

EXTRATERRITORIALITY AND EXTRANATIONALITY: A COMPARATIVE STUDY

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International lawyers are familiar with the concept of extraterritoriality the application of one country's laws to persons, conduct, or relationships outside of that country. Yet the transborder application of law is not limited to international cases. In many states, the presence of indigenous peoples, often within defined borders, creates an analogous puzzle. This Article begins a comparative study of foreign- and native-affairs law by examining the application of domestic laws to foreign facts ("extraterritoriality") and to indigenous peoples, often called "nations" ("extranationality"). Using a distinctive double-comparative perspective, this Article analyzes extraterritoriality and extranationality across three countries: the United States, Canada, and Australia.

Part I addresses the treatment of extraterritoriality across these three countries. Part II does the same for extranationality. These comparative law analyses pay special attention to the sources of the legal regimes and to the similarities and differences among the three countries' approaches. But comparative law is not only a tool to evaluate extraterritoriality and extranationality separately; it is also a tool to compare approaches toward foreign affairs with approaches toward indigenous peoples—here embodied in a presumption against extraterritoriality and a presumption in favor of extranationality. Part III takes up this task, focusing on sovereignty, separation of powers, and due process in the context of these rules. Finally, Part IV identifies practical lessons drawn from the manifold approaches to these related issues. In sum, this Article launches a new double-comparative enterprise and, in the process, offers policy proposals derived from the study of the American, Canadian, and Australian approaches to extraterritoriality and extranationality.

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INTRODUCTION

International lawyers, courts, and scholars have paid significant attention to the issue of extraterritoriality. As this Article uses the term, extraterritoriality refers to the application of the laws of one country to persons, conduct, or relationships outside of that country. The classic example is the gunman standing in one state and shooting someone across the border in another state, though globalization has increased both the quantity of transnational interactions and the interest of states in regulating them. The question for courts is how best to determine whether particular laws apply to cases in which some of the relevant facts are located outside the territorial borders of the state. When a law does not specify its geographic reach, what limits (if any) will courts place on its application?

The gun-across-the-border hypothetical is not only relevant to foreign-affairs cases; it is also applicable to indigenous-peoples law. We just as easily could ask whether a law touches cases across the borders of an Indian reservation. The question of extraterritoriality, therefore, can also be asked in this context: under what circumstances will a court apply domestic laws to cases with a connection to native lands or populations? For convenience, this Article refers to the application of domestic law to native peoples (often characterized as “nations”) as “extranationality.”¹

Despite the similarities between extraterritoriality and extranationality—and between foreign- and native-affairs law generally²—scholars have not taken full advantage of this comparison. This Article takes up this task by comparing extraterritoriality and extranationality across three common law countries with significant native populations: the United States, Canada, and Australia. This double-comparative approach, therefore, assesses the effect of borders on the geographic reach of ambiguous statutes in two different settings (extraterritorial and extranational cases) in each of three countries (United States, Canada, and Australia).

The purposes of this double-comparative project are twofold. First, comparing analogous issues in foreign- and native-affairs law may help explain the structures of these relationships. This Article serves as a model

1. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-60 (1832) (“The very term ‘nation,’ so generally applied to [Indian nations], means ‘a people distinct from others.’ . . . The words ‘treaty’ and ‘nation’ are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.”).

2. For a discussion of the relationships between these areas of law, see *infra* Part II.

for future double-comparative research,³ and also deploys this method with respect to the particular issues of extraterritoriality and extranationality. A second goal is to develop public policy strategies for transborder law. This Article can serve as a model for future policy innovation, and can also offer suggestions for policymaking with respect to extraterritoriality and extranationality. In this Article, each of the six iterations (extraterritoriality and extranationality in three countries) represents a potential source of ideas for legislative, executive, and judicial actors in both fields.

To achieve these goals, this Article begins with separate surveys of extraterritoriality and extranationality. Part I reviews the well-worn question of extraterritoriality, but does so using a comparative law approach that is uncommon to this inquiry.⁴ Part II does the same for extranationality. Within each Part, Sections A, B, and C cover the United States, Canada, and Australia, respectively. One way to look at this information is to compare approaches to extraterritoriality or extranationality separately. For convenience, this task is taken up following each three-country survey: comparative extraterritoriality in Part I, Section D, and comparative extranationality in Part II, Section D. As described below, the three countries' courts take relatively similar approaches to extraterritoriality—default presumptions against extraterritoriality and some reflection of international jurisdictional rules—with interesting variations among their applications and sources. Meanwhile, the countries are more varied in their approaches to extranationality, although the default rules suggest that ambiguous statutes apply to native peoples cases unless the conditions of an exception are satisfied.

Part III then compares extraterritoriality and extranationality. This Part offers some early conclusions about the relationship between legal rules and attitudes toward international and tribal affairs, and also suggests future double-comparative research that can continue to fill out our understanding of the relationships between international and indigenous peoples law. In

3. For example, future studies can ask these same questions as applied to topics like sovereign immunity, personal jurisdiction, forum and venue, abstention, and prosecutorial discretion. Indeed, a notable exception to the dearth of scholarship comparing international and native-peoples law contrasts tribal immunity with foreign sovereign immunity and domestic sovereign immunity (under U.S. law only). See generally Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595 (2010) [hereinafter Florey, *Indian Country*].

4. Professor Keitner's recent article is an outlier in this respect, comparing the approaches of courts in the United States, Canada, and the United Kingdom to the question of the geographic reach of constitutional rights. See Chimène I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT'L L. 55 (2011). See also Maria L. Banda, Note, *On the Water's Edge? A Comparative Study of the Influence of International Law and the Extraterritorial Reach of Domestic Laws in the War on Terror Jurisprudence*, 41 GEO. J. INT'L L. 525 (2010) (addressing a similar issue). This question, though, is different from the issues of statutory interpretation and legislative jurisdiction discussed in this Article.

particular, this Article assesses the roles of sovereignty, the separation of powers, and due process in extraterritorial and extranational cases, and suggests that these interests (and others) may serve as touchstones for further double-comparative analyses.

Finally, Part IV derives practical recommendations from this Article's six-part study. This Part offers a menu of options to legislators, executive actors, courts, and litigants addressing extraterritoriality or extranationality. These include, among others, the codification of the presumptions, a discussion of *Chevron*-style deference in extraterritorial and extranational cases, and the inculcation of the international law of jurisdiction into the executive's exercise of prosecutorial discretion.

In sum, this Article endeavors to launch a new comparative law enterprise and, in the process, it offers proposals to policy actors derived from the study of the American, Canadian, and Australian approaches to two not-so-dissimilar topics: extraterritoriality and extranationality.

I. EXTRATERRITORIALITY

A lawsuit is filed seeking to enforce a domestic statute on parties, conduct, or relationships outside the territorial borders of the forum state. Courts must resolve a series of questions about the suit. At or near the top of the list: does the legislature have the power to make a law that applies to the extraterritorial case? If the answer is yes, then the court must determine whether the legislature chose to do so with the law in question. Since few statutes include express statements of geographic scope, the judiciary must construe the law by relying on extra-statutory sources such as legislative history, canons of construction, or other statutes. This Part explores how the American, Canadian, and Australian legal systems answer these questions about the extraterritorial application of law. It concludes in Section D with brief remarks comparing the three approaches, raising themes that this Article returns to in Parts III and IV.⁵

A. The United States

In U.S. law, questions of extraterritoriality are not, for the most part,

5. Before turning to the substance, one brief terminological note merits attention. The term "jurisdiction" has created confusion—or at least has been prone to misuse—in English-speaking courts, including in cases discussing the extraterritorial reach of statutes. *E.g.*, *Lipohar v R* [1999] HCA 65, (1995) 200 CLR. 485, ¶152 (Austl.) (Kirby, J.) ("It is trite to say that the word 'jurisdiction' is often used in legal discourse in different senses."); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 812-13 (1993) (Scalia, J., dissenting) (distinguishing between subject-matter jurisdiction and extraterritoriality, which "has nothing to do with the jurisdiction of the courts."). This Article avoids using the term "jurisdiction" without a modifier (*e.g.* territorial, legislative, subject-matter) to clarify its meaning.

questions of authority.⁶ There is no dispute that Congress has the constitutional authority to enact extraterritorial legislation;⁷ however, having power and exercising it are two very different things. Some statutes are clearly extraterritorial and some are clearly not.⁸ In most cases, though, Congress does not clearly express its intent. To disambiguate such statutes, the Supreme Court has endorsed two canons of statutory interpretation: the *Charming Betsy* canon and the presumption against extraterritoriality. These two separate rules guide courts asking whether an ambiguous statute applies extraterritorially.

The *Charming Betsy* canon gets its name from the 1804 Supreme Court decision in *Murray v. Schooner Charming Betsy*.⁹ This case asked whether Jared Shattuck and his schooner flying under the Danish flag fell within the scope of the Nonintercourse Act, which restricted trade with France and its dependencies. Chief Justice Marshall concluded that the act did not apply to these facts. Citing the principle that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,” Marshall held that the Nonintercourse Act could not apply to Shattuck because his capture would violate international norms on the capture of neutrals.¹⁰ Moving forward, the *Charming Betsy* canon has been understood to direct courts to choose a reasonable

6. Some courts have discussed potential substantive due process constraints on the extraterritorial application of U.S. law. *See, e.g.*, *United States v. Davis*, 905 F.2d 245, 248 (9th Cir. 1990); *Tamari v. Bache & Co. S.A.L.*, 730 F.2d 1103, 1107 n.11 (7th Cir. 1984). Yet according to a leading textbook on international litigation, “no reported federal court decision has held an extraterritorial application of substantive U.S. law unconstitutional.” GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 579 (4th ed. 2007). For further discussion, *see* Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019 (2011); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT’L L.J. 121, 186 (2007) (discussing “structural” and due-process constitutional limits); A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT’L L. 379 (1997); Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992).

7. *See, e.g.*, *EEOC v. Arabian Amer. Oil Co.*, 499 U.S. 244, 248 (1991) [hereinafter “*Aramco*”]; *Lauritzen v. Larsen*, 345 U.S. 571, 579 n.7 (1953). The authority of U.S. states is a thornier issue. *See* Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057 (2009) [hereinafter Florey, *State Courts*]; Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133 (2010); Katherine Florey, *State Extraterritorial Powers Reconsidered: A Reply*, 85 NOTRE DAME L. REV. 1157 (2010).

8. *See* CHARLES DOYLE, CONG. RESEARCH SERV., CRS 94-166, *EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW* 37-60 (Mar. 26, 2010) (cataloging extraterritorial criminal laws).

9. 6 U.S. (2 Cranch) 64 (1804).

10. *Id.* at 118.

construction of an ambiguous statute consistent with international law.¹¹

Because *Charming Betsy* requires courts to look to international law as a tool of statutory interpretation, in extraterritorial cases the courts must look to the international law of prescriptive jurisdiction.¹² This is not the forum to exhaustively review that body of law, but, in short, it limits a state's legislative reach and, in this way, evinces respect to other sovereigns that may have an interest in regulating the person or conduct at issue. More specifically, the Third Restatement of Foreign Relations Law provides that a state's prescriptive jurisdiction may be based on: (1) territoriality—the conduct occurred within the state's territory; (2) nationality—the actor was a national of the state; (3) objective territoriality—the conduct had effects within the state's territory; (4) passive personality—the conduct is directed against the state or its vital interests; or (5) universal jurisdiction—the conduct is a type that all states may regulate.¹³ Combining *Charming Betsy* with limits on prescriptive jurisdiction establishes the following rule of construction: “Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international law limits on jurisdiction to prescribe.”¹⁴ Again, this is not a rule limiting the authority of Congress.¹⁵ Rather, it is a rule of construction—courts will construe an *ambiguous* statute to apply extraterritorially only if such an interpretation does not exceed the international law limits on prescriptive jurisdiction.

Running parallel to this rule is a separate canon known as the presumption against extraterritoriality.¹⁶ As the name suggests, this rule provides that ambiguous statutes are presumed not to apply extraterritorially. As the Court has often repeated, “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial

11. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (Scalia, J., dissenting); *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr.*, 485 U.S. 568, 575 (1988) (calling the canon “beyond debate”).

12. See 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1986) (defining prescriptive jurisdiction as the power “to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court”).

13. *Id.* §§ 401, 402, 404 (1986). For a more in depth discussion of prescriptive jurisdiction, see MALCOLM N. SHAW, *INTERNATIONAL LAW* 572-622 (Cambridge Univ. Press, 5th ed. 2003); Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 *LAW & POL'Y INT'L BUS.* 1 (1992-1993).

14. *Hartford Fire*, 509 U.S. at 815 (Scalia, J., dissenting).

15. See, e.g., *id.*; *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953).

16. For a discussion of different outcomes under the twin canons, see Zachary D. Clopton, *Bowman Lives: The Extraterritorial Application of U.S. Criminal Law after Morrison v. National Australia Bank*, 67 *N.Y.U. ANN. SURV. AM. L.* 137 (2011).

jurisdiction of the United States.”¹⁷ Although scholars have offered a host of justifications for this rule,¹⁸ recently the Court has maintained that the presumption is grounded in the desire to avoid potential conflicts with foreign laws and the assumption that Congress attends primarily to domestic issues.¹⁹

How does the presumption work in practice? Imagine a litigant seeking to apply a domestic statute to arguably extraterritorial facts. A court’s decision will turn on two axes. First, recall that the presumption is self-limited: it only applies if Congress has not indicated that the statute applies extraterritorially. If the litigant can show that Congress so indicated, she has “overcome” the presumption. Recent Supreme Court decisions have set a high bar to “overcome” the presumption, requiring either a “clear statement”²⁰ or at least a “clear indication”²¹ of congressional intent to legislate extraterritorially.

The other axis addresses whether the presumption applies in the first place. Perhaps the purportedly extraterritorial case is in fact *territorial* in some meaningful way, in which case the presumption against extraterritoriality would be irrelevant. Indeed, as Justice Scalia noted in the recent *Morrison* decision, “it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven

17. *Aramco*, 499 U.S. 241, 248 (quoting *Foley Brothers, Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). *See also* *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993); *Smith v. United States*, 507 US 197 (1993); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 582-89 (1992) (Stevens, J., concurring in the judgment); *United States v. Bowman*, 260 U.S. 94 (1922).

18. *See, e.g.*, Born, *supra* note 13, at 9-21; William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85, 112-23 (1998).

19. *Aramco*, 499 U.S. at 248 (noting that the canon “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord” and that Congress “is primarily concerned with domestic conditions”) (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963) and quoting *Foley Bros.*, 336 U.S. at 285, respectively). *But see* Dodge, *supra* note 18 at 116 (citing *Smith*, 507 U.S. at (applying the presumption without risk of conflict with foreign law); *Sale*, 509 U.S. 155 (same); and *Hartford Fire*, 509 U.S. 764 (not applying the presumption when there was a risk of conflict with foreign law)).

20. *Aramco*, 449 U.S. at 258 (“Congress’ awareness of the need to make a *clear statement* that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute.”) (emphasis added); *But see id.* at 261-66 (Marshall, J., dissenting) (criticizing the majority’s alleged clear-statement rule).

21. *Morrison v. Nat’l Australia Bank Ltd.*, 130 S.Ct 2869, 2883 (2010) (“But we do not say, as the concurrence seems to think, that the presumption against extraterritoriality is a ‘clear statement rule,’ if by that is meant a requirement that a statute say ‘this law applies abroad.’ Assuredly context can be consulted as well. But whatever sources of statutory meaning one consults to give ‘the most faithful reading’ of the text, there is no clear indication of extraterritoriality here.”) (internal citations omitted). *But see id.* at 2891 (Stevens, J., concurring) (characterizing the majority as “transform[ing] the presumption from a flexible rule of thumb into something more like a clear statement rule”).

watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.”²² How then do we know if a case is *territorial* or *extraterritorial*? For years, at least for a certain class of cases, courts followed the Second Circuit’s conduct-and-effects test, asking whether there was any conduct or effect in the United States that would qualify the case as territorial.²³ In *Morrison*, the Court announced a new answer to this question: the presumption against extraterritoriality applies only when the activity that represents the “focus” of the statute occurs outside the United States.²⁴ For example, the Court said that the “focus” of Section 10b of the Securities Exchange Act is the allegedly fraudulent securities transaction, and thus the presumption only applies to cases where the relevant transaction is abroad, even if significant aspects of the case had territorial connections to the United States.²⁵ A litigant may attempt to “avoid” the presumption by characterizing her case as territorial, but after *Morrison*, courts making that determination can look only to the focus of the statute, not to all the facts of the case.²⁶

In sum, Congress can legislate extraterritorially and the courts will enforce expressly extraterritorial statutes. When congressional intent with respect to extraterritoriality is not clear, courts resort to the twin canons. The *Charming Betsy* rule says that courts should select reasonable interpretations of statutes consistent with the international law of prescriptive jurisdiction; the presumption against extraterritoriality tells courts to presume that ambiguous statutes apply only territorially. In recent decisions, the Court has announced rules that curtail the extraterritorial reach of ambiguous statutes—making it harder for a litigant to apply a statute extraterritorially by raising the bar to “overcome” the presumption (only by showing the clear indication of congressional intent) and by limiting the class of connections to the United States that may “avoid” the presumption (only where the conduct comprising the “focus” of the statute is territorial).

22. *Id.* at 2884 (majority opinion) (emphasis in original).

23. *See id.* at 2878-81 (discussing *Schoenbaum v. Firstbrook*, 268 F. Supp. 385, 392 (2d Cir. 1967) and *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972)).

24. *Id.* at 288486. This approach seems to track what other courts have called the “gist of the offense” rule. *See, e.g.,* *Libman v. The Queen*, [1985] 2 S.C.R.178 ¶ 144 (Can.) (rejecting this approach). Recognizing the significance of the new focus test, Justice Stevens referred to it as the “real motor” of *Morrison*. 130 S.Ct. at 2895 (Stevens, J., concurring in the judgment).

25. *Id.* at 2884 (majority opinion) (citing 15 U.S.C. § 78j(b)).

26. Florey, *supra* note 7 at 1069-75. For example, vested-rights theory, propounded by Joseph Story among others, identified the precise location where a cause of action accrued and called for courts to apply the law of that territory.

B. Canada

While there was some uncertainty whether Canada had the power to enact extraterritorial legislation in the early years of the Dominion,²⁷ all doubt was removed in 1931. In that year, the Statute of Westminster provided that “the Parliament of a Dominion has full power to make laws having extra-territorial operation.”²⁸ Relying on this pronouncement, Canadian courts have affirmed the government’s power to legislate extraterritorially,²⁹ and on numerous occasions the Canadian Parliament has chosen to include expressly extraterritorial provisions in Canadian laws.³⁰

Turning to statutory interpretation, Canada has a principle equivalent to the United States’ *Charming Betsy* canon: “Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law.”³¹ Canada’s rule of construction, like *Charming Betsy*, applies only when the statute is ambiguous—Parliament has the power to violate international law if it so indicates.³² Importantly for our purposes, Canadian courts have said that this presumption incorporates the international law of legislative

27. See Symon Zucker, *Extraterritoriality and Canadian Criminal Law*, 17 CRIM. L. Q. 146, 148-151 (collecting cases). See also Libman [1985] 2 S.C.R. 178, ¶¶ 43-59 (Can.).

28. Statute of Westminster, Chapter 4 of the Statutes of the United Kingdom, 22 George V (Dec. 11, 1931), § 3. See Croft v. Dunphy, [1933] A.C. 156, 163(P.C.). (on appeal from the Supreme Court of Canada). Note that this Section also eschews the special class of cases discussing whether the Canadian Charter of Rights and Freedoms applies to Canadian agents’ extraterritorial conduct. See, e.g., Canada (Prime Minister) v. Khadr, 2010 S.C.C. 3, [2010] 1 S.C.R. 44 (Can.); Khadr v. Canada (Minister of Justice), [2008] 2 S.C.R. 125, 2008 SCC 28 (Can.); R. v. Hape, [2007] 2 S.C.R. 292, 2007 SCC 26, ¶ 66 (Can.); R. v. Cook, [1998] 2 S.C.R. 597 (Can.); Keitner, *supra* note 4 (discussing these issues with respect to the United States, Canada, and the United Kingdom); Banda, *supra* note 4 at 535-43 (discussing these issues and the war on terror).

29. E.g., Hape, 2 S.C.R., ¶ 66; Socy of Composers, Authors & Music Publishers of Can. v. Can. Ass’n of Internet Providers, [2004] 2 S.C.R. 427, 2004 SCC 45, ¶ 142-143 (Can.) (LeBel, J.) [hereinafter “SOCAN”]; Libman, 2 S.C.R., 178. ¶ 44. See also Steve Coughlan, et al., *Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization* 12-14 (June 23, 2006) (prepared for the Law Commission of Canada) [hereinafter “Law Commission”].

30. See Robert J. Currie & Stephen Coughlan, *Extraterritorial Criminal Jurisdiction: Bigger Picture or Smaller Frame?*, 11 CAN. CRIM. L. R. 141 (2007) (cataloging Canadian extraterritorial criminal statutes). As for the provinces, the Constitution Act limits their authority to matters “in each province.” Constitution Act, (1867) 30 & 31 Vict. Ch. 3 (U.K.), § 92. Laws must be connected to the province in “pith and substance,” although incidental extraterritorial effects will be tolerated. See, e.g., B.C. v. Imperial Tobacco Can. Ltd., [2005] 2 S.C.R. 473, 2005 SCC 49(Can.); Law Commission, *supra* note 29, at 13-14.

31. Daniels v. White, [1968] S.C.R. 517, 541 (Can.) (Pigeon, J.). See Hape, 2 S.C.R., ¶ 54 (quoting *Daniels*); SOCAN, 2 S.C.R., ¶ 142 (LeBel, J.) (citing *Daniels*); Cook, 2 S.C.R., ¶ 129 (Bastarache, J.) (quoting *Daniels*).

32. E.g., Hape, 2 S.C.R., ¶ 54; Cook, 2 S.C.R., ¶ 129 (Bastarache, J.); Daniels, [1968] S.C.R. at 541 (Pigeon, J.).

jurisdiction.³³

Separately, Canadian law also includes a presumption against extraterritoriality: “While the Parliament of Canada . . . has the legislative competence to enact laws having extraterritorial effect, it is presumed not to intend to do so, in the absence of clear words or necessary implication to the contrary.”³⁴ Like its U.S. equivalent, the presumption recognizes the power to legislate extraterritorially but requires expressed or implied intent to do so. This common law presumption was also codified in the Canadian Criminal Code.³⁵ Continuing the parallel to U.S. law, the Canadian Supreme Court has said that the presumption against extraterritoriality is grounded in an assumption that legislatures are focused on domestic affairs and in a concern for international comity.³⁶

Turning to the meaning of extraterritoriality, the 1985 case *Libman v. The Queen* may be seen as the Canadian equivalent of *Morrison*, although they produced different conclusions.³⁷ *Libman* was charged with a fraud scheme in which calls were made from Canada to the United States, convincing Americans to send money to *Libman*’s co-schemers in Costa Rica in exchange for shares in a sham mining company. The court pithily described the case as “both here and there.”³⁸ The court concluded that such here-and-there conduct should be treated as territorial only if there was “a real and substantial link between an offence and this country.”³⁹ The presumption against extraterritoriality applies only if there is no such link.⁴⁰

33. *E.g.*, *Hape*, 2 S.C.R., ¶¶ 57-65; *Cook*, 2 S.C.R., ¶¶ 131-38 (Bastarache, J.).

34. *SOCAN*, 2 S.C.R., ¶ 54. *See also, id.*, ¶ 144; (LeBel, J.); *Libman*, 2 S.C.R., ¶¶ 43-77; *Zucker*, *supra* note 27, at 151-56 (collecting cases); Law Commission, *supra* note 28.

35. R.S.C. 1985, c. C-46, § 6(2) (Can) (“Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged . . . of an offence committed outside Canada.”). Parliament may overcome this codified presumption as well. *See, e.g.*, *R. v. Finta*, [1994] 1 S.C.R. 701 (Can.) (discussing war crimes and crimes against humanity); *R. v. Klassen*, 2008 B.C.S.C. 1762 (Can.) (discussing sex tourism).

36. *E.g.*, *Libman*, 2 S.C.R., ¶ 65; *Cook*, 2 S.C.R., ¶ 133 (Bastarache, J.).

37. *Libman*, 2 S.C.R. *See also*, *Currie & Coughlan*, *supra* note 30, at 151-52 (discussing *Libman*). For a discussion of the doctrinal confusion before *Libman*, *see Zucker*, *supra* note 27, at 170.

38. *Libman*, 2 S.C.R., ¶ 63.

39. *Id.*, ¶ (internal quotation marks omitted). *See, e.g.*, Law Commission, *supra* note 28, at 40 (“This is the essence of *Libman*—defining the scope of the territoriality principle.”). *Libman*’s “real and substantial connection” test was not new to Canadian law. *See Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077, 1090-91 (Can.) (noting that the rule has its roots in an English decision on divorce law, *Indyka v. Indyka*, [1969] 1 A.C. 33 (U.K.)). Prior decisions had applied this rule to decide whether to recognize or enforce foreign judgments, *e.g.*, *Beals v. Saldanha*, [2003] 3 S.C.R. 416, 2003 SCC 72 (Can.) (foreign-state judgments); *Morguard*, 3 S.C.R. 1077 (foreign-province judgments); to determine the *situs* of a tort, *e.g.*, *Moran v. Pyle Nat’l (Can.) Ltd.*, [1975] 1 S.C.R. 393; and to address personal jurisdiction and choice-of-laws issues, *e.g.*, *Bouzari v. Iran*, [2004] 71 O.R. 3d 675, ¶¶ 23-38 (Can.); *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 (Can.).

40. Professor Currie refers to *Libman* as a test of “qualified territoriality,” although this Article

Since *Libman*, scholars and courts alike have acknowledged that the “real and substantial connection” test is the threshold inquiry in determining whether the presumption against extraterritoriality may be avoided in criminal and civil cases.⁴¹ Notably, this test calls upon courts to assess the overall factual circumstances of the case and determine whether those facts sufficiently engage the Canadian legal system—it does not require courts to focus on the statute in question. In this way, Canada offers a different threshold for extraterritoriality than the United States, although both apply the same presumptions once a case is determined to be extraterritorial. This Part explains this distinction in greater detail in Section D, but first, Australia.

C. Australia

Australian judges have faced many of these same questions. Although the background rules appear similar, upon closer inspection there seems to be ambiguity in the Australian approach not present in the American or Canadian approaches.

The Australian Constitution provides that Parliament may “make laws for the peace, order, and good government of the Commonwealth with respect to . . . external affairs.”⁴² It is this clause that gives Parliament the power to legislate extraterritorially—subject to the “peace, order, and good government” limitation, which is no limit at all.⁴³ The High Court of Australia has interpreted the external-affairs power broadly, including not only all matters geographically external to Australia but also seemingly all internal matters that are, in some way, subject to international concern.⁴⁴

does not use that term in this context. ROBERT J. CURRIE, *INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW* (201) 409-24.

41. *E.g.*, *SOCAN*, [2004] 2 S.C.R. 427, ¶ 60 (restating the rule in a civil case and collecting cases); [LR]; *id.*, at. p¶ 144 (perLeBel, J.); *Klassen*, 2008 B.C.S.C.at ¶ 71; Currie & Coughlan, *supra* note 30, at 151-52; Law Commission, *supra* note 29, at 40-46; Benjamin Perrin, *Taking a Vacation from the Law? Extraterritorial Criminal Jurisdiction and Section 7(4.1) of the Criminal Code*, 13 CAN. CRIM. L. R. 175, 194-97 (2009). The court in *Libman* suggested that the real-and-substantial-interest test may be “coterminous with the requirements of international comity,” and on this basis the Ontario Court of Appeals used international-comity principles to define the reach of a probation order. *R. v. Greco* (2001), 159 C.C.C. 3d 146 (Can. Ont. C.A.).

42. AUSTRALIAN CONSTITUTION s 51(xxix).

43. *E.g.*, *R v Foster; Ex parte E. & Austrl. S.S. Co.* (1959) 103 CLR 256, ¶ 4 (Austl.) (Windeyer, J.) (deferring to Parliament’s assessment of this requirement); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, ¶ 16 (Austl.) (commenting that *Foster’s* deference “applies with particular force to an exercise of the external affairs power”).

44. *See* Donald R. Rothwell, *International Law and Legislative Power*, in *INTERNATIONAL LAW AND AUSTRALIAN FEDERALISM* 104, 105 (Brian Opeskin & Donald Rothwell, eds., 1997) (categorizing external-affairs decisions as approving Parliament’s authority to make laws with respect to matters: (a) “geographically external to Australia”; (b) “implementing an international treaty”; (c) “subject [to]

The Statute of Westminster, as applied to Australia, confirms this authority.⁴⁵

Turning to statutory interpretation, the landscape of the Australian rules is less clear than its American or Canadian counterparts. Three canons are relevant here. First, Australia has a *Charming Betsy* equivalent: Australian courts presume that statutes do not violate international law,⁴⁶ although they recognize that the government has the power to do so.⁴⁷ Second, Australia has a presumption against extraterritoriality,⁴⁸ which may be overcome by express or implied legislative intent.⁴⁹ In addition to this

international concern”; (d) “generally regulated and subject to international law under either customary international law or under general principles of international law”; and (e) “that ha[ve] been the subject of recommendations by international bodies, agencies or organisations”). See also *Polyukhovich*, 172 CLR 501; *Vict. v Commonwealth* (1996) 187 CLR 416 (Austl.); *Horta v Commonwealth* (1994) 181 CLR 183 (Austl.); *Commonwealth v Tas.* (1983) 158 CLR 1 (Austl.); *N.S.W. v Commonwealth* (1975) 135 CLR 337 (Austl.); Joanna Kyriakakis, *Australian Prosecution of Corporations for International Crimes*, 5 J. INT’L CRIM. JUST. 809, 819 (2007); Perrin, *supra* note 41, at 204.

45. Statute of Westminster, Chapter 4 of the Statutes of the United Kingdom, 22 George V (Dec. 11, 1931), § 3. The Australian states also may legislate extraterritorially. Australia Act, 1986, c. 2, § 2(1) (Austl.). See, e.g., Rothwell, *supra* note 44, at 105-06. Courts have required a real connection between the law and the state, although courts have construed this requirement liberally, settling for even a “remote or general” connection. E.g. *Mobil Oil Austral. Pty Ltd v Vict.* (2002) 211 CLR 1, ¶ 9 (Austl.); *Union S.S. Co. of Austral. Pty v King* 166 CLR 1, ¶¶ 22-24 (Austl.); *Pearce v Florenca* (1976) 135 CLR 507, ¶ 6 (Austl.); *Bengtell v Goliath Portland Cement Co.* (1994) 10 NSWCCR 60 (Austl.).

46. E.g., *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, ¶ 27 (Austl.); *Chu Kheng Lim v Minister for Immigration, Local Gov’t & Ethnic Affairs* (1992) 176 CLR 1, ¶ 41 (Austl.); *Polites v Commonwealth* 70 CLR 60 (Austl.); *id.* (Rich, J.); DENNIS CHARLES PEARCE & ROBERT STANLEY GEDDES, STATUTORY INTERPRETATION IN AUSTRALIA § 5.14, at 140-41, (5th ed. 2001); Sir Anthony Mason, *International Law as a Source of Domestic Law*, in INTERNATIONAL LAW AND AUSTRALIAN FEDERALISM 210, 220-22 (Brian Opeskin & Donald Rothwell, eds., 1997).

47. E.g., *Lipohar v. R* [1999] HCA 65; (1999)200 CLR., 485 ¶¶ 94-95 (Austl.) (Gaudron, Gummow & Hayne, JJ.); *Horta*, 181 CLR at ¶ 10.

48. *Morgan v White* (1912) 15 CLR 1 (Austl.) (Barton, J.) (“The governing principle is that all legislation is *primâ facie* territorial”); *id.* (Isaac, J.) (“[U]nless the language of a Statute by express words or necessary implication indicates the contrary, the persons, property, and events in respect of which Parliament has legislated are presumed to be limited to those in the territory over which it has jurisdiction and for the welfare of which it exercises that jurisdiction.”). See, e.g., *Lipohar*, 200 CLR, ¶¶ 15-16 (Gleeson, C.J.); *Welker v Hewett* 120 CLR 503 (Austl.); *Meyer Heine Pty v China Navigation Co.* (1966) 115 CLR 10, ¶ 3 (Austl.) (Kitto, J.); *id.*, at ¶ 6 (Taylor, J.); *id.* (Windeyer, J.); *Koop v Bebb* (1951), 84 CLR 629, ¶ 3 (Austl.) (McTiernan, J.) (citing *American Banana*); PEARCE & GEDDES, *supra* note 46, § 5.3, at 133.; Stuart Dutson, *The Conflict of Laws and Statutes: The International Operation of Legislation Dealing with Matters of Civil Law in the United Kingdom and Australia*, 60 MOD. L. REV. 668, 674-76 (1997).

49. E.g., *Meyer Heine*, 115 CLR, ¶ 7 (Taylor, J.) (looking for a “clear indication” of legislative intent); *id.*, at ¶ 3 (Menzies, J.) (same); *id.* (Windeyer, J.) (looking for “some clear and express indication”); PEARCE & GEDDES, *supra* note 46, § 5.7, at 136-37, § 6.36 at 175-76.; Dutson, *supra* note 48, at 675 (describing the requirement of “express words” or “necessary implication” in cases where the policy, object or purpose of the statute so requires.”); *id.* at 675-76 nn. 44-46 & 53 (collecting cases). Mr. Dutson’s otherwise excellent article on extraterritoriality in Australian law suggests that Australian courts apply a presumption against extraterritoriality and a “purposive method” as separate

common law version of the rule, Parliament and numerous state legislatures have codified the presumption against extraterritoriality in interpretation acts.⁵⁰ Third, Australian courts have also adopted a presumption that statutes do not extend to cases governed by foreign law.⁵¹ Some scholars have articulated this rule as a stand-alone presumption,⁵² while at least one leading treatise has characterized it as merely a “specific application” of the presumption against extraterritoriality.⁵³

Australian law, therefore, includes an international law presumption, a territorial presumption, and a foreign law presumption. A review of Australian jurisprudence and scholarship reveals some blurring among these presumptions. Whether the foreign law presumption is an independent rule is just one example.⁵⁴ Courts also have blurred the lines between the international law presumption and the presumption against extraterritoriality.⁵⁵ Furthermore, the High Court has a propensity to refer to an assumption that a legislature legislates within the scope of its jurisdiction—without specifying whether it is referring to territorial jurisdiction, international prescriptive jurisdiction, or the internal divisions of authority within the country.⁵⁶ Interestingly, while the American and

rules. *Id.* at 676-77. However, it seems that the latter is merely another way to describe a court overcoming the presumption—legislative intent sufficient to overcome the presumption may be inferred from the legislature’s purpose in enacting the statute. Mr. Dutson’s other remarks on the confusion in Australian law, however, are well taken.

50. See, e.g., *Acts Interpretation Act 1901*, s 21(1) (Austl.); PEARCE & GEDDES, *supra* note 46, § 6.36, at 175-76, (collecting statutes for Australian Capital Territory, Northern Territory, Queensland, Tasmania, and Victoria). See *Lipohar*, 200 CLR, ¶ 20 (Gleeson, C.J.) (discussing the statutory presumption in South Australian criminal law); *Wanganui-Rangitikei Elec. Power Bd. v Austrl. Mut. Provident Soc’y* (1934) 50 CLR 581 (Austl.) (interpreting New South Wales law). See also *infra* Section IV.A (discussing interpretation acts). Although there has been no explicit statement on point, it appears that these acts do not alter the strength or breadth of the presumption. See, e.g., PEARCE & GEDDES, *supra* note 46, § 5.4 at 134, & § 6.36, at 176, ; *Grannall v C. Geo. Kellaway & Sons Pty* [1955] HCA 5; (1955) 93 CLR 36, ¶ 16 (Austl.) (noting that the statute “reinforced” the common law presumption); *Vicars v Comm’r of Stamp Duties* (N.S.W.) (1945) 71 CLR 309 (Austl.) (Williams, J.) (noting that the statute “appear[s] to be intended to give statutory effect to the rule of construction”). But see *Wanganui-Rangitikei*, 50 CLR (Dixon, J.) (suggesting that the North South Wales Act is narrower than the common law presumption).

51. See, e.g., *Akai Pty v People’s Ins. Co.* (1996) 188 CLR 418 (Austl.) (Touhy, J.).

52. E.g., Graeme Hill, *Resolving a True Conflict between State Laws: A Minimalist Approach*, 29 MELB. U. L.R. 39, 42-43 (2005); Dutson, *supra* note 48, at 674-76.

53. PEARCE & GEDDES, *supra* note 46, § 5.6, at 135-36.

54. See Dutson, *supra* note 48, at 682-85 (collecting cases).

55. See, e.g., *XYZ v Commonwealth* (2006) 227 ALR 495, ¶ 5 (Austl.) (relying on *Meyer Heine*); *Meyer Heine Pty v China Navigation Co.* 115 CLR 10, ¶ 6 (Austl.) ¶(Taylor, J.) (blurring the extraterritorial presumption and the international-law presumption). But see Geoffrey Lindell, *Judicial Review of International Affairs*, in INTERNATIONAL LAW AND AUSTRALIAN FEDERALISM 160, 179-80 (Brian Opeskin & Donald Rothwell, eds., 1997) (confirming separate presumptions).

56. See, e.g., *R v Foster; Ex parte E. & Austrl. S.S. Co.* 103 C.L.R., ¶ 13; *Barcelo v Electrolytic*

Canadian courts justify the presumption against extraterritoriality by looking to international comity and the domestic focus of the legislature, the Australia courts exclusively justify the presumption on the ground of respect for international comity.⁵⁷ This difference may explain some of the blurring, as it makes it more difficult to differentiate the presumption against extraterritoriality from the other canons that also arise out of a concern for international comity.

The most obvious area lacking clarity, however, is the meaning of territoriality—it appears that Australia has yet to have its *Morrison* or *Libman* moment.⁵⁸ One recent article, for example, identified five separate territorial-connection rules in Australian jurisprudence.⁵⁹ The closest to a *Morrison* or *Libman* decision was *Lipohar* in 1999, but that decision did more to muddy the waters than clarify the law. *Lipohar* addressed an interstate criminal conspiracy law. Although “interstate,” “criminal,” and “conspiracy” bring with them specific issues, the confusion with respect to territoriality in this case is generalizable. Six justices issued four separate opinions, and managed in those pages to offer an even larger number of theories of territoriality. Chief Justice Gleeson would apply the law only where a “real connection” to the state existed.⁶⁰ Justices Gaudron, Gummow, and Hayne dodged the thornier theoretical issue because they found that steps in furtherance of the conspiracy had occurred in the forum state.⁶¹ Justice Callinan looked for a “real link.”⁶² And Justice Kirby criticized “the unsatisfactory state of legal authority” and articulated five different, reasonable proposals—(i) adopting a strict requirement of

Zinc Co. of Australasia Ltd (1932) 48 CLR 391 (Austl.) (Dixon, J.). . In addition, although the seminal decision in *Polites v Commonwealth* articulated the *Charming Betsy*-like rule with respect to issues of legislative jurisdiction, 70 CLR 60 (Austl.) (Dixon, J.), cases relying on it tend to address other international-law issues, e.g. *Minister for Immigration & Ethnic Affairs v. Teoh* (1995) 183 CLR 273 (discussing the Convention on the Rights of the Child); *Horta v. Commonwealth* (1994) 181 CLR 183 (Austl.) (discussing customary international law and various international instruments). This leaves a gap in our understanding of what (and how) prescriptive-jurisdictional limits may apply to extraterritorial cases in Australian courts.

57. See, e.g., *Lipohar v. R* (1999) 200 CLR., 485, ¶¶ 94-95 (Austl.) ¶¶ (Gaudron, Gummow & Hayne, JJ.) (concluding that international comity was the “only relevant reason” to adopt the presumption against extraterritoriality); *Morgan v White* (1912) 15 CLR 1 (Austl.) (Barton, J.) (“This rule rests on the presumption that the legislature did not intend to give its enactment an effect which would be inconsistent with international law or with the comity of nations.”) (internal quotation marks omitted); PEARCE & GEDDES, *supra* note 46, § 5.3, at 133.

58. E.g., Dutson, *supra* note 48, at 675-76; *Mynott v Barnard* (1939) 62 CLR 68 (Austl.) (debating various definitions of territoriality).

59. Belinda Wells & Michael Burnett, *When Cultures Collide: An Australian Citizen’s Power to Demand the Death Penalty Under Islamic Law*, 22 SYDNEY L. REV. 5, 26-27 (2000).

60. *Lipohar*, 200 CLR ¶ 38 (Gleeson, C.J.).

61. *Id.* ¶¶ 112-13 (Gaudron, Gummow & Hayne, JJ.).

62. *Id.* ¶¶ 269-73 (Callinan, J.).

locality; (ii) treating conspiracy as an exception; (iii) looking to the location of the victim; (iv) citing common law as a basis of jurisdiction across all states; and (v) adopting *Libman*'s "real and substantial connection" test—before advocating a strict territoriality rule.⁶³ In short, the meaning of territoriality is still an open question in Australian law, and therefore the question of how to avoid the presumption against extraterritoriality is open as well.

D. Comparative Extraterritoriality

The preceding three sections reviewed the American, Canadian, and Australian approaches to extraterritoriality. Before turning to indigenous-peoples law, it is helpful to pause briefly and consider some lessons from this three-part study. This Section, therefore, asks a traditional comparative law question: what can we learn from the way three different countries approach a single issue?

In a meaningful way, American, Canadian, and Australian courts take a very similar approach to extraterritoriality. They all recognize that their legislatures may pass laws that apply abroad, but they enforce a presumption against extraterritoriality for ambiguous statutes and their statutory canons reflect (in some way) international rules of legislative jurisdiction. These similarities should not be understated.

That said, there is a notable difference in the way that these states define "territoriality"—or, in other words, when their courts choose to apply or avoid the presumption. As noted above, Australian courts have not resolved the territoriality question, so the analysis of this issue focuses on the American (*Morrison*) and Canadian (*Libman*) approaches.

Seeking to avoid the presumption turning into "a craven watchdog" when faced with *any* domestic hook, American and Canadian courts have announced rules requiring more: *Morrison* requires a connection within the focus of the statute while *Libman* requires a connection to Canada that is real and substantial. These rules are not coextensive, and the difference between them was not an accident. In reaching its conclusion in *Libman*, the Canadian court considered and rejected the gist-of-the-offense approach,⁶⁴ which bears a striking resemblance to *Morrison*'s focus test. Meanwhile, the real-and-substantial-link test is not unlike the conduct-and-effects test, which *Morrison* expressly rejected.⁶⁵

63. *Id.* ¶¶ 133-36, 173-200 (Kirby, J.).

64. *Libman v. The Queen* [1985] 2 S.C.R. 178 (Can.) [¶¶ 43-64. *See id.* at 208. (suggesting that rules of this type rest on an "unreality").

65. *Morrison v. Nat'l Australia Bank Ltd.*, 130 S.Ct 2869, 2884-86 (2010).

Although only time will tell how courts deploy these standards, some preliminary comments may be made with respect to the connection between these rules and the bases for the presumption. As described above, the presumption against extraterritoriality has been expressly justified on the basis of legislative attention and conflicts with foreign law. In addition, although not a stated justification for the presumption, some scholars have observed that due process interests are central considerations for questions of extraterritoriality.⁶⁶

With these interests in mind, we can begin to assess the *Morrison* and *Libman* rules. One canonical justification of the presumption is legislative attention. Although some have questioned whether legislative attention is a proper justification at all,⁶⁷ it is hard to deny the importance of legislative intent in statutory interpretation. Perhaps the differences in the American and Canadian courts' understanding of legislation explain the divergent approaches in *Morrison* and *Libman*. The "focus" rule suggests that when a body legislates, its attention is on the particular subject at hand. Therefore, domestic attention is linked to the subject matter of the legislation.⁶⁸ The "real-and-substantial interest" test, on the other hand, implies that the legislature is concerned with all things that could affect the state whether or not any particular element occurs within its territorial borders. Under this view, courts should care about the overall connection between the conduct and the state. Further comparative research could assess whether American and Canadian courts take similar views of legislative intent in other areas of law that touch on foreign affairs.

The second canonical justification is sovereignty, represented here by courts' concern about conflicts with foreign laws.⁶⁹ On this score, neither

66. See *supra* note 6. See also *supra* note 7 (citing Florey-Rosen debate, which addresses, among others, the due-process and sovereign interests related to state extraterritoriality).

67. *E.g.*, *R v Foster; Ex parte E. & Austral. S.S. Co.* [1959] HCA 10; (1959) 103 CLR 256, ¶ 12 (Austl.) ¶(Menziez, J.) ("It is my view that . . . the question must always be one of the construction of a grant of power without any presumption that because there are no express words conferring extra-territorial power there is no such power."); Dutson, *supra* note 48, at 683; Born, *supra* note 13, at 74-75.

68. For divergent views on *Morrison's* approximation of legislative intent, compare Lea Brilmayer, *The New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption against Extraterritorial Application of American Law*, 40 SW. L. REV. 655 (2011) (criticizing the focus rule) and John H. Knox, *The Unpredictable Presumption Against Extraterritoriality*, 40 SW. L. REV. 635 (2001) (same) with William S. Dodge, *Morrison's Effects Test*, 40 SW. L. REV. 687 (2011) (praising the focus rule)..

69. This justification tracks the notion of sovereign equality among states, which represents a fundamental principle of international law and foreign relations. See, e.g., U.N. Charter art. 2, ¶ 1 ("The Organization is based on the principle of the sovereign equality of all its Members."); *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812) (referring to the "full and absolute territorial jurisdiction being alike the attribute of every sovereign" and the "perfect equality and

the *Morrison* nor the *Libman* rule is particularly well-attuned to the sovereignty of other states. These rules do not take into account the existence or degree of conflict with foreign law,⁷⁰ nor do they weigh the strength of a foreign state's connection to the case⁷¹ or permit any deference to the views of foreign states or the diplomatic branches of their own governments.⁷² Indeed, as suggested in the preceding paragraph, these rules may be proxies for *domestic* sovereign interests rather than *foreign* ones. That said, it is not impossible to comment on foreign sovereign interests. If we measure avoidance of foreign law conflicts and respect for foreign sovereignty by the number of cases excluded from domestic courts, then it appears that *Morrison* will win out. One likely reading of the decisions treats the *Morrison* rule as a subset of the *Libman* rule—certainly a state could have a real and substantial interest even if the focus is extraterritorial; but if the focus of a statute is territorial, then courts presumably would find that the state has a real and substantial interest as well. So, on this crude measure, *Morrison* better insulates foreign state interests by excluding more extraterritorial cases from the sweep of domestic law. This is not to say, however, that either *Morrison* or *Libman* tracks foreign interests particularly well.

The last interest is due process. Due process in the context of extraterritoriality comes down to notice. Although neither American nor Canadian courts expressly invoke due process in this connection, a presumption of extraterritoriality tracks this norm by protecting defendants from the application of laws of which they have no notice. If the measure of due process protection is the number of defendants excluded from a law's reach, then, for the same reasons mentioned with respect to sovereignty, *Morrison* will make a better shield.⁷³ However, if we ask which rule better approximates our due process instincts, a different picture

absolute independence of sovereigns”).

Notably, Justice Blackmun observed that this concern for conflict with foreign law, at least in one case, led to a conflict with *international* law. See *Sale v. Haitian Centers Council*, 509 U.S. 155, 207 (1993) (Blackmun, J., dissenting) (discussing the application of the Immigration and Nationality Act to Haitian refugees interdicted by the United States).

70. Cf. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993) (stating that the court would dismiss a case if there was a “true conflict” between U.S. and foreign law).

71. Cf. *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 607 (9th Cir. 1976) (calling for courts to assess strengths of U.S. and foreign interests).

72. Cf. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2291 (2010) (conceding that the State Department has a role in foreign-official immunity cases even after the Foreign Sovereign Immunities Act).

73. In addition, in these circumstances, the international-law canon and notions of international comity may provide a backstop for unreasonable assertions of jurisdiction by the courts. How rigorously courts in the United States and Canada enforce these rules also will require further evaluation.

develops. One could create a convincing due process account of *Libman*—as particular conduct develops a stronger connection to a state, a potential defendant should expect an increased likelihood that her behavior would be subject to that state’s laws. The *Morrison* rule lacks this correlation. Whether or not a defendant’s connection to the United States falls within the focus of the statute says nothing of whether a defendant would imagine that she is subject to U.S. law.⁷⁴ Of course, this analysis is limited to cases where the law is ambiguous about its geographic scope, but those are the only laws whose reach courts could reasonably limit by applying canons of construction (as opposed to, for example, constitutional notions of due process). This Article will return to the interests that underpin extraterritoriality regimes in Part III’s comparison of foreign- and native-affairs law.

Turning away from *Morrison* and *Libman*, distinctions between extraterritoriality in criminal and civil cases also merit attention. In criminal cases, lower federal courts in the United States seem to be more willing to “overcome” the presumption—thereby allowing the government to apply a criminal statute abroad—than they are in civil cases brought by private litigants.⁷⁵ On the other hand, in Australia there is some suggestion that the presumption may be stricter in criminal cases.⁷⁶ The twin interests of sovereignty and due process provide different assessments of these outcomes. If one is most concerned with a respect for foreign sovereignty, then a more permissive rule in criminal cases may be preferred because those cases are brought by the branch of government explicitly charged with foreign affairs; civil cases are brought by private parties, who presumably have less concern for international comity.⁷⁷ Alternatively, the due process concern is more acute when liberty interests are at stake as they are in criminal cases. On this view, courts should be more cautious when extending those laws extraterritorially.⁷⁸

74. On the related topic of personal jurisdiction, U.S. courts permit tag service when a defendant has no connection to the jurisdiction except merely passing through it, *e.g.* *Burnham v. Superior Court of Cal.*, 495 U.S. 604 (1990), leading to the (in)famous case of personal service on an airplane flying through the airspace of the forum state. *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959).

75. See Clopton, *supra* note 16, at 160–72 (collecting and categorizing cases). The criminal cases generally rely on the Supreme Court’s decision in *United States v. Bowman*, 260 U.S. 94, 97–98 (1922), and look to the nature of the offense, the statute’s purpose, or policy considerations.

76. See PEARCE & GEDDES, *supra* note 46, § 9.16; Dutson, *supra* note 48, at 668.

77. See Clopton, *supra* note 16, at 181–83 (discussing how courts could use the justifications of the presumption to support a more lenient reading in criminal cases). Indeed, this consideration seemed to have convinced Justice Stevens to consider different rules depending on whether the government brought the case. See *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869, 2894 n.12 (2010) (Stevens, J., concurring in the judgment).

78. See, *e.g.*, *Pasquantino v. United States*, 544 U.S. 349, 383 (2005) (Ginsburg, J., dissenting)

Finally, turning to a more practical issue, this Part also highlights the different avenues by which the presumption can be introduced. Recall that the Canadian Criminal Code and various Australian interpretation acts codified the common law presumption against extraterritoriality. Not only may such a legislative approach clarify murky areas of law, it also puts the onus on the political branches to define the rules of the road. Particularly for a topic like statutory interpretation, which is by definition a search for the intent of the legislature, it makes sense for the legislature to announce the terms.⁷⁹ The United States has no statutory extraterritoriality rules; Canada has only codified the presumption for criminal cases; and none of the countries surveyed have defined territoriality in a statute—*i.e.*, answering the *Morrison* and *Libman* question. This idea is also taken up in more detail below, after a survey of the three states' approaches to the analogous question of extranationality.

II. EXTRANATIONALITY

As described in the Introduction, extranationality is the analog to extraterritoriality for indigenous peoples: the extent to which a country's laws apply to native peoples and territory. Beyond the facial analogy between two areas of transborder law, the reasons to think about the connection between international legal issues and native-peoples law run deep.

To begin with, indigenous peoples law in the Western world has its roots in international law. In the United States, relations with the Indian tribes during the colonial and early republican periods “were largely treated as matters of foreign relations.”⁸⁰ Chief Justice Marshall's famous trilogy of Indian law opinions reflected international law roots,⁸¹ though he

(applying the rule of lenity to reject the application of the wire fraud statute to frauds against foreign governments).

79. A related concern with legislative clarity is the manner in which states express extraterritorial intent in individual laws. For example, the extraterritorial provision in the old Canadian war crimes law was written in a manner that permitted conflicting interpretations. *See R. v. Finta*, [1994] 1 S.C.R. 701 (Can.) (discussing Canadian Criminal Code § 7(3.71)). The Canadian Parliament adopted clearer language when it updated its laws to conform to the Rome Statute of the International Criminal Court. *See Crimes Against Humanity & War Crimes Act*, S.C. 2000, c. 24, §§ 6, 8.

80. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 30 (2002). For Professor Cleveland's able summary of U.S. Indian law and its connection to international law, see *id.* at 25–81.

81. *Johnson v. M'Intosh*, 21 U.S. (8. Wheat.) 543 (1823) (applying the law of nations to determine the rights of the United States); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (discussing Cherokee sovereignty in the context of international sovereignty); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (discussing treaty rights in light of international law).

stopped short of recognizing the tribes as the equivalent of sovereign states. Instead, Marshall concluded that the tribes were “domestic dependent nations,” or “wards” with the United States as their “guardian.”⁸² In any event, during its first century, the United States conducted business with the Indian tribes through treaties and, as Professor Wiessner has shown, applied to those treaties the same requirements and courtesies that were applied to international treaties.⁸³ Canada also engaged in significant treaty making with its native peoples,⁸⁴ and international law was central to Australian conceptions of early interactions with aboriginals.⁸⁵

The concept of “plenary” or “inherent” powers further links foreign affairs to Indian law. Although these terms have taken on multiple meanings, I use them here to identify the area of national authority derived from the United States’ status as a sovereign nation.⁸⁶ The U.S. Supreme Court has applied the plenary powers doctrine to immigration, overseas territories, foreign affairs, and Indian law.⁸⁷ With respect to Indian law, courts seeking constitutional roots for the plenary power have looked, at various times, to the Indian Commerce Clause, war-making power, and

82. *E.g.*, *Cherokee Nation*, 30 U.S. at 16–17 (1831) (“The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term foreign nation is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else. The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. . . . Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. . . . Their relation to the United States resembles that of a ward to his guardian.”).

83. Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 569–80 (1995). The United States stopped signing treaties with Indian tribes in 1971. *See* 25 U.S.C. § 71 (2006); George William Rice, *Indian Rights*, 25 U.S.C. § 71: *The End of Indian Sovereignty or a Self-Limitation of Contractual Ability?*, 5 AM. INDIAN L. REV. 239 (1977).

84. *See, e.g.*, Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 66–70 (1999). *But see* R. v. Sioui, [1990] 1 S.C.R. 1025, 1038 (Can.) (“[A]n Indian treaty is an agreement *sui generis*, which is neither certified nor terminated according to the rules of international law.”).

85. *E.g.*, *Mabo v. Queensland (No. 2)* (1992) 175 C.L.R. 1 (Austl.). However, unlike in the United States and Canada, no aboriginal treaties were signed in Australia. *See infra* Section II.C.

86. *See, e.g.*, Cleveland, *supra* note 80, at 7–10.

87. *See, e.g., id.*; Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 37 (1996) (“[P]lenary power in federal Indian law, like that in immigration law, arose from conceptions of the inherent sovereignty of nations under international law.”).

treaty power—all of which evoke foreign relations.⁸⁸ Professor Frickey perceptively associated the plenary powers connection not only with its sources of authority but also with the characterization of native peoples as “foreigners.”⁸⁹

Recalling these international law roots, modern activists have turned to international law to protect native interests and redress native grievances. In particular, international human rights law has become an important tool among scholars and practitioners of Indian law.⁹⁰ Native rights advocates have tried to use international law in both domestic and international tribunals to promote native peoples’ rights.⁹¹

In sum, in the words of the father of American federal Indian law, Felix Cohen: “[W]e must recognize that our Indian law originated, and can still be most clearly grasped, as a branch of international law.”⁹² Yet, scholars have not taken full advantage of the connections between these fields in attempting to address specific, overlapping questions that arise in

88. See, e.g., Natsu Taylor Saito, *Asserting Plenary Power Over the “Other”: Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL’Y REV. 427, 441–43 (2002).

89. Frickey, *supra* note 87. Despite the criticism, Professor Frickey also acknowledges that this connection is not all bad: “The most protective aspects of federal Indian law have thus viewed Indians as having group rights—indeed, group sovereignty.” *Id.* at 48.

90. See, e.g., ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS AND THE LEGAL HISTORY OF RACISM IN AMERICA* 161–96 (2005); S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2d ed. 2004); Nigel Bankes, *International Human Rights Law and Natural Resources Projects within the Traditional Territories of Indigenous Peoples*, 47 ALTA. L. REV. 457 (2010); John D. Smelcer, *Using International Law More Effectively to Secure and Advance Indigenous Peoples’ Rights: Towards Enforcement in U.S. and Australian Domestic Courts*, 15 PAC. RIM L. & POL’Y J. 301 (2006); Jonathan P. Vuotto, *Awas Tingni v. Nicaragua: International Precedent for Indigenous Land Rights?*, 22 B.U. INT’L L. J. 219 (2004); *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751 (2003); Wiessner, *Rights and Status of Indigenous Peoples*, *supra* note 84; Frickey, *supra* note 87; Russell Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33 (1994); Robert A. Williams, Jr., *Frontier of Legal Thought III: Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World*, 1990 DUKE L.J. 660. *But see* Walter K. Olson, Maimon Schwarzschild & Carlos T. Bea, Panel Discussion: International Law and Indian Law, Federalist Society: Third Annual Western Conference (Jan. 24, 2009), http://www.fed-soc.org/publications/pubid.1258/pub_detail.asp (lamenting this development).

91. Indeed, some instruments are specifically addressed to indigenous rights. *E.g.*, American Declaration on the Rights of Indigenous Peoples, Inter-Am. Comm’n H.R., Annual Report of the Inter-American Commission on Human Rights 1995, OEA/Ser.L/V/II.91, doc. 7, (1996); Draft United Nations Declaration on the Rights of Indigenous Peoples, E.S.C. Res. 1994/45, U.N. ESCOR, 46th Sess., U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994); Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991).

92. Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L. J. 1, 17 (1942).

both the international and native peoples contexts.⁹³ The paucity of scholarship on this connection is one motivating factor for this project.

With this background in mind, this Part considers the indigenous peoples analogy to extraterritoriality across three states.⁹⁴ As described below, the United States and Canada have bodies of law that address this “extranationality” question.⁹⁵ Both states’ courts have adopted something akin to a presumption *in favor of* the application of domestic law to native peoples and their territory. But the story is far more complex than this pithy mantra, and these complexities reveal insights on comparative questions and offer recommendations to policymakers interested in either international or indigenous issues.⁹⁶

A. United States

We begin our analysis of extranationality with the United States. Given Congress’ plenary power in this field, there is no question that it has legislative jurisdiction over the tribes if it chooses to exercise it.⁹⁷ In this way, the comparison to extraterritoriality is a match.

With respect to the interpretation of ambiguous statutes, the Supreme Court used a presumption against extranationality in *Elk v. Wilkins*, remarking that “[g]eneral acts of Congress did not apply to Indians, unless

93. In this light, Professor Cleveland recently remarked: “Until recently, scholars had generally overlooked the interrelationship between the doctrines of sovereignty relating to Indians, aliens, and territories, and had failed to systematically connect these separate doctrinal areas to modern foreign relations jurisprudence.” Cleveland, *supra* note 80, at 13.

94. Interestingly, in *Worcester v. Georgia*, Chief Justice Marshall expressly connects Indian law to extraterritoriality, referring to the principle that “[t]he extra-territorial power of every legislature being limited in its action to its own citizens or subjects, the very passage of this act is an assertion of jurisdiction over the Cherokee nation, and of the rights and powers consequent on jurisdiction.” 31 U.S. (6 Pet.) 515, 542 (1832).

95. For reasons described in more detail below, Australia’s approach is less useful in this comparison and therefore it is discussed only briefly. See *infra* Part II.C.

96. For other examples of related comparative indigenous-peoples law, see A. Dan Tarlock, *Tribal Justice and Property Rights: The Evolution of Winters v. United States*, 50 NAT. RESOURCES J. 471 (2010) (comparing U.S. and Australian approaches to aboriginal land rights) [hereinafter “Tarlock, *Tribal Justice*”]; Peter Manus, *Indigenous Peoples’ Environmental Rights: Evolving Common Law Perspectives in Canada, Australia, and the United States*, 33 B.C. ENVTL. AFF. L. REV. 1, 13-17, 26-31 (2006) (comparing Canadian, Australian, and American approaches to national regulation and environmental rights); Edo Banach, *The Roma and the Native Americans: Encapsulated Communities within Larger Constitutional Regimes*, 14 FLA. J. INT’L L. 353 (2002) (comparing U.S. Indian law and Roma rights in the European Union); A. Dan Tarlock, *Australian and United States Law of Aboriginal Land Rights: A Comparative Perspective*, 1 VT. J. ENVTL. L. 1 (1998) [hereinafter “Tarlock, *A Comparative Perspective*”]; Bradford W. Morse, *Indigenous Renascence: Law, Culture & Society in the 21st Century: Common Roots but Modern Divergences: Aboriginal Policies in Canada and the United States*, 10 ST. THOMAS L. REV. 115 (1997). None of these draw specific connections to analogous international-law questions.

97. See *supra* notes 86–89.

so expressed as to clearly manifest an intention to include them”⁹⁸—a presumption against extranationality. However, the modern view of statutory interpretation takes a nearly opposite approach.

In *Federal Power Commission v. Tuscarora Indian Nation*, the Supreme Court articulated a presumption *in favor* of extranationality.⁹⁹ The tribe challenged New York’s taking of land for a power plant, but the court concluded that the Federal Power Act authorized the taking.¹⁰⁰ The Court went further: “it is now well settled by many decisions of the Court that a general statute in terms applying to all persons includes Indians and their property interests.”¹⁰¹ In dissent, Justice Black argued that the Court’s decision violated the terms of the Act and ran afoul of both Indian treaties and the policy of preserving reservations for tribal use.¹⁰² Justice Black closed with an oft-quoted jab at the majority: “Great nations, like great men, should keep their word.”¹⁰³

Although courts have been wont to invoke Justice Black’s rebuke,¹⁰⁴ it was *Tuscarora*’s dictum on statutes of general applicability that has had the more profound effect on U.S. law. Without further direct guidance from the Supreme Court, the courts of appeals have run with *Tuscarora* as a presumption of general applicability, tempered by exceptions derived from other Indian law precedents. Most prominently, the Ninth Circuit’s decision in *Coeur d’Alene* reconciled *Tuscarora*’s default presumption in favor of extranationality with other Indian law decisions to articulate a new rule:

98. 112 U.S. 94, 100 (1884).

99. 362 U.S. 99 (1960).

100. *Id.* at 111–15.

101. *Id.* at 116 (referencing *inter alia* Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418 (1935) and *Okl. Tax Comm’n v. United States*, 319 U.S. 598 (1943)). With regard to state law, the Supreme Court has said that state laws typically do not apply on reservations absent express Congressional language to the contrary. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987). See *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980) (“[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.”). See also 18 U.S.C. § 1162 (2006) (providing for state criminal jurisdiction for certain territories in certain states); 28 U.S.C. § 1360 (2006) (same for civil actions to which Indians are parties); Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U.L. REV. 1627 (1998). However, the Court also announced an exception for “pure regulations,” allowing states to regulate conduct without generating revenue even in the face of an Indian treaty. See, e.g., *Puyallup Tribe v. Dep’t of Game of Wash.*, 391 U.S. 392, 398–401 (1968); *Tulee v. Washington*, 315 U.S. 681, 683–85 (1942); *United States v. Smiskin*, 487 F.3d 1260, 1269–70 (9th Cir. 2007). These cases address the prescriptive-jurisdiction issue, not questions of statutory interpretation.

102. *Fed. Power Comm’n*, 362 U.S. at 124–42 (Black, J., dissenting).

103. *Id.* at 142 (Black, J., dissenting).

104. E.g., *Hagen v. Utah*, 510 U.S. 399, 422 (1994) (Blackmun, J., dissenting); *CIA v. Sims*, 471 U.S. 159, 175 n.20 (1985); *United States v. Ortiz*, 315 F.3d 873, 887 (8th Cir. 2002); *American Cetacean Soc’y v. Baldrige*, 768 F.2d 426, 449 (D.C. Cir. 1985) (Oberdorfer, J., dissenting).

laws of general applicability apply to tribes unless “(1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations”¹⁰⁵ Many courts of appeals have adopted this formulation and applied it to civil and criminal cases involving native peoples.¹⁰⁶

To review, Congress has the power to legislate extranationally. But if it does not specify whether a particular statute applies to native peoples, *Tuscarora/Coeur d’Alene* not only apply a presumption in favor of extranationality, but also formalize exceptions that recognize tribal sovereignty,¹⁰⁷ pre-existing treaty rights,¹⁰⁸ and indicia of congressional

105. *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (internal quotation marks omitted) (modification in original).

106. *E.g.*, *Menominee Tribal Enters. v. Solis*, 601 F.3d 669, 671–74 (7th Cir. 2010) (Occupational Safety and Health Act (“OSHA”)); *Solis v. Matheson*, 563 F.3d 425, 429–38 (9th Cir. 2009) (Fair Labor Standards Act (“FLSA”)); *United States v. Mitchell*, 502 F.3d 931, 947–48 (9th Cir. 2007) (criminal); *Taylor v. Ala. Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032, 1034–37 (11th Cir. 2001) (*per curiam*) (42 U.S.C. § 1981); *United States v. White*, 237 F.3d 170, 173–74 (2d Cir. 2001) (criminal); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177–82 (2d Cir. 1996) (OSHA); *United States v. Funmaker*, 10 F.3d 1327, 1330–32 (7th Cir. 1993) (criminal). The Eighth Circuit seemed to follow the reasoning of *Coeur d’Alene* without citing its rule expressly. *See EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 248–51 (8th Cir. 1993). Various district courts have also relied on the *Coeur d’Alene* approach. *See, e.g.*, *NLRB v. Fortune Bay Resort Casino*, 688 F. Supp. 2d 858, 865–71 (D. Minn. 2010); *Pearson v. Chugach Gov’t Servs., Inc.*, 669 F. Supp. 2d 467, 474–77 (D. Del. 2009); *United States v. Fox*, 557 F. Supp. 2d 1251, 1257–59 (D. N.M. 2007). In *San Manuel Indian Bingo & Casino v. NLRB*, the D.C. Circuit declined to expressly adopt the *Coeur d’Alene* formulation, but reached a result consistent with *Tuscarora*. 475 F.3d 1306, 1311–15 (D.C. Cir. 2007) (applying the NLRA to tribal casino). For a discussion of the Tenth Circuit’s twist on these approaches, *see infra* note 117.

107. *Coeur d’Alene*, 751 F.2d at 1116 (“[T]he tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes.”). *See Reich*, 95 F.3d at 179–80; *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1463 (10th Cir. 1989). The tribal-governance exception derives from courts’ recognition of innate sovereignty of domestic dependent nations. *E.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978) (“Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government. Although no longer possessed of the full attributes of sovereignty, they remain a separate people, with the power of regulating their internal and social relations.”) (citations omitted); *United States v. Farris*, 624 F.2d 890, 893 (1980) (citing *Santa Clara Pueblo* for this proposition); *Coeur d’Alene*, 751 F.2d at 1116 (citing *Farris*). But this exception is limited, since the “right of tribal self-government is ultimately dependent on and subject to the broad power of Congress.” *E.g. Smart v. State Farm Ins. Co.*, 868 F.2d 929, 935 (7th Cir. 1989) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)). The Ninth Circuit, for example, has described its limited scope by noting that it applies “only in those rare circumstances where the immediate ramifications of the conduct are felt primarily within the reservation by members of the tribe and where self-government is clearly implicated.” *Snyder v. Navajo Nation*, 382 F.3d 892, 895 (9th Cir. 2004).

intent.¹⁰⁹ In this way, the *Tuscarora/Coeur d'Alene* rule serves the same function as the presumption against extraterritoriality—disambiguating statutes that do not specify their reach—albeit by establishing both a default rule and formal exceptions to it.¹¹⁰

Tracking the discussion of extraterritoriality, the next step is the *Morrison/Libman* question: when do we apply the extranationality presumption? In *Libman*, the court remarked that the facts of the case were “here and there,” and then articulated a rule to sort future cases as either here *or* there (thus avoiding the presumption or applying it). For extranationality, we must sort cases into those to which the exceptions for self-government, treaty rights, and congressional intent apply, and those to which they do not. For example, a court could say that the exceptions to the rule are not available if conduct occurs or effects are felt outside the reservation or by non-tribal members. Alternatively, a “focus test” could ask whether the events comprising the focus of the statute occurred on- or off-reservation.

A review of the cases in which federal courts have wrestled with this question does not reveal a single, coherent rule.¹¹¹ While extraterritoriality

108. *Coeur d'Alene*, 751 F.2d at 1117 (“We also ‘presume[] that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws, unless it makes specific reference to Indians.”) (quoting *Farris*, 624 F.2d at 893). The treaty exception is grounded in this Supreme Court’s admonition that “[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights.” *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 690 (1979). However, courts have required that the Indian tribe identify a specific treaty right that would be violated by the application of the statute. *E.g.*, *Menominee Tribal Enters.*, 601 F.3d at 671–74; *Solis v. Matheson*, 563 F.3d 425, 343–48 (9th Cir. 2009); *United States v. Smiskin*, 487 F.3d at 1264–70; *Smart*, 868 F.2d at 934–35 (7th Cir. 1989). Note that the treaty exception allowed the *Coeur* court to reconcile its holding with *Navajo Forest*, since that decision eschewed *Tuscarora*’s presumption in the face of a conflict treaty right. *Coeur d'Alene*, 751 F.2d at 1117 (quoting *Navajo Forest*, 692 F.2d at 711).

109. *Farris*, 624 F.2d at 893–94 (asking the tribe to prove congressional intent by “legislative history or some other means”). *See, e.g.*, *United States v. Baker*, 63 F.3d 1478, 1485–86 (9th Cir. 1995) (examining legislative history, including House Conference Report No. 95-1778 (1978)).

110. Professor Bryan H. Wildenthal has laid out an excellent case for why courts should reject the *Tuscarora-Coeur d'Alene* approach, relying instead on a series of Supreme Court pronouncements since the *Tuscarora* decision. Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413 (2007). This author has no quarrel with Professor Wildenthal that there is a good argument that the Supreme Court could reject the *Coeur d'Alene* approach if given the opportunity. But to date, it has not done so, and courts of appeals continue to cite this line favorably. *E.g.*, *Menominee Tribal Enters. v. Solis*, 601 F.3d 669, 671–74 (7th Cir. 2010). Furthermore, as a basis for new approaches to transborder law, *Coeur d'Alene* is equally useful whether or not it is wholly endorsed by the Supreme Court.

111. The Second Circuit’s summary of its holding in *Reich v. Mashantucket Sand & Gravel* highlights the complicated factors that make up the “mosaic” of this inquiry: “These separate tiles—the nature of [the tribal entity’s] work, its employment of non-Indians, and the construction work on a hotel and casino that operates in interstate commerce—when viewed as a whole, result in a mosaic that is

is necessarily a question of “location,” territory appears to be a relevant—but not conclusive—factor for extranationality.¹¹² Indeed, some decisions expressly hold that off-reservation conduct does not defeat a tribal defendant’s ability to invoke an exception to the presumption.¹¹³ Similarly, tribal identity—which could track notions of nationality that also apply to international prescriptive jurisdiction—is important but not dispositive.¹¹⁴

distinctly inconsistent with the portrait of an Indian tribe exercising exclusive rights of self-governance in purely intramural matters.” 95 F.3d 174, 181 (2d Cir. 1996).

112. *E.g.*, *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 984–86 (10th Cir. 2005) (Lucero, J., concurring) (framing the issue as whether the Highway Beautification Act applies to “Indian lands”); *Navajo Nation*, 382 F.3d at 892 (9th Cir. 2004) (noting the significance that the primary conduct and effects were located on-reservation, but also recognizing that some off-reservation conduct would not defeat the exception); *Reich v. Great Lakes Indian Fish & Wildlife Comm’n*, 4 F.3d 490, 501-02 (7th Cir. 1993) (Coffey, J., dissenting) (arguing the significance of off-reservation claims); *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 250 (8th Cir. 1993) (“[T]he ADEA does not apply to the narrow facts of this case which involve a member of the tribe, the tribe as an employer, and *on the reservation* employment.”) (emphasis added); *Phillips Petroleum Co. v. United States EPA*, 803 F.2d 545, 546-50 (10th Cir. 1986) (discussing whether an EPA rule applies to “Indian lands”).

Territory plays a vexing role in other Indian law issues as well. In tax cases, the Supreme Court has noted that the interest balancing test applied to on-reservation taxation in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), does not apply to taxation of off-reservation activity. *See Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 112 (2005) (commenting on the “significant geographical component” of Indian sovereignty) (citation omitted). Meanwhile, as the D.C. Circuit observed, the Supreme Court’s jurisprudence on state law and on-reservation activity treats the location of the activity as a primary consideration, but “this consideration was expressly tied to preserving tribal self-government, which the court defined in terms of the right of Indians to be ruled by their own laws.” *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1313–14 (D.C. Cir. 2007). As noted by Professor Florey, the Court has tended to deemphasize territoriality in Indian law cases. Florey, *Indian Country*, *supra* note 3.

113. *E.g.*, *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) (holding that treaty rights preclude the application of a federal statute to tribal members’ transport of cigarettes even though some of the transport occurred off-reservation); *Navajo Nation*, 382 F.3d at 892 (9th Cir. 2004) (holding that off-reservation conduct does not defeat the exception).

114. *E.g.*, *Navajo Nation*, 382 F.3d at 894 (9th Cir. 2004) (discussing the significance of primary Indian plaintiffs but also holding that presence of non-Indian plaintiffs does not defeat the exception); *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1081 (9th Cir. 2001) (considering the dispute to be “intramural because it involved the tribal government and a member—“it does not concern non-Karuks or non-Indians as employers, employees, customers, or anything else.”); *Reich*, 95 F.3d at 176-77 (2d Cir. 1996) (suggesting that presence of non-Indian employees countenances against, but does not necessarily preclude, the application of the intramural exception); *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 250 (8th Cir. 1993) (“[T]he ADEA does not apply to the narrow facts of this case which involve a *member of the tribe*, the tribe as an employer, and on the reservation employment.”) (emphasis added). *See also Duro v. Reina*, 495 U.S. 676, 684–88 (1990) (holding that tribal criminal jurisdiction did not apply to non-members and collecting cases on other topics in Indian law drawing the member/non-member distinction); Judith Resnik, *Symposium: Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of Marbury v. Madison to Tribal Courts’ Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77, 116 (2004).

With respect to tribal identity, courts have been asked to apply the *Coeur d’Alene* rule to (a) tribal members, *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007); *United States v. Funmaker*, 10 F.3d

Moreover, none of the cases discussing *Tuscarora* and *Coeur d'Alene* inquire into due process considerations. Instead, a review of the case law suggests a different theme: courts tend to apply *Tuscarora/Coeur d'Alene* to cases that demonstrate a connection to the tribe as a metaphysical, sovereign, self-governing entity. Each of the *Coeur d'Alene* exceptions tracks the courts' understanding of native sovereignty—an understanding under which limited tribal sovereignty is tied not to territory or nationality, but instead to the necessity of the power to “protect tribal self-government” and to “control internal relations.”¹¹⁵

Turning first to the intramural affairs exception, courts have specifically linked this rule to notions of sovereignty and self-government.¹¹⁶ For this reason, some off-reservation conduct or effects, or

1327 (7th Cir. 1993); (b) tribal governments, *Snyder v. Navajo Nation*, 382 F.3d 892 (9th Cir. 2004); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (en banc); *Taylor v. Ala. Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032 (11th Cir. 2001) (per curiam); and (c) tribal businesses, *Menominee Tribal Enters. v. Solis*, 601 F.3d 669 (7th Cir. 2010); *Florida Paralegic Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126 (11th Cir. 1999); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996); *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246 (8th Cir. 1993); *Lumber Industry Pension Fund v. Warm Springs Forest Products Indus.*, 939 F.2d 683 (9th Cir. 1991).

115. *Mont. v. United States*, 450 U.S. 544, 564 (1981). Over the years, the Supreme Court has referred to tribal sovereignty with a range of modifiers, such as “quasi-sovereign,” *Morton v. Mancari*, 417 U.S. 535, 554 (1974), “retained sovereignty,” *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (Marshall, J., dissenting), and “primeval sovereignty,” *United States v. Wheeler*, 435 U.S. 313, 328 (1978).

116. The Ninth Circuit, which expresses the dominant approach to this issue, invokes the exception for intramural affairs only in cases where the tribe's self-governance is impinged. *Snyder v. Navajo Nation* highlights this point. 382 F.3d at 896 (9th Cir. 2004). Tribal members employed as tribal law-enforcement officers sued their employer under the FLSA. The Court ultimately held that the FLSA did not apply, invoking the exception for purely intramural matters. The court noted that this exception usually applies only “where the immediate ramifications of the conduct are felt primarily within the reservation by members of the tribe and where self-government is clearly implicated.” *Id.* at 895. However, in this case, the court was willing to look past the off-reservation conduct because of the centrality of self-government: “[S]uch services performed off-reservation nevertheless relate primarily to tribal self-government and remain part of exempt intramural activities. . . . Employed by an arm of the tribal government, officers serve the tribe's governmental need for law enforcement to promote the welfare of the tribe and its members.” *Id.* at 896 (citation omitted). Similarly, the court also overcame the presence of non-Indian plaintiffs (employees) because the officers “serve the interests of the tribe and reservation governance.” *Id.* In sum, despite the presence of non-Indian plaintiffs and off-reservation conduct, the court applied *Coeur d'Alene's* first exception to protect the tribe's right to self-government. See also *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1080 (9th Cir. 2001) (“The Housing Authority thus functions as an arm of the tribal government and in a governmental role. It is not simply a business entity that happens to be run by a tribe or its members, but, rather, occupies a role quintessentially related to self-governance.”).

Interestingly, the Supreme Court's dalliance with shielding states and localities from the FLSA for traditional government functions (e.g. police) lasted less than decade, expiring with *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)). So at least the Ninth Circuit (and the Seventh Circuit in *Reich v. Great*

some connections to non-Indians, do not doom the claim to this exception. In the words of *Morrison*, what a craven watchdog this exception would be if it retreated to its kennel whenever some non-Indian activity was involved in the case. Sovereignty and internal affairs, therefore, are the hallmarks of this exception.¹¹⁷

The same emphasis on sovereignty and internal affairs defines the second exception—treaty rights. The elevation of treaty rights necessarily reflects the tribe’s sovereign authority, differentiating the tribe from a run-of-the-mill private entity. Some courts have held that treaty rights (and hence the exception) inure only to the tribe as a whole, not to individual tribe members.¹¹⁸ Again, native sovereignty is limited—deriving not from territory or nationality but from self-governance and sovereignty, and always subject to the express will of Congress. This is not to say that individual rights are disserved by these approaches—more on that later—but only that courts have relied on notions of sovereignty to craft the exceptions.

B. Canada

Like the United States, Canada has a native population, a reserve system, and a legal approach to extranationality.¹¹⁹ Canada’s 1867 Constitution Act gave Parliament exclusive authority over “Indians, and

Lakes Indian Fish & Wildlife Comm’n, 4 F.3d 490 (7th Cir. 1993)) believes that the *Tuscarora* rule provides more insulation for tribal affairs than the Tenth Amendment provides to the states on the same issue.

117. The Tenth Circuit, meanwhile, has framed the *Tuscarora/Coeur d’Alene* test in a different way, applying the three exceptions only where the tribe is acting in a proprietary (rather than sovereign) capacity. See *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1293 (10th Cir. 2010) (Briscoe, J., concurring in part and dissenting in part); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (en banc). This alternative formulation, though, does not reflect a fundamental disagreement between the circuits. Instead, the issue here is the blurry line between cases that touch on a tribe’s exclusive rights of self-governance in purely intramural matters (*Coeur d’Alene* #1) and tribal immunity. All of these courts of appeals recognize a zone of tribal affairs that must be protected, and they define that zone with reference to tribal sovereignty and self-government, but they get there in different ways.

118. See, e.g., *United States v. Fox*, 557 F. Supp. 2d 1251 (D. N.M. 2007) (rejecting defendant’s individual claim to treaty right in felon-in-possession prosecution); *United States v. Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d 1288 (7th Cir. 1974) (same). But see *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) (applying the treaty-rights exception to individual tribal members). For a discussion of tribal, rather than individual rights in federal Indian law generally, see, e.g., Frickey, *Domesticating Federal Indian Law*, *supra* note 87; Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 379 (1989).

119. See, e.g., *Indian Act*, R.S.C., 1985, c. I-5, § 2 (Can.); Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1321-22 (1993) (discussing Canadian Indian law). As above, tribal immunity is not addressed here.

Lands reserved for the Indians.”¹²⁰ And the historic default rule was that Canadian laws of general application applied to native populations—another presumption in favor of extranationality.¹²¹

The 1982 Constitution Act added a new dimension to this default presumption. Specifically, Section 35(1) constitutionalized aboriginal rights: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”¹²² Not only does constitutionalization protect these substantive rights from extinguishment,¹²³ it also limits the power of the federal and provincial governments to infringe upon them. In so doing, it limits the presumption in favor of extranationality. How exactly Section 35 changed Canada’s approach to extranationality was spelled out in the four-step analysis of the famed *Sparrow* decision and its progeny.

The first two steps in the *Sparrow* approach define the relevant substantive rights. Step one requires courts to determine if an aboriginal or

120. Constitution Act, 1867, 30 & 31 Vict, c.3 (U.K.) § 91(24) (Can.).

121. *E.g.*, *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010, ¶ 179 (Can.); *R. v. Francis*, [1988] 1 S.C.R. 1025 (Can.); *Four B Mfg. Ltd. v. United Garment Workers of Am.*, [1980] 1 S.C.R. 1031 (Can.). In addition, at least before the 1982 Constitution, the federal government could extinguish aboriginal rights through “clear and plain” enactments. *E.g.*, *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶ 173; *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (Can.) (citing *inter alia* *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C. 700 (U.K.)).

Canadian courts originally held that provincial laws of general application did not apply to cases touching on a core of Indianness. These courts interpreted the Constitution as excepting native populations and territories from provincial control; through the notion of “interjurisdictional immunity,” the provinces may not legislate on topics expressly reserved for Parliament. *E.g.*, *Delgamuukw*, 3 S.C.R. 1010, ¶ 179; *R. v. Sutherland*, [1980] 2 S.C.R. 451 (Can.). *See also* Kerry Wilkins, *Of Provinces and Section 35 Rights*, 22 *DALHOUSIE L.J.* 185, 207–208 (1999). Even in this period, Canadian courts permitted provincial laws of general application to infringe—but not extinguish—aboriginal rights even prior to the Indian Act. Following the passage of the Indian Act, the Canadian courts lifted the “core of Indianness” exception to the default rule for provincial laws. *Indian Act*, *supra* note 119 § 88 (Can.) (“Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province . . .”). *See* JOHN J. BORROWS & LEONARD I. ROTMAN, *ABORIGINAL LEGAL ISSUES: CASES, MATERIALS & COMMENTARY* 521-54 (2d ed. 2003). In short, Section 88 federalized provincial laws, thus avoiding interjurisdictional immunity by dint of parliamentary authority. *Delgamuukw*, 3 S.C.R. 1010, ¶¶ 180-83; *Dick v. R.*, [1985] 2 S.C.R. 309, ¶¶ 39–41 (Can.); Catherine Bell & Clayton Leonard, *New Era in Metis Constitutional Rights: The Importance of Powley and Blais*, 41 *ALTA. L. REV.* 1049, 1059–60 (2004); Wilkens, *supra* note 121 at 207–08, 220–21. Yet even in the era of Section 88, provinces still may not extinguish tribal rights. *See, e.g.*, *Delgamuukw*, 3 S.C.R. 1010, ¶ 183.

122. Constitution Act, 1982, c. 11 (U.K.) § 35(1) (Can.).

123. *E.g.*, *R. v. Van der Peet*, [1996] 2 S.C.R. 507, ¶ 28 (Can.) (“Subsequent to s. 35(1) aboriginal rights cannot be extinguished . . .”); University of British Columbia Faculty of Law, *Primer: Canadian Law on Aboriginal and Treaty Rights* 12 (2009), available at http://www.law.ubc.ca/files/pdf/enlaw/primer_complete_05_10_09.pdf (hereinafter “Primer”) (“Section 35 now protects these rights from extinguishment by unilateral federal legislation.”).

treaty right is indeed at issue. The meaning of “treaty right” is fairly self-evident.¹²⁴ While *Sparrow* suggested a liberal interpretation of “aboriginal rights,” more recent cases have limited the term to “element[s] of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”¹²⁵ To prove that an activity is “integral,” the group must show that the activity holds “central significance” and exhibits continuity with pre-contact activities.¹²⁶ Once the right is recognized, at step two the court must ensure that the right is “existing,” as required by the Constitution.¹²⁷ Rights that have been properly extinguished cannot serve as the basis for an aboriginal claim.

The third and fourth steps evaluate the alleged infringement of the “existing aboriginal or treaty right.” The court in *Sparrow* adopted a burden-shifting framework for these final two steps. Step three asks whether there has been a “*prima facie* infringement,” and places the burden of showing the infringement on the party asserting the aboriginal right.¹²⁸ If that party is successful, in the fourth step the burden shifts to the government to show that the infringement was justified.¹²⁹ To be justified,

124. See *R. v. Marshall*, [1999] 3 S.C.R. 456, ¶ 64 (Can.) (holding that the same *Sparrow* test applies to aboriginal and treaty rights); *R. v. Côté*, [1996] 3 S.C.R. 139, ¶¶ 73–88 (Can.) (applying *Sparrow* and its progeny with respect to a treaty right).

125. *R. v. Van der Peet*, [1996] 2 S.C.R. 507, ¶ 46. See *Manus*, *supra* note 96 at 13–17, 26–31 (tracking the Canadian Supreme Court’s narrowing of the aboriginal-rights concept). See also BORROW & ROTMAN, *supra* note 121 at 345–428 (discussing the characterization of aboriginal rights by the courts); Patrick Macklem, *Aboriginal Rights and State Obligations*, 36 ALTA. L. REV. 97 (1997) (advocating for a positive-rights approach to Section 35(1) and *Sparrow*); Morse, *supra* note 96, at 126–27 (discussing aboriginal-rights claims).

126. *R. v. Van der Peet*, [1996] 2 S.C.R. 507, ¶¶ 55–67. See also Andrew Lokan, *From Recognition to Reconciliation: The Functions of Aboriginal Rights Law*, 23 MELB. U. L. REV. 65, 96–97 (1999) (summarizing factors applied in *Van der Peet*). “Aboriginal title” is a specific type of aboriginal right. *E.g.*, *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010, ¶ 2; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Calder v. B.C.*, [1973] S.C.R. 313. For further discussion of aboriginal title, see Alisia Adams, *Unforgiven Trespasses: Provincial Statutes of Limitations and Historical Interference with Indian Lands*, 7 APPEAL: REV. CURRENT L. & L. REFORM 32, 34 (2001); Jacqueline F. Pruner, *Aboriginal Title and Extinguishment Not So “Clear And Plain”: A Comparison of the Current Maori and Haida Experiences*, 14 PAC. RIM L. & POL’Y J. 253 (2005); BORROWS & ROTMAN, *supra* note 121 at 1–100.

127. *E.g.*, *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (“The word ‘existing’ makes it clear that the rights to which s. 35(1) applies are those that were in existence when the Constitution Act, 1982 came into effect.”).

128. In *R. v. Sparrow*, the court outlined illustrative questions: “First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?” [1990] 1 S.C.R. 1075.

129. *Id.* (“The justification analysis would proceed as follows. First, is there a valid legislative objective? . . . If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. . . . That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.”).

an infringement must further a “compelling and substantial” objective and be consistent with the Crown’s fiduciary duty to the aboriginal population.¹³⁰ This is not the forum to assess the intricacies of the justification requirement; it suffices to say that the protection of aboriginal and treaty rights bends to compelling governmental justifications.¹³¹

Canadian courts have highlighted a number of sources of and justifications for its approach in these cases. In *Sparrow* itself, the court remarked on the need to “hold[] the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada,” “uphold the honour of the Crown,” and “guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.”¹³² The court recognized that these issues must be viewed in light of a history in which tribal rights “were virtually ignored” and during which courts were often stripped of the power to evaluate claims of Crown sovereignty.¹³³ In *Gladstone*, the court noted that “[a]boriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part.”¹³⁴ The court went on to say that “limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.”¹³⁵ Notably, these explanations focus on community (rather than individual) and substantive (rather than procedural) rights.

In any event, if one looks beyond the language of the *Sparrow* test, a familiar picture emerges. Canadian courts have held that laws of general application apply to tribal lands unless they conflict with aboriginal or treaty rights. In other words, the court established a presumption with carve-outs from the default rule, much like U.S. courts have done in applying *Tuscarora*.¹³⁶ In fact, the Canadian carve-outs for aboriginal or

130. *Id.* See *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010, ¶¶ 160-64.

131. In his exceedingly instructive article, Professor Peter Manus explains how the Canadian Supreme Court has made it easier for the government to satisfy this burden, while making it more difficult to establish aboriginal rights. See Manus, *supra* note 96. See, e.g., *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010, ¶ 165 (“[T]he development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.”).

132. *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

133. *Id.*

134. *Gladstone*, [1996] 2 S.C.R. 723, ¶ 73.

135. *Id.*

136. Indeed, just as the dissenting opinion in *Tuscarora* ended with the weighty quotation about “great nations” keeping their word, the *Delgamuukw* majority opinion concluded with the pithy

treaty rights resemble the *Coeur d'Alene* exceptions: both rules recognize an exception for treaty rights, and Canadian law protects “integral” parts of aboriginal culture while U.S. law protects “the exclusive rights of self-governance in purely intramural matters.” These exceptions are not coterminous: U.S. courts are concerned with self-government (rather than culture), while Canadian courts have not acknowledged self-government as “integral” to native culture.¹³⁷

The Canadian courts’ attention to native culture also plays out in their answer to the *Morrison/Libman* question. Canadian jurisprudence with respect to aboriginal rights focuses not on territory but on the nature of the activity in question and its cultural significance to the tribe.¹³⁸ In *Sparrow*, for example, a member of the Musqueam Indian Band was cited for a regulatory violation of the Fisheries Act arising out of his activities outside the Musqueam reservation (but within traditional fishing areas).¹³⁹ In assessing this case, the court eschewed territorial considerations to acknowledge an “existing aboriginal right to fish for food and social and ceremonial purposes.”¹⁴⁰ In this way, Canadian courts share the American courts’ emphasis on *tribal* (not only individual) rights, but they recognize these substantive rights connected to tribal history, customs, and traditions.¹⁴¹

Finally, we pause briefly on the Canadian government’s policy response to these issues.¹⁴² The government issued a formal statement of policy, which begins: “The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the Constitution Act, 1982.”¹⁴³ Despite this recognition, the government does not waiver from the view that general laws apply to the tribes.¹⁴⁴ The

admonition: “Let us face it, we are all here to stay.” *Delgamuukw v. B.C.* [1997] 3 S.C.R. 1010, ¶ 186.

137. See John Borrows, *Sovereignty’s Alchemy: An Analysis of Delgamuukw v. British Columbia*, 37 OSGOODE HALL L.J. 537, 574–75 (1999) (contrasting the Canadian Supreme Court’s treatment of Crown sovereignty (excessive and general) versus tribal sovereignty (not)).

138. *E.g.*, *R. v. Van der Peet*, [1996] 2 S.C.R. 507, ¶¶ 55–67.

139. *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

140. *Id.*

141. For example, *Sparrow* is a case about an individual’s claim to an aboriginal right, but the court sought to define the scope of the “Musqueam right to fish.” *Sparrow*, 1 S.C.R. 1075.

142. Aboriginal Affairs & Northern Development Canada Webpage. *The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, <http://www.ainc-inac.gc.ca/al/l/dc/ccl/pubs/sg/sg-eng.asp> (last modified Sep. 15, 2010).

143. *Id.*

144. *Id.* (“The Government takes the position that negotiated rules of priority may provide for the paramountcy of Aboriginal laws, but may not deviate from the basic principle that those federal and provincial laws of overriding national or provincial importance will prevail over conflicting Aboriginal laws.”).

policy goes on to say that the government will seek negotiated agreements on the scope of the inherent right of self-government, rather than litigating its precise contours,¹⁴⁵ and calls for the participation of native populations and provincial governments in this process.¹⁴⁶ In other words, the government will negotiate future exceptions to the default rule that general laws apply to native populations.

C. Australia

Australia tells a drastically different story. Indeed, Australian indigenous peoples law lacks some of the key elements that would make it useful as a comparison to American and Canadian approaches to extranationality. Thus it will not feature prominently in the comparative analyses that follow. For these reasons, this Section will merely touch on Australian law as a foundation for future research.

For more than two centuries following Captain Cook's landfall, Australia was treated as a "settled colony." General laws applied to native peoples; those laws applied to the exclusion (or extinguishment) of existing native laws; and no formal exceptions were made for aboriginal rights.¹⁴⁷ Moreover, under this original conception, native populations were not sovereign or self-governing entities—or even domestic-dependent nations—and they were not owed fiduciary obligations as peoples.¹⁴⁸ One consequence of this view was that treaties were not negotiated with native

145. *Id.* (“[T]he central objective of negotiations will be to reach agreements on self-government as opposed to legal definitions of the inherent right.”).

146. *Id.*

147. *See, e.g.*, Walker v. N.S.W. (1994) 182 C.L.R. 45, ¶¶ 2-6; Mabo v. Queensland, (1992) 175 C.L.R. 1, ¶ 36; Coe v. Commonwealth, (1979) 24 A.L.R. 118, ¶ 12; *Report No. 31: The Recognition of Aboriginal Customary Laws*, AUSTL LAW REFORM COMM'N, June 12, 1986, at ¶¶ 1, 39-40, available at <http://www.alrc.gov.au/publications/report-31> (hereinafter “ALRC Report”); DAVID LANHAM, *ET AL.*, CRIMINAL LAWS IN AUSTRALIA 90-95 (2006). The seminal decision of *R. v. Jack Congo Murrell* confirmed that general criminal law applied to the murder of one aboriginal by another, *R. v. Murrell*, 1 Legge 72 (1836) N.S.W., and the High Court reiterated this position over the years since *Murrell*, *e.g.*, *Mabo*, 175 C.L.R., para 36; *Coe*, 24 A.L.R., para 12. The Australian Constitution originally assigned to the states the power to legislate with respect to native populations, but a 1967 referendum expanded Parliament's authority to include this power. Australia Constitution Act s 51(xxvi). *See generally* John Williams & John Braden, *The Perils of Inclusion: The Constitution and The Race Power*, 19 ADEL. L. REV. 95 (1997) (discussing the history of this clause); Michael Legg, *Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations*, 20 BERKELEY J. INT'L L. 387, 393-94 (2002) (discussing the referendum). *See also* ALRC Report, ¶¶ 906-69 (discussing federal and state legislative regarding aboriginals).

148. *E.g.*, *Mabo*, 175 C.L.R., ¶ 36; *id.* ¶¶ 86-93 (Dawson, J.) (rejecting the American and Canadian conceptions and concluding that “there is no room for the application of any fiduciary or trust obligation”); *Coe*, 24 A.L.R., para 12 (rejecting aboriginal sovereignty); *id.* para 42 (rejecting the notion of a fiduciary duty). *See also* Julie Cassidy, *Aboriginal Title: “An Overgrown And Poorly Excavated Archeological Site”?*, 10 INT'L LEGAL PERSP. 39, 75-84 (1998).

groups.¹⁴⁹ Therefore, the American and Canadian approaches to extranationality could not exist in Australia: there was no recognition of aboriginal rights from which exceptions could be drawn, nor were there treaties with which general laws could conflict.¹⁵⁰

A major development in aboriginal law was the High Court's 1992 decision in *Mabo v. Queensland*. In *Mabo*, the High Court held, for the first time, that Australian common law recognized prior land rights in native peoples—so-called “native title.”¹⁵¹ Native title is a limited, usufructory right that applies only to land and water to which there is a claim recognized by traditional law and to which the native peoples maintain a connection.¹⁵² In this way, the Australian courts account for native interests not through conceptions of native sovereignty or exceptions to general laws (as in the United States and Canada), but instead through a property rights regime.¹⁵³ Yet, as Professor Tarlock argues, this usufructory right is less powerful than the hard property rights that characterize parts of U.S. Indian law jurisprudence.¹⁵⁴

149. See, e.g., *Coe*, 24 A.L.R., para 12; ALRC Report, *supra* note 147, ¶ 39; Brynna Connolly, *Non-State Justice Systems and the State: Proposals for a Recognition Typology*, 38 CONN. L. REV. 239, 253-56 (2005); William D. Wallace, *M'Intosh to Mabo: Sovereignty, Challenges to Sovereignty and Reassertion of Sovereign Interests*, 5 CHI.-KENT. J. COMP. & INT'L L. 1, 21-23 (2005) (collecting cases, statutes, and legal policies); Sean Brennan, Brenda Gunn & George Williams, *'Sovereignty' and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments*, 26 SYDNEY L. REV. 307 (2004).

150. For a useful comparison between American Indian law and Australian Aboriginal law, see Tarlock, *A Comparative Perspective*, *supra* note 96.

151. 175 C.L.R. 1. See, e.g., Manus, *supra* note 96 (discussing native title in Australia, Canada, and the United States); Andrew Erueti, *The Demarcation of Indigenous Peoples' Traditional Lands: Comparing Domestic Principles of Demarcation with Emerging Principles of International Law*, 23 ARIZ. J. INT'L & COMP. L. 543 (2006) (discussing comparative law of native land claims); Wallace, *supra* note 9 at 26-28; Sean Brennan, *Native Title and the Acquisition of Property under the Australian Constitution*, 28 MELB. U. L. REV. 28 (2004); Cassidy, *supra* note 148. Following *Mabo*, the Australian Parliament codified this concept in the Native Title Act. Native Title Act 1993 (Cth). See *W. Austl. v. Ward* [2002] H.C.A. 28, ¶ 468 (summarizing the effect of the Act). In *Western Australia v. Commonwealth*, the High Court held that, with minor exception, the Native Title Act was constitutional. (1995) 183 C.L.R. 373.

152. Native Title Act, 1993, s 223(1). See *Ward*, [2002] H.C.A. ¶ 19; *Commonwealth v. Yarmirr*, (2001) 208 C.L.R. 1. The High Court remarked that under the Act “[t]he spiritual or religious is translated into the legal.” *Ward*, [2002] H.C.A. ¶ 19. Notably, the criteria for establishing native title are not dissimilar from *Sparrow*'s test for identifying an aboriginal right.

153. See *Coe v. Commonwealth*, (1993) 118 A.L.R. 193, para. 27. See also *Members of the Yorta Yorta Aboriginal Cmty. v. Victoria* (2002) 214 C.L.R. 422, ¶¶ 37-38 (discussing sovereignty since *Mabo*); *Wik Peoples v. Queensland* (“Pastoral Leases case”) (1996) 187 C.L.R. 1 (Kirby, J.); *Walker*, 182 C.L.R., para. 2; *Mabo*, 175 C.L.R., ¶¶ 36 & 83; *id.* ¶¶ 2-4 (Deane & Gaudron, JJ.); *id.* ¶¶ 1-6 (Dawson, J.); *id.* ¶¶ 14-21 (Toohey, J.).

154. See Tarlock, *Tribal Justice*, *supra* note 96, at 476-77.

D. Comparative Extranationality

Before turning to a fuller discussion of extraterritoriality and extranationality in Parts III and IV, it is helpful to pause to consider the findings of this Part with respect to extranationality alone. Putting aside Australia for the reasons articulated in Section C, it is notable that both the American and Canadian courts have adopted presumptions in favor of extranationality. Moreover, both states recognize formal exceptions to this presumption. In the United States, courts allow exceptions for intramural matters, tribal rights, and legislative intent; in Canada, the Constitution permits exceptions to protect aboriginal or treaty rights. This notion of carve-outs (deriving from constitutional protections, the common law, or treaties) is foreign to the extraterritoriality regimes reviewed in Part I. Lastly, the courts in both states have begun to answer the threshold *Morrison/Libman* question, though neither state has formally resolved the issue.

This Part also highlights how courts conceptualize their government's relationship to the native populations. The rights protected by American and Canadian laws are linked to the status of native peoples as political or cultural groups. The United States and Canada have signed treaties with native peoples as (somewhat) sovereign entities. Moreover, the courts in both states recognize a fiduciary duty that their governments owe to their native populations.¹⁵⁵ Putting these facts together, a picture emerges of native peoples as peoples possessing some quasi-sovereign attributes. Indeed, it is this characterization that best describes the courts' answers to the *Morrison/Libman* question. In this way, extranationality and extraterritoriality share something of a common lineage, with "foreign" sovereignty at the heart of both interpretive regimes. At the same time,

155. For the United States, *see, e.g.*, *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993) (referring to a fiduciary obligation owed to all tribes); *United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("undisputed existence of a general trust relationship"); *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) ("distinctive obligation of trust"); *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913) ("[The law] attribute[s] to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders . . ."); *United States v. Kagama*, 118 U.S. 375, 383 (1886) ("These Indian tribes are the wards of the nation.") (emphasis omitted). *See generally* Eugenia Allison Phipps, Note, *Feds 200, Indians 0: The Burden of Proof in the Federal/Indian Fiduciary Relationship*, 53 VAND. L. REV. 1637 (2000); Notes, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422 (1984). *But see* *United States v. Mason*, 412 U.S. 391 (1973) (discussing fiduciary duty owed to individual Indians). The trust relationship betrays this tribe-level focus, arising out of Congress' plenary power to regulate commerce "with the Indian Tribes." U.S. CONST. art. I, § 8.

For Canada, *see, e.g.*, *Guerin v. The Queen* [1984] 2 S.C.R. 335,349-50 (Austl.) ("[T]he Crown has a fiduciary obligation to the Indian Bands with respect to the uses to which reserve land may be put and that s. 18 [of the Indian Act] is a statutory acknowledgment of that obligation."); *id.* at 336-37 (Dickson, J.) (discussing the fiduciary relationship between the government and the Band).

courts from neither country treat the native populations as truly independent nations. Otherwise we would expect a presumption against extranationality, rather than rules that only except tribes in limited circumstances, reflecting a limited sovereignty that is dependent on the fully-sovereign domestic state.

Examining the American and Canadian extranational regimes, the bases of the tribal rights exceptions present a notable contrast. Both the United States and Canada create exceptions from their default rules for tribal rights, but Canada excepts rights integral to native culture while the United States excepts intramural matters of tribal governance.¹⁵⁶ While U.S. law more generally recognizes some inherent sovereignty deriving from tribes' status as domestic-dependent nations, Canadian courts (even since *Sparrow*) have not acknowledged inherent tribal self-government. Indeed, in 1992, Canadian voters defeated a proposed constitutional amendment that would have accorded Indians greater rights of self-government.¹⁵⁷ Further comparative research on indigenous peoples may reveal other ways in which the American and Canadian approaches diverge with respect to notions of self-governance.

Two other contrasts between the American and Canadian approaches merit brief comment here. First, after applying the presumptions, Canadian courts permit the government to overcome the exception with a compelling justification; U.S. courts have no explicit "savings" rule.¹⁵⁸ Second, although Canadian law expressly acknowledges that aboriginal rights are not absolute, it is noteworthy that Canadian aboriginal rights are constitutionalized while their American counterparts may be infringed or extinguished by any federal statute.¹⁵⁹ So, although this Article has focused so far on statutes with ambiguous reach, the limits of the Canadian Constitution and *Sparrow* apply to all legislation, ambiguous or not.

III. COMPARATIVE EXTRATERRITORIALITY AND EXTRANATIONALITY

Part II of the Article began with some brief comments linking international and native peoples law and an admonition that scholars and

156. This divergence may not be limited to transborder law issues. For example, Professor Felix Cohen identified four general principles of U.S. Indian law: "(1) The principle of the legal equality of races; (2) the principle of tribal self-government; (3) the principle of Federal sovereignty in Indian affairs; and (4) the principle of governmental protection of Indians." Cohen, *supra* note 92, at 3. Notably, cultural rights are absent from this list.

157. See Brad W. Morse, *A View from the North: Aboriginal and Treaty Issues in Canada*, 7 ST. THOMAS L. REV. 671, 678 (1995).

158. Whether there is one in practice is another matter.

159. See, e.g., Morse, *supra* note 96, at 124 (noting this distinction).

policymakers have insufficiently plumbed the depths of this comparison. This Part picks up that challenge based on observations regarding extraterritoriality and extranationality.

Comparisons between international and indigenous peoples law on this basis are necessarily modest. Any conclusions comparing attitudes toward foreign states and native peoples cannot rely on the single question of the transborder application of law. Even within the scope of this question, this Article has looked primarily at judicial responses; a comprehensive comparison between extraterritoriality and extranationality would need to include a full account of the frequency and intensity with which legislatures explicitly legislate extraterritorially and extranationally and the frequency and intensity with which executives attempt to enforce laws across borders.

Those caveats aside, this Article reveals a salient difference between extraterritorial and extranational jurisprudence with respect to the orientation of the respective default rules. For extraterritoriality, the courts of all three countries frame the question as whether the legislature intended an ambiguous law to apply extraterritorially, and in each of the countries the courts presume that the legislature did not intend to do so. For extranationality, U.S. courts presume that Congress intended general laws to apply to native populations; Canadian courts start with this same presumption, and have layered on top a constitutional approach that still permits justified intrusions on aboriginal rights. In short, the courts generally follow a presumption *against* extraterritoriality and a presumption *in favor of* extranationality. Why?

At first blush, the answer may seem obvious: the presumption against extraterritoriality tracks “real” borders between states while the presumption in favor of extranationality reflects less-significant subdivisions within a state. In short, there is a fundamental distinction between an international border and an internal, indigenous one. This distinction may influence the courts’ thinking on transborder law, and future comparative research on foreign states and native peoples can dig deeper into the nature and effects of this predisposition.

Although there certainly is some truth to this perception, it cannot be the whole answer. For one thing, international and indigenous peoples law are not wholly explained by this simple, binary construction: on issues from sovereign immunity to treaty interpretation to the reach of foreign or native law, courts do not simply accord full respect to foreign states and none to indigenous peoples. The rules used to answer these and other related questions are not uniform and permit more nuance than a simple yes or no. Further double-comparative research can apply this Article’s

analytical framework to other common questions.¹⁶⁰

With respect to the issues covered in this Article, a pure foreign-versus-native dichotomy would predict simpler rules governing the transborder application of law than those described above. If international borders were impenetrable, then courts would not seek out legislative indications of extraterritoriality (express or implied), and there would be no disputes regarding which nuanced definition of territoriality determines when the presumption applies. Nor would we expect judicially-developed exceptions to the presumption in favor of extranationality if tribal constructions were meaningless. What, then, explains the rules as articulated?

Courts have not given clear explanations for these outcomes, but it is possible to assess extraterritorial and extranational jurisprudence with respect to some broader themes. One important area of inquiry relates to the courts' role in the separation of powers. In foreign affairs, it is common wisdom that courts take a cautious approach to foreign relations.¹⁶¹ Consistent with this idea, a modest judiciary might take steps to avoid making a splash in foreign affairs (adopting a presumption *against* extraterritoriality), but also might defer to the judgments of the political branches (permitting extraterritoriality when the legislature says so expressly).¹⁶² This deferential theory also rightly predicts that U.S. courts seem to apply the presumption against extraterritoriality more loosely in cases brought by the government than by private actors.¹⁶³ Meanwhile, courts have not exhibited the same reluctance to participate in the governance of native peoples, and instead have invoked the obligations of states (*e.g.* as a guardian or trustee) to justify further interference in native affairs. In this way, the courts may be more likely to support a presumption

160. For example, in her exceedingly helpful article, Katherine J. Florey summarizes the history of tribal immunity in U.S. law, and contrasts it with both foreign sovereign immunity and domestic sovereign immunity as applied to the states and the federal government. *Indian Country*, *supra* note 3. See also John W. Borchert, Comments, *Tribal Immunity through the Lens of the Foreign Sovereign Immunities Act: A Warrant for Codification?*, 13 EMORY INT'L L. REV. 247 (1999).

161. See, *e.g.*, David Gray Adler, *Court, Constitution, and Foreign Affairs*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 19 (David Gray Adler & Larry N. George eds., 1996); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (noting "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations").

162. See, *e.g.*, Dodge, *supra* note 18, at 120-22 (discussing the separation-of-powers justification for the presumption against extraterritoriality). See also Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1 (2009) (using this separation-of-powers theory in the context of foreign-affairs federalism). That being said, Professor Brilmayer makes the case that the Supreme Court's *Morrison* decision "marginalize[d] Congress" in favor of "showcas[ing] judicial creativity." Brilmayer, *supra* note 68, at 656.

163. See Clopton, *supra* note 16 and accompanying text.

in favor of extranationality both as a matter of authority *and* as a proxy for their own willingness to participate in cases without express approval from the legislature or executive.¹⁶⁴ Future double-comparative research can look more deeply at the domestic institutional relationships that underpin these two types of “foreign” relations.

Another relevant interest is that of the individual defendant or regulatee. Due process is one frame through which individual interests may be evaluated. Although courts have not articulated due process as a basis for the presumption against extraterritoriality, the overzealous application of domestic laws abroad is contrary to the notion that individuals should have notice that they are subject to a particular set of laws.¹⁶⁵ Extranational cases present less of a notice problem: there is simply less concern that individuals will be unaware that domestic laws apply on native territory. In this light, it is not surprising that courts eschew a default rule against extranationality, though again they do not do so with specific reference to due process. However, not all extranational cases are created equal. For example, defendants might reasonably think they were outside the reach of domestic law when acting in relation to aboriginal cultural rights, intramural tribal affairs, or topics expressly reserved by treaties for tribal control—*i.e.*, those topics that comprise the Canadian and American exceptions.¹⁶⁶ In this way, both the extraterritorial and extranational rules may reflect individual rights considerations.

Lastly, this Article has suggested throughout that sovereignty is central to any assessment of transborder law. The presumption against extraterritoriality must be located within a larger sphere of foreign affairs questions, and the sovereign equality of states is a fundamental principle of international law and foreign relations. The history of the presumption and its justification of avoiding conflict with foreign laws manifest this respect for sovereign equals. This principle of international sovereign equality is not matched by an equivalent principle respecting native peoples. Indeed, as described in Part II, courts in all three states have declined to grant true sovereign status to the tribes. However, to the extent that courts have developed exceptions to the presumption in favor of extranationality, they

164. Notably in this connection, even as Canadian courts have softened the presumption, they have expressly protected their government’s most significant priorities through *Sparrow*’s justification prong.

165. See Colangelo, *Unified Approach*, *supra* note 6 (collecting sources addressing due process). Indeed, Professor Colangelo recommends a “unified approach” to extraterritoriality in which due process (notice) and statutory interpretation become one inquiry.

166. An alternative formulation might be that the exceptions to the extranationality rules reflect the protection not of due process rights, but of substantive rights that have independent significance. Under either formulation, one question for future research is whether the Canadian or American approaches better approximate lay notions of jurisdiction and notice.

address the areas where tribal governments have the most sovereignty— inherent (but limited) sovereignty over internal affairs or important cultural matters, or negotiated sovereignty in the form of treaty rights.

The norm of sovereign equality is important in itself but also in its practical manifestation as a concern for the problem of inconsistent regulation.¹⁶⁷ Again, on the international side, courts justify the presumption against extraterritoriality with reference to concerns about conflict with foreign law, recognizing that each state may regulate its territory as it sees fit. In a “guardian-ward” arrangement between the national government and a tribe, however, the courts may be less concerned about conflict with native laws than with the *absence* of law. Professor Judith Resnik, for example, situates certain Indian law decisions in a longer tradition of the U.S. Supreme Court taking “jurisdiction by distrust,” suggesting that the federal courts will assert jurisdiction to review state or tribal cases where they lack confidence in the underlying systems.¹⁶⁸ Whether the “absence of law” is a real phenomenon (resulting from a lack of legal authority) or a perceived one (stemming from a historical view of the tribes as unenlightened and unable to govern themselves), the presumption in favor of extranationality could be seen as filling a void not present in cases involving foreign states.¹⁶⁹ Indeed, a “jurisdiction by distrust” approach would explain not only the courts’ presumption in favor of extranationality, but also their desire to identify exceptions to the rule— perhaps the courts have more trust in tribal systems on the core areas of Indianness that populate the exceptions to the American and Canadian rules. Further research can explore this version of the sovereignty thesis and its relationship to other interests in international and indigenous-peoples law.¹⁷⁰

167. As Professor Florey rightly notes, this aspect of the sovereignty interest is tangled up with notions of due process as well. Florey, *State Courts*, *supra* note 7, at 1113-19.

168. Resnik, *supra* note 114 at 108-09 (discussing, in this connection, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)). One interesting topic for future research would explore this distrust thesis with respect to the recognition and enforcement of foreign (or tribal) judgments in national courts. For example, the common-law rule for the enforcement of foreign judgments in the United States does not provide for uniform outcomes, instead calling upon the court to assess the foreign proceedings and the foreign system of jurisprudence. See *Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895).

169. A confounding factor, for which further research is required, is that many federal Indian law decisions are as focused on the federal-state question as the domestic-tribe one. See, e.g., *Kagama*, 118 U.S. 375 (1886). At least regarding extranationality, Canadian courts have not faced this issue since the Indian Act federalized general provincial laws vis-à-vis the tribes. See *Constitution Act* *supra* note 120.

170. For example, in the context of the Florey-Rosen debate, Professor Florey suggests that due-process or state-sovereign interests tend to move in parallel. Florey, *State Courts*, *supra* note 7, at 1113-19. That trend seems to be matched in these cases, although further research is necessary to unravel the correlation-causation question.

The foregoing paragraphs offer an account of the presumption against extraterritoriality and the presumption in favor of extranationality. Yet, as this Article has made clear, antecedent to the presumption is the question whether the presumption applies at all: the *Morrison/Libman* question. On the extraterritoriality side, the American and Canadian courts use the *Morrison/Libman* question to account for the interest of the forum state. *Morrison* cabins the presumption based on the territorial location of the focus of statute, reflecting the idea that Congress' interest, as defined by the statutory text, trumps countervailing concerns of individuals and foreign states. *Libman* eschews a strictly territorial approach, accounting for national interest by looking for a connection to Canada. As explained in Part I, *Libman* is consistent with a due process account, but fundamentally it too reflects the forum state's interest in the case. So, while the presumption against extraterritoriality itself admits the sovereign interests of foreign states and the individual rights of putative defendants, the courts have taken to narrowing the scope of the presumption on the basis of domestic state interest, although they have done so in different ways.

With respect to extranationality, the American and Canadian approaches take different tacks. When deciding whether or not to apply the presumption in favor of extranationality, U.S. courts look not to domestic interests (as in *Morrison* and *Libman*) but to tribal ones. The threshold question in U.S. courts is whether the connection to the tribe is strong enough, not whether the interest of the United States is so weak as to give way. Canadian extranational jurisprudence splits the difference, applying the exceptions where the case has a sufficient connection to native peoples, but also acknowledging the importance of national interest by permitting the government to justify any intrusions it may make. In further contrast to *Morrison* and *Libman*, the extranational exceptions in the United States and Canada are defined more by metaphysical considerations than by territorial connections (either to the forum state or to native territory). This de-emphasis of territory parallels a broader trend in federal Indian law in the United States.¹⁷¹

This Part has laid out some initial conclusions on extraterritoriality and extranationality that offer both substantive and procedural models for further double-comparative work. At the same time, even this first cut at

171. Professor Florey has documented the complex issues of territory in American Indian law, and the recent trend to deemphasize territory in favor of other conceptions of tribal sovereignty. Florey, *Indian Country*, *supra* note 3. For an excellent discussion of the importance of territoriality in international-legal issues, see Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631 (2009), and for a discussion of other areas of law where extraterritoriality matters, see Brilmayer, *supra* note 68.

double-comparative research offers models for policymakers in both areas of law.

IV. EXTRATERRITORIALITY AND EXTRANATIONALITY ROADMAP

While the academic conclusions described in Part III necessarily require further study, the observations in this Article can serve as the basis for recommendations to all three branches of government. I turn to those practical suggestions here.

A. The Legislative Branch

Although this Article has focused on the courts' approaches to extraterritoriality and extranationality, the legislature may play the central role. Not only can the legislature overcome the "constraints" of statutory interpretation with express provisions, but the entire goal of statutory interpretation is to discern *legislative* intent.

Given that the presumptions are tools to find legislative intent, a natural recommendation to legislators would be to define the geographic scope of each statute they enact. Or, perhaps less obviously, the legislature could also enter the presumption business. As mentioned above, the Australian Commonwealth and various Australian states have adopted formal interpretation acts that include a presumption against extraterritoriality, and the Canadian Criminal Code includes a similar presumption. These are examples of legislatures codifying common law presumptions. Could the United States Congress do the same? Could legislatures answer the *Morrison* and *Libman* question by statute?¹⁷² And should there be legislative solutions for extranationality?

In a 2002 article, Professor Rosenkranz concludes that a federal interpretation act would be constitutional under U.S. law.¹⁷³ Professor Rosenkranz starts from an important (and often overlooked) premise: statutory interpretation is not necessarily an exclusively judicial task. The legislature can and should play a role in the process.¹⁷⁴ Professor

172. The question of territoriality would be a particularly useful area for legislative intervention given that there appears to be a finite number of likely rules, but significant differences in outcomes depending on the rule adopted.

173. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002). For additional discussion of legislative canons, see Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010).

174. In its simplest form, the legislature participates in interpretation when it includes a definition section in a statute. See, e.g., 1 U.S.C. §§ 1-8 (2011) ("General Provisions" of the U.S. Code including rules of interpretation for words denoting number, gender, and tense, and certain definitions); Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.* (establishing rules of statutory

Rosenkranz goes on to recommend that Congress adopt an interpretation act that codifies particular canons of interpretation.¹⁷⁵ He argues that as long as the rules adopted do not conflict with constitutionally-rooted canons, then the statute should not present a constitutional problem.¹⁷⁶ Seemingly, a presumption against or in favor of extraterritoriality could be safely adopted because it would not raise any constitutional issues; presumably legislatures could codify presumptions with respect to extranationality as well, with the exception of the protection for aboriginal rights enshrined in the Canadian Constitution.

A legislative solution to extraterritoriality or extranationality would have a number of positive consequences. As a threshold matter, it would relieve courts of the task of divining legislative intent. This outcome has intuitive appeal: why have an independent body try to guess at legislative intent when the legislature can answer the question itself? Professor Rosenkranz lists a number of additional advantages of congressional rules, but the most relevant here is that the legislature “is best positioned to assess and compare the efficiency of various interpretative rules.”¹⁷⁷ While this author might say that Congress is best positioned to assess and compare the *merit* of various interpretative rules—expanding the inquiry beyond efficiency—the underlying point is the same: Congress should weigh the various equities and decide on rules in advance.

This preference is particularly true for the topics addressed in this Article. Foreign policy is a notoriously weak point for courts, and the assessment of potential conflicts with foreign laws is the sort of weighing that the legislature could address in the first instance. Therefore, this solution responds to both foreign law and legislative intent—the two justifications of the presumption against extraterritoriality.¹⁷⁸ Meanwhile, Congress has a plenary, fiduciary responsibility to native peoples. In that light, a resolution to the issue of extranationality could be part of a larger native affairs project, much like Canada’s federal policy.

interpretation for statutes that substantially burden the free exercise of religion). Rosenkranz also collects interpretative codes from all 50 U.S. states and the District of Columbia. Rosenkranz, *supra* note 173, at 2089 n.10.

175. Rosenkranz, *supra* note 173 at 2148-50. Professor Rosenkranz specifically suggests that Congress select canons from the list provided in your author’s favorite law-review chart: Karl Llewellyn’s “Trust but Parry.” *Id.* at 2148 (referring to Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950)).

176. Rosenkranz, *supra* note 173, at 2109-26.

177. *Id.* at 2145. See also Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1151 (2010) (supporting legislative approaches to state extraterritoriality).

178. The codification of an interpretative canon should have no effect on the due-process interest—that issue will depend on the content of the rule.

A legislative approach also may allow for creative approaches. The extranational jurisprudence discussed here exemplifies one strategy for addressing the reach of statutes: a default presumption with specific carve-outs. American, Canadian, and Australian courts have not adopted this strategy for extraterritoriality, but legislatures certainly could do so without needing to wait for just the right series of cases to percolate to the high courts. An interpretation act could include a rule that says “the presumption against extraterritoriality applies to all ambiguous statutes except for laws related to antitrust or competition . . .” Or, taking a cue from Professor Colangelo, it could provide that “the presumption against extraterritoriality applies to all ambiguous statutes except for laws implementing or enforcing international law.”¹⁷⁹ Additionally, legislatures could adopt rules that treat different enforcement mechanisms differently: an interpretation act could apply different presumptions to enforcement actions brought by the government versus civil actions brought by private plaintiffs,¹⁸⁰ or expressly permit the courts to consider a compelling government justification as the Canadian court did in *Sparrow*.¹⁸¹ While courts could adopt creative rules with exceptions or justification tests, legislatures can do so expressly in coherent, generalizable statutes. Moreover, although interest group lobbying is often viewed with a jaundiced eye, the legislative process is better positioned than a bilateral proceeding in a common law court to respond to multifarious interests on a single issue.

In sum, legislatures may be in the best positions to establish default interpretative rules; they are well positioned to respond to the specific issues that animate extraterritorial and extranational judicial decisions; and the nature of legislative action may allow them to adopt more creative and innovative approaches than courts would likely apply on their own.

179. See Colangelo, *Unified Approach*, *supra* note 6.

180. If a legislature was inclined to rely on the executive branch to handle extraterritorial (or extranational) issues, it could also include a *qui tam*-like provision in which individuals could bring extraterritorial civil-enforcement issues to the attention of the executive branch and then share in any recovery obtained thereafter. See, e.g., 31 U.S.C. § 3730(d)(1) (2010) (*quit tam* provision in the False Claims Act). See generally, Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949 (2007); Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381 (2001); J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539 (2000); Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989).

181. Congress took a similar tack in the Religious Freedom Restoration Act. See 42 U.S.C. § 2000bb-1(b) (“Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”).

B. The Executive Branch

As described in this Article, the courts are on the frontlines of extraterritoriality and extranationality and the legislatures are, at a minimum, commanding the process from headquarters. But the limited attention paid to the executive should not be read as understating that branch's role. Criminal and civil enforcement actions brought by the executive frequently touch on extraterritorial or extranational issues, and in foreign affairs the executive branch is often regarded as the primary actor. What, then, should executive actors take from this Article?

A seemingly unavoidable question is what sort of deference, if any, courts should grant to executive action. Will courts evaluate extraterritoriality or extranationality differently in cases where the executive, rather than a private party, brings the case? As discussed above, U.S. courts appear to be less likely to throw out criminal cases than civil cases based on the presumption against extraterritoriality. In one of his last opinions on the Court, Justice Stevens indicated in *Morrison* that he would likely have ruled differently had the case been brought by the SEC.¹⁸² In Canadian extranational law, deference manifests itself in a different form: courts permit the government to abridge constitutional aboriginal rights based on a compelling justification.¹⁸³

While as a formal matter it is for the courts or the legislature to announce the deference due to executive actions, the executive branch nonetheless plays an important role in this process. Not only is it likely that the executive will request deference from the courts,¹⁸⁴ but it is also quite possible that the courts' deference will depend on how and when the executive lays out its positions. For example, one could imagine courts

182. 130 S. Ct. at 2894 n.12 (Stevens, J., concurring in the judgment) (“The Court’s opinion does not, however, foreclose the Commission from bringing enforcement actions in additional circumstances, as no issue concerning the Commission’s authority is presented by this case.”). Going further, Judge Kavanaugh has argued that the *Charming Betsy* canon “should not be invoked against the Executive Branch, which has the authority to weigh international-law considerations when interpreting the scope of ambiguous statutes.” *Al-Bihani v. Obama*, 619 F.3d 1, 42 (D.C. Cir. 2010) (*en banc*) (concurring in denial for rehearing *en banc*).

183. Interestingly, there appears to be a circuit-split among the U.S. appellate courts with respect to the relationship between the Indian canons and *Chevron* deference. Compare *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (holding that the Indian canon trumps the *Chevron* doctrine) with *Shields v. United States*, 698 F.2d 987 (9th Cir. 1983) (declining to apply the Indian canon in light of contrary agency interpretation). See Kristen A. Carpenter, *Symposium: Native American Sovereignty Issues: Interpreting Indian Country in State Of Alaska v. Native Village of Venetie*, 35 TULSA L.J. 73 (1999) (discussing this circuit split).

184. See, e.g., Brief for the Equal Employment Opportunity Commission, *EEOC v. Aramco* (Nov. 15, 1990) (Nos. 89-1838 & 89-1845), 1990 WL 511330 at *22-*24 (citing prior EEOC and Justice Department interpretations of the extraterritoriality of Title VII in support of the government’s interpretation of the statute).

giving less deference to executive interpretations of statutes offered exclusively as litigating positions, as opposed to interpretations offered *ex ante* in administrative decisions or informal policy statements.¹⁸⁵ In fairness to the due process rights of potential defendants and out of respect to other sovereigns with an interest in the case, executive actors should be encouraged to stake out their positions in advance. And in deciding upon the substance of these positions, the executive should recall the individual rights and sovereign interests that these doctrines protect. In other words, the executive should heed Professor Buxbaum's observation that territoriality is not just a geographic principle but it also expresses "a specific understanding about fairness and legitimacy in cross-border regulation."¹⁸⁶

Finally, the discussion of the executive would not be complete without mentioning the starring role it plays with respect to treaties. All three countries' courts apply a presumption against the violation of international law (which includes international treaty law), and U.S. and Canadian extranational decisions recognize exceptions for treaty rights. There is no reason that treaties could not address some of the statutory-reach issues that have occupied this Article. In a recent article, Professor Colangelo calls for courts to unify international substantive and jurisdictional law by applying international jurisdictional limits (and no presumption against extraterritoriality) to domestic laws enforcing substantive international treaties.¹⁸⁷ An even more "unified approach" would involve putting jurisdictional limits into the treaties themselves.¹⁸⁸ In other words, treaties

185. See, e.g., Clopton, *supra* note 16, at 186-88 (discussing so-called *Chevron* deference in the context of extraterritoriality). See also Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783 (2011); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007); Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005); Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000).

186. Buxbaum, *supra* note 171, at 674.

187. Colangelo, *Unified Approach*, *supra* note 6.

188. Notably, certain international agreements include provisions that appear to provide legislative-jurisdictional rules. E.g., U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, CAT/C/28/Add.5, at 43-44 (Feb. 9, 2000). See also Colangelo, *Unified Approach*, *supra* note 6 at 56-60 (discussing jurisdictional provisions in the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation). And states have drafted or adopted international agreements related to other issues of jurisdiction—Europe addresses jurisdiction issues in European Council Regulation No. 44/2001, while the Hague Conference on Private International Law has addressed issues from choice of courts to service of process, see http://www.hcch.net/index_en.php?act=conventions.listing (list of conventions) (last visited Jan. 27, 2013). Relatedly, Professor Coyle has argued for choice-of-law treaties in which states agree to enforce choice-of-law clauses in commercial contract. John F. Coyle, *Rethinking the Commercial Law Treaty*, 45 GA. L. REV. 343 (2011).

can address extraterritoriality and extranationality. States could negotiate bilateral (or multilateral) treaties for the express purpose of resolving the scope of extraterritorial legislative jurisdiction, they could include such provisions in substantive multilateral treaties, or they could add extraterritoriality provisions to extradition treaties. For extranationality, one could imagine the Canadian government negotiating extranationality exceptions in the treaties on self-government that form a central part of its federal policy. Other states could do the same.¹⁸⁹ In short, executives could use “jurisdictional” treaty law to resolve issues of extraterritoriality and extranationality and, in so doing, manifest fairness and legitimacy by engaging with foreign states and indigenous peoples directly.

C. Judicial Branch

Lastly, we return to the judiciary. Proposals for clearly written statutes, legislative interpretation acts, and executive policy statements will only go so far—unless circumstances change dramatically, courts will continue to face questions of extraterritoriality and extranationality. One achievement of a review like this one, therefore, would be to provide a menu of options for the courts. This Section will not rehash every nuance of the six permutations previously outlined, but it will highlight a few topics that merit specific attention.

First, a threshold issue for cases involving the extraterritorial application of law is the meaning of “territoriality.” A number of answers exist: territoriality could be defined by conduct, effects, conduct and effects, the focus of the statute, or a real-and-substantial link. The American and Canadian courts have addressed this choice for extraterritoriality; the Australian courts should do the same, and the equivalent question in native law cases also deserves more concerted attention.

This survey also reveals different ways that presumptions can be structured. Courts have tended to advocate straightforward rules for extraterritoriality, but extranational jurisprudence demonstrates that other options are available. Courts could identify carve-outs from default rules, following the *Coeur d’Alene* route. Or they could adopt rebuttable presumptions, taking a cue from *Sparrow*. While these suggestions also may form the basis of legislation or executive decision-making, that should not absolve courts of the responsibility to consider them as well. At the

189. Similarly, treaties with native peoples could spell out enforcement-jurisdictional limits that will have the effect of shrinking the scope of statutes that could apply to them. See *infra* note 192 (discussing the treaty right to exclude).

same time, the courts must consider the value of simplicity.¹⁹⁰ Simplicity, in this context, is not just about the terms of the rule—it must be judged in the context of the overall legal environment. A U.S. court faced with the extraterritorial application of a statute, for example, not only must address the presumption (and the meaning of territoriality), but also the *Charming Betsy* canon, due process, and a host of other issues. Given the existence of these alternative protections for defendants, some scholars have argued that the *simplest* approach would be to get rid of the presumption against extraterritoriality altogether.¹⁹¹ While this formulation may overstate its simplicity—“getting rid of” the presumption really means applying a presumption *in favor of* extraterritoriality—its effect would be to shift the action from statutory presumptions to prescriptive jurisdiction (*Charming Betsy*) and constitutional law (due process), while maintaining a focus on the two interests of sovereignty and individual rights.¹⁹²

Next, a discerning reader may have noticed that the discussion of the international law of prescriptive jurisdiction in the context of extraterritoriality lacks a parallel in the context of extranationality. Perhaps such a parallel is warranted. In a few paragraphs at the end of his William B. Lockhart Lecture, Professor Frickey suggests that, given the international law roots of federal Indian law, courts addressing questions of native peoples law should apply the *Charming Betsy* rule and presume that Congress did not intend to violate international law when dealing with native peoples.¹⁹³ Professor Frickey made this argument with respect to

190. In *Morrison*, Justice Scalia was explicit in justifying the presumption against extraterritoriality, in part, as “preserving a stable background against which Congress can legislate with predictable effects.” 130 S. Ct at 2881.

191. See *supra* note 67 (collecting examples). For alternative proposals, see, e.g., Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 119 (2010) (proposing a “dual illegality rule” under which courts decline to apply U.S. law to extraterritorial conduct unless that conduct would be illegal or similarly regulated in the territorial state); John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351 (2010) (advocating a three-tiered “presumption against extrajurisdictionality”).

192. The extraterritorial application of law is also constrained in practice by enforcement jurisdiction. Restatement (Third) of Foreign Relations Law of the United States § 401(c) (1987). A law that may be applied extraterritorially is of limited utility if the state cannot take evidence abroad, serve process abroad, or otherwise hale foreign defendants into national courts. Indeed, in her recent article, Professor Buxbaum observes that German courts consider the statutory-interpretation question in antitrust law expressly in connection with the limits on enforcement jurisdiction. Buxbaum, *supra* note 171, at 663-65. This notion is not limited to extraterritoriality: at least one U.S. court of appeals has held that OSHA cannot be enforced on the Navajo Reservation because the tribe had a treaty with the United States that included the right to exclude non-Indians—a limitation on enforcement jurisdiction. *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982).

193. Frickey, *Domesticating Federal Indian Law*, *supra* note 87, at 92-93. Professor Cleveland ponders a similar question in her opus on the Supreme Court’s application of “inherent powers” in cases regarding Indians, aliens, and territories: “if the government’s constitutional authority derives from

international human rights law. However, the international law of prescriptive jurisdiction has also found a voice in the *Charming Betsy* canon. Courts therefore could require litigants to identify a basis of prescriptive jurisdiction under international law before applying ambiguous statutes to native peoples. This approach would manifest the deep connection between international and indigenous peoples law and could better approximate individual and sovereign interests.

Throughout this Article, various approaches have been judged against due process and sovereign interests. In many ways, however, foreign- and native-affairs jurisprudence lags behind on these issues: exterritorial cases do not address due process head on; courts are reluctant to acknowledge anything but very limited native sovereignty; and due process is also absent from extranational cases. One final recommendation, therefore, is for courts to catch up. Courts should acknowledge that sovereignty and due process are central interests to these related problems, and they should take account of how their rules of interpretation play out on these metrics.

* * *

This Article has reviewed the extraterritorial and extranational jurisprudence of the United States, Canada, and Australia for its own ends and as a starting point for comparative research across international and indigenous peoples law. The goals of this endeavor are to better understand these two fields and to arm policymakers with creative approaches to problems that may have gone stale. While the publication of this Article may not be followed shortly thereafter by Congress adopting an interpretation act for extranationality or the Australian High Court having a *Morrison/Libman* moment—the latter seeming much more likely than the former—hopefully this Article will nudge scholars and policymakers in both fields to think more broadly about their own disciplines and about other disciplines that can inform their work.

customary international law, should not the authority likewise be limited by customary international law constraints?" Cleveland, *supra* note 80, at 280.