COURTS & JUSTICE LAW JOURNAL

MISUSING THE PRESUMPTION AGAINST EXTRATERRITORIALITY IN CLIMATE CHANGE LITIGATION

William S. Dodge*

Climate change is one of the most important issues of our times. Like other important issues, it has found its way into the courts of the United States.[1] Among the most promising climate change cases are state-law tort claims filed by cities against major oil companies. These suits do not seek to enjoin the production of fossil fuels but simply seek compensation for the costs that the cities are having to bear in order to protect against climate change. In other words, these suits seek to internalize the costs of producing fossil fuels from which the companies have profited. Two such cases—*City of New York v. BP P.L.C.* and *City of Oakland v. BP P.L.C.*—are currently on appeal before the Second and Ninth Circuits.

While these cases raise many interesting and complex issues, this Essay focuses on whether the presumption against extraterritoriality that applies to federal statutes, and the principle of "judicial caution" that applies

* Martin Luther King, Jr. Professor of Law and John D. Ayer Chair in Business Law, University of California, Davis, School of Law.

[1] For a helpful database of climate change cases filed in U.S. courts, see http://climatecasechart.com/us-climate-change-litigation/.

to the federal cause of action under the Alien Tort Statute (ATS), should apply to the cities' state-law claims. In both the *New York* and *Oakland* cases, the district courts dismissed the plaintiffs' claims relying in part on the presumption against extraterritoriality and this principle of "judicial caution." The author helped write *amicus* briefs in both cases on behalf of conflict of laws and foreign relations law scholars, arguing among other things that the district courts erred in applying these principles to state-law claims.[2] This Essay explains and elaborates upon the arguments in those briefs.

I. THE PROCEEDINGS IN DISTRICT COURT

In the *New York* case, the city brought three causes of action in federal district court under New York common law—for public nuisance, private nuisance, and trespass. It sought damages for the costs of protecting the city's property and residents against the effects of climate change, including building sea walls and waterproofing infrastructure. The complaint sought an injunction to abate the public nuisance and trespass only in the event that the defendants failed to pay damages.[3] The district court dismissed the complaint. The court first held that the city's claims were properly governed by federal, rather than state, common law.[4] To the extent that the city's claims were based on domestic emissions of greenhouse gases, the court held that any federal common-law claims were

[2] Brief of Conflict of Laws and Foreign Relations Law Scholars as Amici Curiae in Support of Plaintiff-Appellant and Reversal of the District Court's Decision, City of New York v. BP P.L.C., No. 18-2188 (2d Cir.), available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20181115_docket-18-2188_amicus-brief-5.pdf (filed on behalf of Professors Sarah Cleveland, Zachary Clopton, William Dodge, Harold Koh, Kermit Roosevelt, and Christopher Whytock); Brief of Conflict of Laws and Foreign Relations Law Scholars as Amici Curiae in Support of Plaintiffs-Appellants and Reversal of the District Court's Decision, City of Oakland v. BP P.L.C., No. 18-16663 (9th Cir.), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3355871 (filed on behalf of Professors Sarah Cleveland, Zachary Clopton, William Dodge, Kermit Roosevelt, Symeon Symeonides, and Christopher Whytock).

[3] City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 468-70 (S.D.N.Y. 2018).

[4] *Id.* at 470-72.

preempted by the Clean Air Act.[5] To the extent that the city's claims were based on foreign emissions of greenhouse gases, the court held that "the City's claims are barred by the presumption against extraterritoriality and the need for judicial caution in the face of 'serious foreign policy consequences.'"[6]

In the *Oakland* case, the cities of Oakland and San Francisco brought suits in California state court for public nuisance under California law, seeking the establishment of an abatement fund to cover future costs resulting from climate change. The defendants removed the case to federal court, which denied a motion to remand on the ground that the claims were properly governed by federal common law.[7] As in the *New York* case, the court held that claims based on domestic emissions were preempted by the Clean Air Act.[8] And to the extent that the claims were based on foreign emissions, the court held that they "run[] counter to the presumption against extraterritoriality" and the principle of "judicial caution" applied in ATS cases.[9]

II. THE PRESUMPTION AGAINST EXTRATERRITORIALITY

The federal presumption against extraterritoriality is a principle of statutory interpretation that courts apply to determine the geographic scope of federal statutes. In *RJR Nabisco v. European Community*,[10] the U.S. Supreme Court adopted a "two-step framework" for the federal presumption.[11] At step one, a court asks "whether the statute gives a clear, affirmative indication that it applies extraterritorially."[12] If so, the court

[5] *Id.* at 472-75.

[6] *Id.* at 475 (quoting Jesner v. Arab Bank PLC, 138 S. Ct. 1386 (2018)).

[7] City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1021 (N.D. Cal. 2018).

[8] *Id.* at 1024.

[9] *Id.* at 1025.

[10] 136 S. Ct. 2090 (2016).

[11] *Id.* at 2101; *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (AM. LAW INST. 2018) (restating the federal presumption against extraterritoriality).

[12] *RJR*, 136 S. Ct. at 2101.

applies the statute according to its terms.[13] If not, then at step two, the court "determine[s] whether the case involves a domestic application of the statute . . . by looking to the statute's focus."[14] If whatever is the focus of the statute is found in the United States, then application of the statute is considered domestic and is permitted.[15]

The federal presumption against extraterritoriality does not apply to common law claims because it is a presumption about legislative intent.[16] Both steps of *RJR*'s "two-step framework" depend on the existence of a statute.[17] Courts have not often been asked to apply a presumption against extraterritoriality to common law claims, but those that have been asked to do so have rejected the suggestion.[18] As then-Professor (now-Judge) Jeffrey Meyer has explained, "the presumption—like any other rule of statutory

[13] *See id.* ("The scope of an extraterritorial statute . . . turns on the limits Congress has (or has not) imposed on the statute's foreign application, and not on the statute's 'focus.'").

[14] *Id.*

[15] *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. c (AM. LAW INST. 2018). As I explain elsewhere, the version of the federal presumption that the Supreme Court has applied since 2010 is significantly more flexible than previous versions because it is not a clear statement rule and does not turn mechanically on the location of the conduct. *See* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. (forthcoming 2020), *available at* http://ssrn.com/abstract=3429336.

[16] *See* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 255 (2010) (noting that the presumption is "about a statute's meaning" and "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign, matters"); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("This 'canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained.'" (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949))).

[17] *See RJR*, 136 S. Ct. at 2101 (asking at step one "whether the statute gives a clear, affirmative indication that it applies extraterritorially"); *id.* (asking at step two "whether the case involves a domestic application of the statute . . . by looking to the statute's focus").

[18] *See, e.g.*, Armada (Sing.) Pte Ltd. v. Amcol Int'l Corp., 244 F. Supp. 3d 750, 758 (N.D. Ill. 2017) ("The presumption is, after all, a canon of statutory construction. The defendants cite no authority to suggest that the principle should apply to claims fashioned through common-law adjudication."); Russo v. APL Marine Servs., Ltd., 135 F. Supp. 3d 1089, 1096 (C.D. Cal. 2015) (observing that "the presumption against extraterritoriality does not apply to common law claims").

interpretation—has no application to the common law," which is instead limited "only by background principles of choice of law."[19]

The federal presumption against extraterritoriality also does not apply to state law, the geographic scope of which is a question of state law.[20] Some states have adopted their own presumptions against extraterritoriality to determine the geographic scope of state statutes.[21] But none of these states applies its presumption to state common law.[22] Whether state common law applies in a particular case is determined instead by state choice-of-law rules.

It seems clear that the district courts in the *New York* and *Oakland* cases erred when they applied the federal presumption against extraterritoriality to dismiss the cities' claims. In New York, trespass and nuisance are common-law claims to which New York's presumption against extraterritoriality does not apply.[23] In California, public nuisance is a statutory claim.[24] California has a presumption against extraterritoriality that generally turns on the location of the conduct at issue.[25] But the

[19] Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 GEO. L.J. 301, 304 (2014).

[20] *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. a (AM. LAW INST. 2018) ("As a presumption about congressional intent, the federal presumption against extraterritoriality applies only to federal statutes and causes of action.").

[21] *See* William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. (forthcoming 2020), *available at* http://ssrn.com/abstract=3426241 (manuscript at 19-23) (identifying 20 states that have adopted a presumption against extraterritoriality).

[22] *See id.* (manuscript at 29-30).

[23] New York has applied a presumption against extraterritoriality to some state statutes. *See, e.g.*, Glob. Reinsurance Corp. U.S. Branch v. Equitas Ltd., 969 N.E.2d 187, 195 (N.Y. 2012) (applying state presumption to state antitrust law); *see also* Dodge, *supra* note 21 (manuscript at 21-22) (discussing inconsistent application of New York presumption).

[24] Cal. Civ. Code § 3480.

[25] *See* Sullivan v. Oracle Corp., 254 P.3d 237, 248 (Cal. 2011) ("we presume the Legislature did not intend a statute to be operative, with respect to occurrences outside the state, unless such intention is clearly expressed or reasonably to be inferred from the language of the act or from its purpose, subject matter or history" (quotation marks and alterations omitted)).

California Supreme Court has not applied its presumption against extraterritoriality to limit the application of state statutes when conduct outside the state causes injury within the state.[26] In the climate changes cases, both district courts found that the state-law claims were preempted by federal common law. But even if that were true, the courts still erred in applying a presumption against extraterritoriality to common-law claims in the absence of any statute to interpret.

The proper approach would have been to apply choice-of-law rules to determine the applicable law. In tort cases, New York applies "the law of the jurisdiction having the greatest interest in resolving the particular issue."[27] For rules that regulate primary conduct, that jurisdiction is generally the place "where the plaintiffs' injuries occurred."[28] And in cases involving property torts, New York holds that the law of the jurisdiction where the property is located must be applied.[29]

California has adopted a "comparative interest analysis" that applies the law of the state whose interest would be more impaired if its law were not applied."[30] When conduct and injury occur in different jurisdictions, California regularly applies the law of the place of the injury, recognizing that "a state may act to protect the interests of its own residents while in their home state."[31]

The result would be the same under federal choice-of-law rules if federal common law were deemed to apply. Federal courts routinely look

[26] *See* Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 931 (Cal. 2006) (rejecting argument that applying statute to recording in Georgia of conversation with person in California was "an unauthorized *extraterritorial* application of the statute"); *see also* Dodge, *supra* note 21 (manuscript at 27-29) (discussing application of California presumption).

[27] Cooney v. Osgood Mach., Inc., 612 N.E.2d 277, 280 (N.Y. 1993).

[28] Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 681 (N.Y. 1985).

[29] *See* Heaney v. Purdy, 272 N.E.2d 550, 551 (N.Y. 1971) (calling it "almost unthinkable to seek the applicable rule in the law of some other place").

[30] *Kearney*, 137 P.3d at 925.

[31] *Id.* at 920; *see also* Bernhard v. Harrah's Club, 546 P.2d 719, 722 (Cal. 1976) (holding Nevada tavern owner liable for serving drinks to intoxicated customer who injured persons in California).

to the *Restatement (Second) of Conflicts* for federal conflicts rules,[32] and the general rule for injuries to property under the *Restatement (Second)* is that "the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship."[33]

In sum, the federal presumption against extraterritoriality does not apply to state-law claims, and it does not apply to common-law claims even if those claims arise under federal common law. The district courts should have determined the applicable law by applying choice-of-law rules. And under New York, California, and federal choice-of-law rules, the law applicable to property torts is the law of the place where the property is located.

III. "JUDICIAL CAUTION"

The district courts in the *New York* and *Oakland* cases also invoked the notion of "judicial caution" that the Supreme Court has articulated in human rights cases brought under the ATS.[34] But those cases are inapposite for two reasons. First, the climate change cases are not human rights suits implicating the conduct of foreign governments. Second, the climate change cases involve the application of existing state laws not the creation of an implied cause of action under a federal statute.

In *Sosa v. Alvarez-Machain*, the U.S. Supreme Court recognized a federal common law cause of action under the ATS, allowing human rights claims for violations of modern customary international law.[35] But because holding that "a foreign government or its agent has transgressed" international law risks "adverse foreign policy consequences," the Supreme

[32] *See, e.g.*, Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 12 (2d Cir. 1996) ("In the absence of Congressional guidance, we have from time to time consulted the Restatement (Second) of Conflict of Laws (1971) in fashioning that federal [choice of law] rule."); *see also id.* (discussing cases from other circuits).

[33] RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 147 (AM. LAW INST. 1971).

[34] City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1025 (N.D. Cal. 2018); City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 475 (S.D.N.Y. 2018).

[35] Sosa v. Alvarez-Machain, 542 U.S. 694, 725 (2004).

Court adopted a "high bar" for exercising its law-making authority.[36] Specifically, the Court limited the ATS cause of action to those "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[37] In *Kiobel v. Royal Dutch Petroleum Co.*, the Court re-emphasized "the need for judicial caution . . . in light of foreign policy concerns.[38] This time, the Court limited the ATS cause of action to claims that "touch and concern the territory of the United States."[39] In *Jesner v. Arab Bank, PLC*, the Court, again citing the possibility of "serious foreign policy consequences," held that "foreign corporations may not be defendants in suits brought under the ATS."[40]

These sorts of foreign policy concerns are absent in the climate change cases. The climate change cases do not challenge the actions of foreign governments or their officials. They do not allege any violations of international law. They simply ask that the defendant oil companies bear some of the costs that have been imposed by their profit-making activities. To be sure, the problem of climate change is one that can be addressed effectively only though international negotiations and agreements. But internalizing the costs of fossil fuel production will in no way hinder the U.S. and foreign governments from addressing climate change in whatever ways they think best.[41]

---

[36] *Id.* at 727-28.

[37] *Id.* at 725. Those paradigms are piracy, violation of safe-conducts, and infringement of the rights of ambassadors. *Id.* at 715.

[38] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013).

[39] *Id.* at 124-25.

[40] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018). For discussion of these cases and the current obstacles facing suits against corporations under the ATS, see William S. Dodge, *Corporate Liability Under the U.S. Alien Tort Statute: A Comment on* Jesner v. Arab Bank, 4 BUS. & HUM. RIGHTS J. 131 (2019).

[41] *See* Brief of Former U.S. Government Officials as Amici Curiae Supporting Reversal of the District Court's Decision, Oakland v. BP P.L.C., No. 18-16663 (9th Cir.), available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20190320_docket-18-16663_amicus-brief.pdf (filed on behalf of Susan Biniaz, Antony Blinken, Carol M. Browner, William J. Burns, Avril D. Haines, John F. Kerry, Gina McCarthy, Jonathan Pershing, John Podesta,

The second reason that the principle of "judicial caution" invoked in the ATS cases is inapposite is that the climate change cases do not ask federal courts to create a "new cause of action" under a federal statute.[42] Rather, the climate change cases ask federal courts to apply existing *state* causes of action. Post-*Erie* concerns about "the role of federal courts in making [common law]," which *Sosa* cited as one of the reasons for judicial caution under the ATS, are thus absent.[43] Indeed, *Erie* cuts the other way in the climate change cases. *Erie* held that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."[44] Federal courts have authority to shape federal common law causes of action, as the U.S. Supreme Court has done under the ATS. But they have no authority to modify or limit causes of action that exist under state law, because that power is reserved to the states. For federal judges to refuse to apply state law, based on their own predictions of foreign policy consequences, is the antithesis of "judicial caution."

IV. CONCLUSION

The *New York* and *Oakland* cases arise in the context of climate change, but most fundamentally they are state-law tort suits. Federal courts have no business applying the federal presumption against extraterritoriality to state law, or dismissing state-law claims in the name of "judicial caution." These state-law suits will not solve the problem of climate change—they are not intended to. But providing compensation for harms caused by tortious activity is a traditional and an appropriate role for state law to play.

Susan E. Rice, Wendy R. Sherman, and Todd D. Stern).

[42] *Sosa*, 542 U.S. at 725.

[43] *See id.* at 726 (discussing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)).

[44] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).