate the distinction between common law and statutes, and neither establishes that common law presumptively should reach extraterritorially and statutes should not.

Meyer claims that the common law is "commoner" in that it derives from the experience of common people, not legislatures, and therefore does not represent a "top-down" legislative intent prone to clashes with co-equal sovereigns.[17] Rather, he suggests that "common law originates bottom-up from long-established customs and practices of people, including from lawyers and judges as participants in iterative dispute resolution processes."[18] But this view of common law is unrealistic. Meyer understates the elite and top-down nature of judges as common law makers.[19] Further, paralleling our comments above, even if Meyer is correct on average, there is no reason to believe that every common law cause of action is more organic and long established than every statutory claim. To repeat an earlier example, it is hard to believe that a state's choice to codify common law battery makes it less "commoner" than the common law rule.

Meyer also suggests that we should tolerate extraterritorial common law because common law is constrained by its development from the retrospective resolution of individual disputes.[20] One could argue that in the abstract, "[c]ourts *must* resolve the dispute before them and need not declare principles," while "[l]egislatures *must* declare general principles and do not generally resolve single disputes."[21] But this description overstates the distinction. Judges articulate common law rules not only with respect to local disputes, but also with future disputes in mind, and it is not at all clear that every common law solution is necessarily more constrained than its statutory counterpart.

More importantly, even if Meyer is correct that common law is "commoner" and "constrained," Meyer does not explain why, on the particular question of a law's geographic reach, we should believe that judge-made common law necessarily deserves greater breadth than statutory law. Institutionally, there are reasons to believe that legislators, rather than judges, are better placed to assess the proper reach of substantive law. A full account of extraterritorial policy-making must consider accountability, legitimacy, democracy, and expertise, all of which conceivably augur in favor of legislative rather than judge-made law. Meyer may be right to suggest that common law rules arise in response to specific disputes, but this characteristic could be more of a bug than a feature if it is more difficult for judges to account for interests outside of the instant dispute—such as sovereign equality, predictability, and notice—that motivate the rules of prescriptive jurisdiction. Meyer also argues that "it is most reasonable to presume the

17. *See* Meyer, *supra* note 5, at 340.

18. *Id.*

19. Meyer acknowledges that judge-made common law exists by and through governmental authority, yet he maintains that common law nonetheless "arises organically from people's relationships and that it functions apart from territorially deterministic concerns." Meyer, *supra* note 5, at 342. For a discussion of the breakdown of Blackstone's "oracular" model of common law, see William R. Casto, *The* Erie *Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 912–14 (1988).

20. Meyer, *supra* note 5, at 342–49.

21. Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 937 (2006).

intent of legislators only to regulate activity that corresponds to their territorial zone of authority."[22] But why would we think that legislators, who are responsible for external as well as internal relations, are more territorially focused than judges resolving a series of individual disputes? Meyer may be correct to say that common law likely would not offend co-equal sovereigns, but none of his analysis establishes that the risk of offense is less in the judiciary than in the legislature, and certainly he does not show that this difference would exist so routinely as to justify a blanket rule.

CONCLUSION

Meyer has drawn attention to a pressing area for further discussion—the extraterritorial reach of common law causes of action. By focusing too narrowly on the features of common law, however, Meyer's account fails to consider the comparative institutional strengths of judges and legislators. The question Meyer should ask, then, is whether judges or legislators are more likely to achieve his goal of remedying extraterritorial infringements of universal rights without offending the dignity of co-equal sovereigns. As demonstrated above, Meyer's labels of "common," "commoner," and "constrained" do not in themselves establish that judges win this comparative institutional contest. Indeed, the political branches have some advantages too—accountability, legitimacy, and a broader perspective on social welfare as opposed to a focus on individual disputes.

Further research should explore how the branches can work together on extraterritorial policy. The presumption against extraterritoriality is a judicial tool to (depending on whom you ask) predict and/or constrain legislative preference. And legislatures can overrule judicially created rules.[23] How, then, should a system be calibrated to take advantage of the different strengths of the branches? Should courts take some of the lawmaking reigns from legislatures, or should legislatures preempt more common law in areas that likely have extraterritorial implications? Should legislatures write default rules of interpretation, or is this task better left to the judicial branch?[24]

A further question is how prescriptive jurisdiction (either for statutes or common law) fits with other doctrines that protect due process and avoid clashes with co-equal sovereigns. Prescriptive jurisdiction is just one of the many levers that courts can pull to promote these interests. Personal jurisdiction reflects similar concerns, and it may protect defendants from foreign procedures and remedies. In a world of concurrent jurisdiction, venue also might be an important tool of judicial equilibration—allocating cases among courts when multiple states have the authority to prescribe rules and adjudicate disputes.[25] Ignoring the interrelationships among

22. Meyer, *supra* note 5, at 340.

23. This observation applies to judicially created substantive rules as well as judicially created rules of interpretation, provided that the rule does not have constitutional origins.

24. One of us has explored the possibility of Congress writing an interpretative statute for extraterritoriality. Zachary D. Clopton, *Extraterritoriality and Extranationality: A Comparative Study*, 23 DUKE J. COMP. & INT'L L. 217, 258–60 (2013) (discussing this proposal in light of interpretation acts in Canada and Australia).

25. *See* Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 205 (2001) (coining the term "jurisdictional equilibration" to describe lis pendens, antisuit injunctions and forum non conveniens).

these doctrines can lead courts to overreact to problematic cases rather than narrowly tailor their solutions.[26]

In sum, we believe that a categorical distinction between common law and statutes for deciding extraterritorial application of U.S. law may not serve the relevant policy interests. Instead, a more fine-grained assessment of the substantive law, the strengths of the branches and their interrelationships, and other avenues to regulate international lawmaking is required to map out a regime for extraterritoriality in all of its forms.

26. It is not clear, for example, that a decision about the substantive scope of ATS causes of action in *Kiobel* responded to the Court's concerns as well as decisions on personal jurisdiction or forum non conveniens would have.