

THE TERRITORIAL AVOIDANCE POWER OF THE BANKRUPTCY CODE

INTRODUCTION

As international insolvencies become more frequent, the legal issues underlying these insolvencies grow commensurately more important. Among the many legal questions that arise in an international bankruptcy, the authority of a bankruptcy court to adjudicate rights to foreign-based assets remains one of the most fundamental and least resolved. Avoidance of fraudulent or preferential transfers of foreign-based assets represents one crucial subset of this issue. With the accelerating pace of globalization and the prevalence of foreign debtors availing themselves of American bankruptcy courts, the avoidance of such transfers will confront the bankruptcy system more frequently. Yet, the law lacks clarity in this area because the Bankruptcy Code (“Code”) does not explicitly define its extraterritorial power. Consequently, recent court interpretations have yielded a split in authority.

This split in authority centers on whether the avoidance sections of the Code empower the trustee to avoid transfers of property located in foreign jurisdictions. This split arises because of differing views on the strength and substance of two important legal theories: the presumption against extraterritoriality and the doctrine of comity. The presumption against extraterritoriality is a rule of statutory construction positing that a statute applies only within the territorial boundaries of the prescribing state unless the language of the statute indicates clear contrary intent.¹ The presumption serves as a means of preventing international discord and correlating the application of a law with likely congressional intent, among other ends.² Because the Code contains no overt statement of extraterritorial application of its general provisions or of the specific reach of its avoidance sections, any attempt to avoid a transfer of foreign property implicates the presumption. Premised on similar concerns as the presumption, comity is either a doctrine of abstention to

¹ EEOC v. Arabian Am. Oil Co. (“*Aramco*”), 499 U.S. 244, 248 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1077, *as recognized in* *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 512 n.8 (2006).

² See *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

foreign proceedings or an affirmative disavowal of jurisdiction to adjudicate a dispute.³ An attempt to avoid a foreign transfer also involves comity since nations regulate property within their borders. Foreign regulations can purport to apply to a debtor's property within that jurisdiction, leaving comity to ensure that the most significant of conflicting interests prevails.

The strength of the presumption determines when the inference of extraterritorial application from the statutory language is appropriate. Likewise, the outcome of a comity analysis depends on the particular strand of comity employed by the court and the weight attached to factors in the analysis. With such nuanced doctrines, it is hardly surprising that courts have reached divergent outcomes on similar facts. On the one hand, the bankruptcy court of the Central District of California held that an allegedly preferential transfer to a foreign creditor was not recoverable for lack of congressional intent to apply the Code extraterritorially.⁴ The court in *Midland* applied the presumption against extraterritoriality to dismiss the action for the avoidance of the transfer,⁵ specifically rejecting the trustee's argument that the transfer was domestic since its primary effects were felt within the United States.⁶ With the matter resolved, the court in *Midland* declined to address whether it should abstain from jurisdiction on the grounds of international comity.⁷

On the other hand, a panel of the Fourth Circuit affirmed the avoidance of a constructively fraudulent transfer of Bahamian real property to the debtor's children.⁸ The transferees in *French* asserted essentially the same defenses as the transferee in *Midland*.⁹ First, the transferees contended that the presumption against extraterritoriality prevented application of § 548 of the Code to Bahamian real property.¹⁰ Second, the transferees argued that

³ See *infra* text accompanying notes 134–39.

⁴ *Barclay v. Swiss Fin. Corp. (In re Midland Euro Exch. Inc.)*, 347 B.R. 708, 720 (Bankr. C.D. Cal. 2006). The debtor in *Midland* operated a Ponzi scheme involved in currency trading. *Id.* at 712. Before the scheme's inevitable descent into insolvency, the debtors transferred a million dollars to their foreign currency broker's bank accounts in England. *Id.* at 713. The trustee attempted to avoid the majority of the transfer as fraudulent when Swiss Finance claimed the funds as fees and commissions. *Id.*

⁵ *Id.* at 719.

⁶ *Id.* at 715–17.

⁷ *Id.* at 719–20.

⁸ *French v. Liebmann (In re French)*, 440 F.3d 145, 148 (4th Cir. 2006). French had given a deed to the Bahamian real estate to her children for Christmas in 1981. *Id.* The children did not record the deed until 2000. *Id.* Because French was insolvent at the time of recording and had received less than equivalent value for the property, the trustee attempted to avoid the transfer as constructively fraudulent. *Id.*

⁹ Compare *French*, 440 F.3d at 148, with *Midland*, 347 B.R. at 714.

¹⁰ *French*, 440 F.3d at 149.

international comity dictated abstention by American courts in favor of Bahamian law.¹¹ The court rejected the first claim because the primary effects of the constructive fraud were within the United States¹² and because Congress showed sufficient intent to include foreign property in the estate.¹³ The comity argument did not avail the transferees since the totality of the circumstances showed a stronger American interest in the controversy.¹⁴ The strong interest of the *situs* of property did not overcome the factors favoring the United States.¹⁵

This Comment will investigate the intersection of the presumption against extraterritoriality, international comity, and the avoidance mechanisms of the Code. Whether viewed through the lens of the presumption against extraterritoriality or the doctrine of comity, United States courts should accept that their mandate to adjudicate insolvencies is not absolute. Part I will briefly examine the history of the presumption against extraterritoriality and then analyze how the presumption applies to the Code and its avoidance powers. Part I will demonstrate that, as a threshold matter, the Code, and particularly its avoidance mechanisms, do not apply extraterritorially. Part II will then explore the doctrine of international comity and its relation to the presumption against extraterritoriality and to avoidance powers. The discussion of comity will show that even where the presumption against extraterritoriality may be overcome, many factual circumstances and policy implications weigh in favor of either deferring to foreign courts or affirmatively limiting United States prescriptive jurisdiction.

I. EXTRATERRITORIALITY

Congress has the power to apply its laws in foreign countries.¹⁶ Nevertheless, the existence of this authority does not address the underlying issue of whether Congress intended to prescribe law outside of the physical boundaries of the United States.¹⁷ The Supreme Court has addressed this second question through varying formulations of the presumption against

¹¹ *Id.*

¹² *Id.* at 150.

¹³ *Id.* at 152.

¹⁴ *See id.* at 154.

¹⁵ *Id.* at 150, 153–54.

¹⁶ *Foley Bros. v. Filardo*, 336 U.S. 281, 284 (1949).

¹⁷ *Id.* at 284–85.

extraterritoriality.¹⁸ The presumption is a canon of construction which asserts that statutes should be interpreted to apply only domestically absent express contrary language.¹⁹ The following section will examine the historical development of the presumption against extraterritoriality.

A. Overview

Under the presumption against extraterritoriality, a court will not infer congressional intent for extraterritorial prescription from statutory silence.²⁰ Statutory “boilerplate language which can be found in any number of congressional Acts, none of which have ever been held to apply overseas” does not reflect “the intent of Congress as to the extraterritorial application of [a] statute.”²¹ The presumption can be overcome by some “clearly expressed purpose” to apply a law extraterritorially.²² The Court has fashioned a three-step analysis for determining such a purpose: (1) examine the statutory language; (2) review legislative history; and (3) consider administrative opinions.²³ Statutory language in particular must be highly explicit to constitute a clear purpose.²⁴ Even statutes purporting to apply to anyone or everyone fail to pass the presumption without some further statement of

¹⁸ See *infra* Part I.A.

¹⁹ EEOC v. Arabian Am. Oil Co. (“*Aramco*”), 499 U.S. 244, 248 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1077, *as recognized in* Arbaugh v. Y&H Corp., 546 U.S. 500, 512 n.8 (2006).

²⁰ See *id.* at 250–51.

²¹ *Id.*

²² *Foley Bros.*, 336 U.S. at 286; *accord Aramco*, 499 U.S. at 248 (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)). *Contra* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85, 97 (1998) (arguing that “the Supreme Court does not view the presumption as a clear statement rule and that it will examine ‘all available evidence’ of congressional intent in determining whether a statute applies abroad” (quoting *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 153, 177 (1993))).

²³ *Foley Bros.*, 336 U.S. at 285–88. The *Aramco* majority followed a substantially similar framework. They first looked for a clear statement in the statutory language. *Aramco*, 499 U.S. at 248–49. The majority then dispensed with many of the EEOC arguments regarding Congressional intent. *Id.* at 249–56. Finally, the majority rejected the EEOC’s claims for deference to its agency interpretations. *Id.* at 256–58. Justice Marshall’s formulation of the presumption as a rule of last resort, available only after legislative history has been exhausted, mischaracterizes the principles of *Foley Bros.* See *id.* at 266 (Marshall, J., dissenting).

²⁴ See *Aramco*, 499 U.S. at 248–49. Justice Marshall has criticized the *Aramco* majority for misapplying the *Foley Bros.* precedent to characterize the presumption as a “clear statement rule.” *Id.* at 261 (Marshall, J., dissenting). Nevertheless, Justice Marshall misses the mark with this criticism. The Court in *Foley Bros.* also required a “clearly expressed purpose.” *Foley Bros.*, 336 U.S. at 286. Although *Aramco* may have revitalized the presumption, the decision did not substantially alter the *Foley Bros.* framework. See *supra* note 23 and accompanying text.

extraterritorial intent.²⁵ A statute must show “affirmative evidence” of congressional intent to apply so expansively.²⁶ Even words that “comprehend the whole human race” apply only domestically because the legislature rarely intends to regulate the entire world.²⁷

After revitalizing the presumption in *Aramco*, the Supreme Court has applied the presumption against extraterritoriality in a diverse body of law.²⁸ For example, the presumption weighed in favor of finding that the Federal Tort Claims Act did not apply to injuries in Antarctica.²⁹ The Court recently held that federal laws against firearm possession by felons apply only to persons convicted by domestic courts.³⁰ Moreover, a provision of the Immigration and Nationality Act has been found to apply only domestically, allowing the President to interdict refugees at sea.³¹ Although the Supreme Court has never applied the presumption against extraterritoriality in a bankruptcy case, the Court’s widespread reliance on this canon shows why the presumption should serve as a default rule in bankruptcy as well. Indeed, lower courts have applied the Supreme Court’s formulations of the presumption in the bankruptcy context.³²

B. The Primary Effects Exception to the Presumption Against Extraterritoriality

The categorization of domestic and extraterritorial conduct is often the decisive factor in issues of extraterritoriality.³³ A court can avoid the presumption against extraterritoriality simply by defining conduct as domestic.³⁴ Courts redefine conduct in this manner by focusing on the location of the effects of the conduct in question rather than on the location of the

²⁵ *United States v. Palmer*, 16 U.S. 610, 632–34 (1818). The Court in *Palmer* declined to apply a piracy statute to “any person or persons” where all relevant vessels and parties were foreign. *Id.* Similarly, in *Foley Bros.* the Court concluded that “every contract” did not include government contracts in foreign nations. *Foley Bros.*, 336 U.S. at 282, 290.

²⁶ *Aramco*, 499 U.S. at 259.

²⁷ *See Palmer*, 16 U.S. at 632.

²⁸ Dodge, *supra* note 22, at 91–92.

²⁹ *Smith v. United States*, 507 U.S. 197, 203–04 (1993).

³⁰ *Small v. United States*, 544 U.S. 385, 394 (2005).

³¹ *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187–88 (1993).

³² *See In re Midland Euro Exch. Inc.*, 347 B.R. 708, 717 (Bankr. C.D. Cal. 2006).

³³ *Compare In re French*, 440 F.3d 145, 149–51 (4th Cir. 2006) (considering whether the effects of a foreign transfer are domestic), *with In re Midland*, 347 B.R. at 715–17 (finding the domestic effects of a foreign transfer to be de minimis).

³⁴ *See H.K. & Shanghai Banking Corp. v. Simon (In re Simon)*, 153 F.3d 991, 996–97 (9th Cir. 1998).

conduct itself.³⁵ Judge Learned Hand illustrated this principle in *United States v. Aluminum Co. of America* (“*Alcoa*”),³⁶ where the United States filed suit under the Sherman Anti-Trust Act for monopolistic practices.³⁷ In *Alcoa*, the conduct was arguably extraterritorial because the defendant imported ingots into the United States through a Canadian subsidiary.³⁸ On the other hand, it was arguably domestic because the defendant’s dominant market position in the United States raised domestic aluminum prices.³⁹ The Court in *Alcoa* held that the Act was violated by conduct geographically outside the United States.⁴⁰ Later courts have viewed this as an attractive means of sidestepping the presumption against extraterritoriality.⁴¹

C. Justifications for the Presumption Against Extraterritoriality

There are several persuasive justifications for the presumption.⁴² Two such justifications appear in *Foley Bros.* First, “Congress is primarily concerned with domestic conditions.”⁴³ Second, a sovereign nation must cede some authority to the United States over the regulated conduct for the domestic regulations to be valid.⁴⁴

³⁵ See Dodge, *supra* note 22, at 87–91 (noting three possible interpretations of what constitutes extraterritorial, and concluding that the presumption applies to conduct causing effects within the United States).

³⁶ 148 F.2d 416 (2d Cir. 1945).

³⁷ *Id.* at 421, 443 (“[A]ny state may impose liabilities . . . for conduct outside its borders that has consequences within its borders which the state reprehends.”). This principle formed the backbone of the theory of interests, shifting both state and federal courts away from the presumption. See Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 192, 209. Moreover, it abrogated the earlier Supreme Court decision of *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 359 (1909), which held that the Sherman Anti-Trust Act did not apply in these circumstances.

³⁸ *Alcoa*, 148 F.2d at 423.

³⁹ See *id.* at 423–24.

⁴⁰ *Id.* at 445.

⁴¹ Dodge, *supra* note 22, at 100 (arguing that the presumption did not apply in *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), or in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), because the conduct at issue caused effects within the United States).

⁴² See generally Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505 (1997). Bradley identifies five reasons for presuming domestic application: (1) avoiding conflicts of international law; (2) international comity; (3) domestic choice of law principles; (4) implementing congressional intent; and (5) federalism concerns. *Id.* at 513–16. Even so, none of these justifications are hermitically sealed categories. Each reason typically relates to several others. While the justifications dealing with international concerns are highly relevant to the presumption, this Comment will address them primarily in the sections on comity. See discussion *infra* Part II.B.

⁴³ *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

⁴⁴ *Id.*

The first justification is rooted in common sense. Assuming that Congress primarily deals with domestic matters, logic requires some further affirmative evidence of intent for a court to interpret a statute expansively.⁴⁵ Given that Congress has successfully employed laws extraterritorially in the past, it is logical to assume that “[w]hen it desires to do so, Congress knows how to place the [foreign location] within the jurisdictional reach of a statute.”⁴⁶ Acting in consonance with likely congressional intent promotes the judiciary’s job of applying the legislature’s laws.

This consonance naturally raises separation of powers concerns.⁴⁷ Without the presumption, courts could unilaterally expand their authority over international disputes. Yet, international affairs are governed predominantly by the executive or legislative branches and are largely outside the competence of even the most qualified court.⁴⁸ If any branch of the government were to initiate a dispute with another country, the executive and legislative branches would have the most authority and the best qualifications to do so.⁴⁹ Indeed, Congress has the authority to enact statutes that act extraterritorially, even if they violate international law.⁵⁰ The judiciary lacks such a mandate. The theory of separation of powers underlying the Constitution concerns the prevention of application of authority in contravention of the will of another branch of the government entrusted with that authority.⁵¹ The presumption preserves the legitimacy of laws by preventing limitless application of law to situations outside the contemplation of the legislature.⁵² Articulated

⁴⁵ Suzanne Harrison, Comment, *The Extraterritoriality of the Bankruptcy Code: Will the Borders Contain the Code?*, 12 BANKR. DEV. J. 809, 826 (1996).

⁴⁶ *Smith v. United States*, 507 U.S. 197, 204 (1993) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989)).

⁴⁷ See Bradley, *supra* note 42, at 550–61.

⁴⁸ See *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 22 (1963) (requesting that Congress deal with international policy decisions in an action concerning the regulation of labor disputes on international vessels in American territorial waters); Bradley, *supra* note 42, at 551.

⁴⁹ *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) (“[Congress] alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.”); see also Frederick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT’L L. 31, 83 (2001) (“Officers of the political branches may be appropriate agents to dole out rewards and punishments, but judges are not. The judicial function does not lend itself well to conducting foreign relations while deciding specific cases.”).

⁵⁰ Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2287 n.54 (1991).

⁵¹ *Cf. Christopher v. Harbury*, 536 U.S. 403, 417 (2002) (stating that judicial inquiry into foreign relations, a province of other branches, raises separation of powers concerns).

⁵² See Bradley, *supra* note 42, at 561.

differently, the presumption ensures that only qualified branches create international discord.

The sovereignty justification essentially speaks to these concerns of preventing international discord.⁵³ Other nations have objected fiercely to extraterritorial applications of American law,⁵⁴ as the increase in domestic regulation over the past century has spilled into regulation of foreign entities.⁵⁵ Given businesses' opposition to governmental regulation, let alone a foreign government, these extraterritorial regulations have caused predictably strong reactions.⁵⁶ Foreign entities lobby their domestic governments to either negotiate or enact blocking statutes.⁵⁷ These responses to perceived unjust extraterritorial regulations could gain momentum and morph from justifiable reaction to overreaction.⁵⁸ Indeed, the United States responded to several such reactions with the hypocritical position of objecting to extraterritorial regulation of monopolistic activities by the European Commission⁵⁹ after having applied the Sherman Anti-Trust Act extraterritorially for decades.⁶⁰ Thus, while territorialism has been criticized as creating artificial barriers,⁶¹ it could actually reduce conflicts by preventing major controversies and the resultant conflicts between economically interdependent nations.

⁵³ See *McCulloch*, 372 U.S. at 21–22 (noting that regulating labor disputes on Honduran vessels in United States territorial waters would lead to international discord). Even so, the issue is not limited to preventing international discord. The issue also extends to which branch of the government has the authority to create international discord.

⁵⁴ See, e.g., *Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos Human Rights Litig.)*, 94 F.3d 539, 543 n.5 (9th Cir. 1996) (noting objections by Switzerland to an American injunction over assets held in Switzerland). See generally Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505 (1998).

⁵⁵ See Sir Ian Sinclair, *The Diplomatic Response*, in EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO 217, 217–22 (Cecil J. Olmstead ed., Oxford: International Law Association 1984).

⁵⁶ *Id.* at 217. “[I]f no attention is paid to reasoned objections to the reach of US economic laws, it ought not to occasion surprise if those governments whose trading interests are adversely affected by the extra-territorial application of those laws take the necessary steps to protect those interests.” *Id.* at 222. See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 reporters’ note 1 (1987) (noting several examples of foreign objections to United States regulation of foreign economic matters).

⁵⁷ See generally Serge April, *Blocking Statutes as a Response to the Extra-territorial Application of Law*, in EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO, *supra* note 55, at 223, 223–33.

⁵⁸ See Griffin, *supra* note 54, at 522; April, *supra* note 57, at 233.

⁵⁹ Griffin, *supra* note 54, at 518.

⁶⁰ *United States v. Aluminum Co. of Am. (“Alcoa”)*, 148 F.2d 416, 445 (2d Cir. 1945) (applying the Sherman Anti-Trust Act extraterritorially); see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 reporters’ note 1 (1987).

⁶¹ See Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT’L L. 499, 513–14 (1991) (arguing that territoriality mainly protects local procedure without corresponding policy benefits).

D. *The Presumption Against Extraterritoriality in Bankruptcy*

The Supreme Court has not applied the presumption against extraterritoriality in a bankruptcy case. Yet, many lower courts have examined the presumption in the bankruptcy context. Although a majority of cases has either found that the Code applies extraterritorially or redefined the conduct in question as domestic, a minority of cases find insufficient authorization.⁶²

When viewed in light of the Supreme Court's three-step presumption analysis, it is difficult to find any affirmative evidence of congressional intent to apply the avoidance mechanisms of the Code extraterritorially. The avoidance provisions of the Code contain no specific language reflecting their intended geographic reach.⁶³ The legislative history accompanying the

⁶² For cases finding that the Code applies extraterritorially, see *In re French*, 440 F.3d 145, 150–52 (4th Cir. 2006) (affirming the avoidance of a constructively fraudulent transfer of Bahamian real property); *In re Simon*, 153 F.3d 991, 999 (9th Cir. 1998) (subjecting a Hong Kong bank to a § 524 discharge order for a debt owed to a British Virgin Islands Corporation guaranteed by a Hong Kong resident because § 541 applies worldwide); *Thurmond v. Rajapakse (In re Rajapakse)*, 346 B.R. 233, 236 (Bankr. N.D. Ga. 2005) (including debtor's non-disclosed foreign real estate within the estate); *Lykes Bros. S.S. Co. v. Hanseatic Marine Serv. (In re Lykes Bros. S.S. Co.)*, 207 B.R. 282, 287 (Bankr. M.D. Fla. 1997) (impounding a maritime vessel in Belgium as part of the estate); *Nakash v. Zur (In re Nakash)*, 190 B.R. 763, 768–69 (Bankr. S.D.N.Y. 1996) (granting motion for violation of an automatic stay where an Israeli receiver for an Israeli bank filed an involuntary petition on instructions from an Israeli court); *Deak & Co. v. Soedjono (In re Deak & Co.)*, 63 B.R. 422, 427, 435 (Bankr. S.D.N.Y. 1986) (rejecting a foreign creditor's motion to dismiss an injunction action where the creditor attempted to collect in Switzerland on a pledge made by the debtor, a foreign exchange trader); *U.S. Lines, Inc. v. GAC Marine Fuels Ltd. (In re McLean Indus., Inc.)*, 68 B.R. 690, 694 (Bankr. S.D.N.Y. 1986) (holding that the automatic stay applies extraterritorially to enjoin attempts by foreign creditor to collect against debtor's vessels); *In re Nat'l Safe Ctr., Inc.*, 41 B.R. 195, 196 (Bankr. D. Haw. 1984) (including debtor's property held by custom service in the estate); *In re Filipek*, 35 B.R. 339, 341 (Bankr. D. Haw. 1983) (dismissing a bankruptcy case in part because the debtor failed to list Canadian assets).

For cases holding that the Code does not apply extraterritorially, see *In re Midland Euro Exch. Inc.*, 347 B.R. 708, 718 (Bankr. C.D. Cal. 2006); *Official Comm. of Unsecured Creditors v. Transpacific Corp. (In re Commodore Int'l, Ltd.)*, 242 B.R. 243, 260 (Bankr. S.D.N.Y. 1999) (holding that §§ 547 and 548 do not allow avoidance of pre-bankruptcy transfers between a Bahamian debtor and a Bahamian corporation); *Maxwell Commc'n Corp. v. Barclay's Bank (In re Maxwell Commc'n Corp.)*, 170 B.R. 800, 814 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996) (holding that § 547 will not allow the avoidance of a transfer where "the center of gravity of [the] transfer is overseas").

For cases that have raised the issue of the presumption, but decided on other grounds, see *Underwood v. Hilliard (In re Rimsat, Ltd.)*, 98 F.3d 956, 961 (7th Cir. 1996) (holding that application of the automatic stay was not extraterritorial because the debtor was an American citizen and because the debtor corporation was headquartered in the United States); *Florsheim Group, Inc. v. USAsia Int'l Corp. (In re Florsheim Group Inc.)*, 336 B.R. 126, 130–31 (Bankr. N.D. Ill. 2005) (deciding not to apply the presumption because the center of gravity of the preferential transfers was domestic); *Interbulk, Ltd. v. Louis Dreyfus Corp. (In re Interbulk, Ltd.)*, 240 B.R. 195, 198–99 (Bankr. S.D.N.Y. 1999) (holding that a foreign creditor in a preference avoidance action submitted to the equitable jurisdiction of the court, making the application of the Code non-extraterritorial).

⁶³ See 11 U.S.C. §§ 547, 548 (2000).

provisions gives no better indication.⁶⁴ No agency exists to provide an administrative interpretation of the Code that would be subject to deference from courts. The presumption against extraterritoriality posits that without affirmative evidence, inference of congressional intent to apply the Code outside of American territory will not suffice.⁶⁵ Nevertheless, litigants and scholars have advanced many arguments to show that the language of other provisions of the Code reflect congressional intent to avoid extraterritorial transfers.

1. What Constitutes Property of the Estate Under § 541

What constitutes estate property is the main sparring ground over extraterritoriality.⁶⁶ Section 541(a) provides that the bankruptcy estate comprises “all legal or equitable interests of the debtor in property as of the commencement of the case,”⁶⁷ “wherever located and by whomever held.”⁶⁸ Proponents of extraterritorial application interpret the statute with plain meaning arguments. They make the dispositive argument that “all” means all, and “wherever” means anywhere in the world, both inclusive of property held in foreign locations.⁶⁹

Congress has rarely spoken on the subject. A 1952 House Report said that “a trustee in bankruptcy is vested with the title of the bankrupt in property which is located without, as well as within, the United States. . . . The words ‘wherever located’ have therefore been added at appropriate places.”⁷⁰ But, since the Bankruptcy Reform Act of 1978, no such language has ever reentered the legislative history. The current statute incorporates the “wherever located” language,⁷¹ but it is unclear if that statement reflects a continued intent to

⁶⁴ See discussion *infra* accompanying notes 70–73.

⁶⁵ See *EEOC v. Arabian Am. Oil Co. (“Aramco”)*, 499 U.S. 244, 250–51 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1077, *as recognized in* *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 512 n.8 (2006).

⁶⁶ Compare *French*, 440 F.3d at 151, with *Midland*, 347 B.R. 708, 717–18.

⁶⁷ 11 U.S.C. § 541(a)(1) (2000). Sections 547 and 548 allow avoidance of a “transfer of an interest of the debtor in property.” 11 U.S.C. §§ 547(b), 548. Although the sections do not explicitly state that they allow avoidance of any transfer within the estate, the similarity to § 541(a)(1) permits the inference that estate property can be avoided.

⁶⁸ 11 U.S.C. § 541(a).

⁶⁹ See *In re Simon*, 153 F.3d 991, 996 (9th Cir. 1998); see also David M. Green & Walter Benzija, *Spanning the Globe: The Intended Extraterritorial Reach of the Bankruptcy Code*, 10 AM. BANKR. INST. L. REV. 85, 94–95 (2002).

⁷⁰ H.R. REP. NO. 82-2320, at 1976 (1952).

⁷¹ 11 U.S.C. § 541(a).

include foreign property in the estate. Because there are no administrative agencies to disseminate rulings on the Code, courts can not rely on the agency deference prong of *Aramco* to resolve this dispute.

By comparison with the 1952 Report, the legislative history accompanying the 1978 reforms gives less specific guidance. The 1978 House and Senate Reports provide: “The scope of this paragraph is broad. It includes all *kinds* of property, including tangible or intangible property, causes of action . . . and all other *forms* of property currently specified in section 70a of the Bankruptcy Act”⁷² These later reports do not speak to extraterritoriality. “Kinds” and “forms” refer to types of property rather than geographic distributions.⁷³ Although it could be argued that the specific reference to the old § 70a incorporates the old sentiment that § 541 should be applied extraterritorially, nearly thirty years have elapsed since the last indication of congressional intent. Especially with the wide scope of the recent Bankruptcy Abuse Prevention and Consumer Protection Act amendments, Congress could have reasonably reiterated its intent towards extraterritorial application. Even so, this line of inquiry is irrelevant to the issue of avoiding transfers of foreign assets.

Irrespective of the extraterritorial application of § 541, foreign transferred property is not within the estate.⁷⁴ A split exists among the circuit courts of appeals as to whether transfers not yet avoided are included within the estate under § 541, even if the transfers are wholly domestic.⁷⁵ Proponents of the theory that such transfers are part of the estate before avoidance contend that a

⁷² H.R. REP. NO. 95-595, at 367 (1977) (emphasis added); S. REP. NO. 95-989, at 82 (1978) (identical).

⁷³ Form is the “outer shape or structure of something, as distinguished from its substance or matter.” BLACK’S LAW DICTIONARY 678 (8th ed. 2004). A kind is defined in part as “a specific or recognized variety.” WEBSTER’S NEW COLLEGIATE DICTIONARY 635 (Henry Bosley Woolf ed., 1973).

⁷⁴ See *In re Midland Euro Exch. Inc.*, 347 B.R. 708, 718 (Bankr. C.D. Cal. 2006).

⁷⁵ Compare *Am. Nat’l Bank of Austin v. MortgageAmerica Corp.* (*In re MortgageAmerica Corp.*), 714 F.2d 1266, 1277 (5th Cir. 1983) (holding that property recoverable under a state fraudulent transfer act constituted estate property), with *FDIC v. Hirsch* (*In re Colonial Realty Co.*), 980 F.2d 125, 131 (2d Cir. 1992) (citing *In re Saunders*, 101 B.R. 303, 305 (Bankr. N.D. Fla. 1989)) (holding that fraudulently transferred property is not part of the estate until recovered). These two cases, along with *Saunders*, have spawned a wide progeny. For those cases following *MortgageAmerica*, see *Cullen Ctr. Bank & Trust v. Hensley* (*In re Criswell*), 102 F.3d 1411, 1417 (5th Cir. 1997); *In re Swallen’s, Inc.*, 205 B.R. 879, 882 (Bankr. S.D. Ohio 1997); *McGowan v. Ciccone* (*In re Ciccone*), 171 B.R. 4, 5 (Bankr. D.R.I. 1994). For those cases following *Saunders* and *Colonial Realty*, see *Steffen v. Gray, Harris & Robinson, P.A.*, 283 F. Supp. 2d 1272, 1284 n.24 (M.D. Fla. 2003); *Grossman v. Murray* (*In re Murray*), 214 B.R. 271, 279 (Bankr. D. Mass. 1997); *Yellow Cab Coop. Ass’n v. Mathis* (*In re Yellow Cab Coop. Ass’n*), 178 B.R. 265, 268 (Bankr. D. Colo. 1995); *Klingman v. Levinson*, 158 B.R. 109, 112–13 (N.D. Ill. 1993); *In re McDonald Bros. Constr., Inc.*, 114 B.R. 989, 997 (Bankr. N.D. Ill. 1990).

debtor retains an equitable interest in fraudulently transferred property under § 541(a)(1).⁷⁶ They justify this result as furthering the bankruptcy policy of equitable distribution.⁷⁷ A second canon of statutory construction defeats this argument; every clause of a statute should have functional meaning.⁷⁸ The interpretation would violate this canon by making § 541(a)(3) duplicative.⁷⁹ Section 541(a)(3) brings avoided transfers into the estate by reference to § 550, which ultimately authorizes the trustee to bring recovered property into the estate.⁸⁰ Thus, including avoided transfers in the estate under § 541(a)(1) would render § 541(a)(3) useless surplusage. The only interpretation that yields coherent purposes for all subsections of § 541 requires considering § 541(a)(1) as non-extraterritorial in scope and subservient to § 541(a)(3) with respect to unavoided transfers.

Some courts have ruled on the § 541 dispute based on the legal fiction that property exists within the physical territory of the district.⁸¹ These courts contend that because bankruptcy courts have in rem jurisdiction over all estate property, the property is considered within the court's district; because the property is considered within the court's district, the court therefore has jurisdiction to apply the Code extraterritorially.⁸² This argument simply assumes what it seeks to prove. Without adopting this circular argument, extraterritorial jurisdiction cannot be premised on notions of domestic jurisdiction.

In sum, the "wherever located" language of § 541(a) reflects the type of statutory boilerplate the presumption against extraterritoriality was conceived to defeat. Indeed, the Supreme Court has refused to apply such language extraterritorially.⁸³ Even though the language of § 541(a) comprises simple words, non-domestic application still requires inference. Such inference

⁷⁶ *MortgageAmerica*, 714 F.2d at 1275.

⁷⁷ *Id.* at 1275–76.

⁷⁸ *See, e.g., Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (citing *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)) (applying "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

⁷⁹ *In re Saunders*, 101 B.R. 303, 304–05 (Bankr. N.D. Fla. 1989).

⁸⁰ *Id.*

⁸¹ *In re Simon*, 153 F.3d 991, 996 (9th Cir. 1998).

⁸² *Id. But see Elscint, Inc. v. First Wis. Fin. Corp. (In re Xonics, Inc.)*, 813 F.2d 127, 131 (7th Cir. 1987) ("[Jurisdiction] lapses when property leaves the estate."). If property is never within the estate in the first instance, the fiction of worldwide in rem jurisdiction amounts to gross usurpation of authority.

⁸³ *See, e.g., Foley Bros. v. Filardo*, 336 U.S. 281, 282, 290 (1949) (refusing to apply a statute supposedly regulating "[e]very contract" extraterritorially).

precludes the affirmative evidence of congressional intent necessary to apply § 541 extraterritorially.⁸⁴

2. Section 362: The Automatic Stay

A second textual argument for extraterritorial application of the Code posits that Congress intended to apply the Code extraterritorially because the automatic stay provision applies to foreign entities.⁸⁵ Section 362(a) extends the automatic stay to “all entities.”⁸⁶ The Code defines “entity” to include a “governmental unit.”⁸⁷ In turn, “governmental unit” comprises, inter alia, a “foreign state.”⁸⁸ Although Congress doubtlessly intended to regulate foreign governments with this provision, it is less clear how far that intent can be extrapolated onto other parties.

First, the sum of these provisions speaks only to the identity of the persons or groups affecting estate property, but says nothing about the geographic scope of the property subject to the Code. Congress could have reasonably included foreign governmental units within the definition of entity as a defensive measure to make certain that American-based assets owned by foreign governments would be subject to the stay. The United States receives billions of dollars per year in international investment, some of it directly from foreign governments or from sovereign investment funds.⁸⁹ Given the magnitude of these investments, Congress could reasonably include a foreign government or state-owned corporation to prevent its unjust enrichment during a bankruptcy proceeding.

Second, the statutes explicitly include only foreign governments, and not foreign individuals.⁹⁰ The overwhelming majority of foreign parties to

⁸⁴ See *EEOC v. Arabian Am. Oil Co. (“Aramco”)*, 499 U.S. 244, 250–51, 259 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1077, *as recognized in* *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 512 n.8 (2006).

⁸⁵ Green & Benzija, *supra* note 69, at 93.

⁸⁶ 11 U.S.C. § 362(a) (2000).

⁸⁷ 11 U.S.C. § 101(15) (2000); H.R. REP. NO. 95-595, at 311 (1977) (“‘Entity’ is defined, for convenience, in paragraph (14), to include person, estate, trust, and governmental unit. It is the most inclusive of the various defined terms relating to bodies or units.”).

⁸⁸ 11 U.S.C. § 101(27) (2000).

⁸⁹ The recent controversy surrounding Dubai Ports World’s attempted acquisition of American port terminals is one example of a multi-billion dollar investment by a sovereign wealth fund. See CNN.com, *Ports Company Will Delay Takeover*, Feb. 24, 2006, <http://www.cnn.com/2006/POLITICS/02/23/port.security/index.html>.

⁹⁰ Green & Benzija, *supra* note 69, at 93. The authors do not explore the point, but it could be argued that a “person” within the definition of an “entity” could include foreign residents. See 11 U.S.C. § 101(15).

bankruptcy proceedings are not foreign states. This distinction would yield the awkward disparity that American bankruptcy proceedings would be valid in rare instances against foreign sovereigns, but would not apply in more frequent cases against foreign private creditors. There is no reason why Congress would intentionally create such a divergence.

3. *Definition of Property*

The most logical way for Congress to demonstrate the geographic extent of the Code would be through the definition of property, rather than through the definition of entity.⁹¹ But, the Code does not define property.⁹² Rather, the definition of property under the Code is a function of state law.⁹³ A state could define property subject to state laws not just by its physical or existential characteristics, but also by where it is located, either solely within the state or throughout the entire world. Most state legislatures, however, do not even consider the location of property,⁹⁴ probably because they resemble Congress in legislating with domestic conditions in mind.⁹⁵ Where Congress and courts have been so adamant on the uniformity of outcomes in bankruptcy, it again seems odd that Congress would create opportunities for divergences. These possibilities for divergent outcomes because of different state definitions of property are minimized by a Code that applies only domestically.

But, the Code does not define “person” by location. *See* 11 U.S.C. § 101(41) (2000). Nevertheless, this construction yields the same presumption against extraterritoriality problem of a potentially limitless application of the statute. *See supra* Part I.A; *see also* discussion *infra* Part I.D.4 (discussing the related issue of which “person[s]” can be debtors).

⁹¹ Defining “property” not just as a particular bundle of rights, but also with respect to geographic distribution would apply to nearly every determinative section of the Code. For instance, §§ 362, 541, and 547 all refer directly to “property.” *See, e.g.*, 11 U.S.C. §§ 362(a)(2)–(5), 541(a), 547(b) (2000). Such a definition would also affect § 548 through the definition of “transfer,” which is defined in part by methods of transmitting “property.” *See* 11 U.S.C.A § 101(54)(D) (West 2007).

⁹² *See* 11 U.S.C. A. § 101.

⁹³ *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992) (“In the absence of any controlling federal law, ‘property’ and ‘interests in property’ are creatures of state law.”). Indeed, even foreign state definitions of property and ownership were valid, at least in the context of domestic turnover proceedings under the now-repealed § 304. *See* *Koreag, Controle et Revision S.A. v. Refco F/X Assocs.* (*In re* *Koreag, Controle et Revision S.A.*), 961 F.2d 341, 348–49 (2d Cir. 1992).

⁹⁴ Pennsylvania’s definition is representative: “‘Property.’ Includes both real and personal property.” 1 PA. CONS. STAT. ANN. § 1991 (West 2008) (applying to all Pennsylvania statutes finally enacted on or after September 1, 1937). Model laws also create generic definitions. The Uniform Fraudulent Transfer Act defines property as “anything that may be the subject of ownership.” UNIF. FRAUDULENT TRANSFER ACT § 1(10) (1984).

⁹⁵ *Cf. Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

4. Section 109: Definition of a Debtor

Others believe that the Code applies extraterritorially because § 109 permits a foreign person to be a debtor.⁹⁶ Section 109(a) requires debtors to “reside[] or [have] a domicile, a place of business, or property in the United States.”⁹⁷ In turn, anyone eligible to be a debtor can file a case under §§ 301-303.⁹⁸ Although it is certainly true that foreign entities can avail themselves of American bankruptcy law to the extent that they satisfy § 109(a), this argument fails because foreign participation is a one-way street.⁹⁹ The allowance into bankruptcy of foreigners with contacts within the United States proves nothing with respect to applying American bankruptcy laws to creditors receiving potentially avoidable transfers overseas.¹⁰⁰ The recent *Yukos* case illustrates this distinction. *Yukos*, a Russian oil company, transferred assets to the United States to gain bankruptcy protection against a tax foreclosure by the Russian government.¹⁰¹ By simply transferring money to a Texas bank account, *Yukos* qualified as a debtor under § 109, giving the bankruptcy court jurisdiction over the case.¹⁰² Nevertheless, the court abstained from jurisdiction in part because of its relative inability to act on assets in Russia.¹⁰³ Although § 109 allows foreign debtors, such as *Yukos*, to enter the American bankruptcy system, this scenario is inapposite to whether the Code applies extraterritorially to foreign-based assets. Congressional intent for the extraterritorial application of the Code can not be extrapolated from foreign availment of domestic bankruptcy courts.

⁹⁶ Harrison, *supra* note 45, at 837.

⁹⁷ 11 U.S.C. § 109(a) (2000).

⁹⁸ *Id.* §§ 301–303.

⁹⁹ Cf. Evelyn H. Biery et al., *A Look at Transnational Insolvencies and Chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 47 B.C. L. REV. 23, 32–33 (2005) (“[S]ection 304 was designed to act as a ‘gateway,’ shielding American creditors and assets situated within the borders of the United States from foreign reorganization or liquidation procedures.”).

¹⁰⁰ See *In re Yukos Oil Co.*, 321 B.R. 396, 405–07 (Bankr. S.D. Tex. 2005); see also Kurt A. Mayr, *A Tale of Two Proceedings: “Turnabout is Fair Play” in the Yukos U.S. Bankruptcy Cases*, AM. BANKR. INST. J., July–Aug. 2006, at 24, 66–67.

¹⁰¹ *Yukos*, 321 B.R. at 401.

¹⁰² *Id.* at 407 (“Several courts have held that nominal amounts of property located in the United States enable a foreign corporation to qualify as a debtor under Section 109(a) of the Bankruptcy Code. The courts have noted that there is ‘virtually no formal barrier’ to having federal courts adjudicate foreign debtors’ bankruptcy proceedings.”). The situation is best described as “non-U.S. transactions involving the sale of significant non-U.S. assets by non-U.S. entities to non-U.S. acquirors.” Mayr, *supra* note 100, at 24. Nevertheless, § 109 allows such a debtor to enter the United States bankruptcy system.

¹⁰³ *Yukos*, 321 B.R. at 411.

5. *The Comity Sections of the Code*

Proponents of extraterritoriality also contend that other Code sections, particularly the old § 304, evidence congressional awareness of the international nature of bankruptcy.¹⁰⁴ They essentially argue that congressional awareness of international insolvencies translates into intent for extraterritorial effect.¹⁰⁵ But, like the old § 304, the new chapter 15 sections regarding cross-border insolvencies are one-way streets.¹⁰⁶ The provisions shield domestic asset holders by governing the efforts of foreign courts to access American-based assets,¹⁰⁷ but lend no guidance to efforts by American courts to access foreign-based assets.¹⁰⁸ Whatever the degree of Congress's awareness of international insolvencies,¹⁰⁹ the comity sections of the Code permit domestic application of foreign bankruptcy proceedings without the imposition of any reciprocal authorization to use the Code extraterritorially to avoid transfers.

¹⁰⁴ Green & Benzija, *supra* note 69, at 93–94. These arguments remain valid, if overstated, despite the repeal of § 304 since § 1507 codified existing jurisprudence under § 304. H.R. REP. NO. 109-31, at 109, 172 (2005). The two provisions are substantially similar. Biery et al., *supra* note 99, at 51.

¹⁰⁵ Green & Benzija, *supra* note 69, at 93–94.

¹⁰⁶ Compare 11 U.S.C.A. § 1507 (West 2007), with 11 U.S.C. § 304 (2000) (repealed 2005).

¹⁰⁷ Richard E. Coulson, *Choice of Law in United States Cross-Border Insolvencies*, 32 DENV. J. INT'L L. & POL'Y 275, 288–89 (2004); Biery et al., *supra* note 99, at 32–33 (“[S]ection 304 was designed to act as a ‘gateway,’ shielding American creditors and assets situated within the borders of the United States from foreign reorganization or liquidation procedures.”).

¹⁰⁸ Whether coined as “ancillary” petitions under § 304 or “additional assistance” under § 1507, § 304 and its successor have governed deference to foreign courts. 11 U.S.C. § 304; 11 U.S.C.A. § 1507. By definition, a domestic proceeding can only lend assistance when a foreign proceeding exists. Without a foreign proceeding, i.e. when the American case is the dominant or sole proceeding, these provisions of the Code have little utility. The exception is § 1525(b), which allows a court “to communicate directly with, or to request information or assistance directly from, a foreign court or a foreign representative.” 11 U.S.C.A. § 1525 (West 2007). Even so, the section reflects a desire for cooperation rather than unilateral authorization of extraterritorial extent. *See id.* Congress did not imbue the Code with authority to apply extraterritorially outside of this limited context.

¹⁰⁹ Congress is clearly aware of the nature of the international nature of insolvency. In the recent Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”), Congress adopted the 1997 Model Law drafted by the United Nations Committee on International Trade Laws (“UNCITRAL”). *In re Tri-Cont'l Exch. Ltd.*, 349 B.R. 627, 631–32 (Bankr. E.D. Cal. 2006) (citing H.R. REP. NO. 109-31, at 105–07 (noting that the BAPCPA adopts the UNCITRAL Model Law under chapter 15 of the Code)). The main impact of the UNCITRAL Model Law was to change the Code's administrative and procedural mechanisms for dealing with what used to be termed ancillary proceedings. H.R. REP. NO. 109-31, at 105–07 (noting that the BAPCPA replaced § 304 with chapter 15). The Model Law remained silent on many substantive issues of law, particularly relating to avoidance powers and extraterritoriality. SAMUEL L. BUFFORD, ET AL., INTERNATIONAL INSOLVENCY 57 (Federal Judicial Center 2001), available at [http://www.fjc.gov/public/pdf.nsf/lookup/IntlInso.pdf/\\$file/IntlInso.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/IntlInso.pdf/$file/IntlInso.pdf); Parikshit Dasgupta, *Securitization: Crossing Borders and Heading Towards Globalization*, 27 SUFFOLK TRANSNAT'L L. REV. 243, 259 (2004).

6. Rule 7004 of Bankruptcy Procedure

Rule 7004 of Bankruptcy Procedure governs process and service in bankruptcy.¹¹⁰ It arguably supplies one rationale for the extraterritorial reach of the Code. Congress amended the Bankruptcy Rules of Procedure in 1996 to conform to the 1993 amendments to the Federal Rules of Civil Procedure.¹¹¹ The 1993 amendments changed the rules regarding service to foreign parties by bringing American law in harmony with the Hague Convention.¹¹² Before the 1996 amendments, bankruptcy courts could only serve process nationwide.¹¹³ The rules now allow for worldwide service of process by a bankruptcy court by incorporating Federal Rule of Civil Procedure 4(k) into Bankruptcy Rule 7004(f).¹¹⁴ The sole restraint on bankruptcy service is that the party to be served must have minimum contacts with the United States to satisfy the Due Process Clause of the Fifth Amendment.¹¹⁵ Because the Rules of Bankruptcy Procedure permit worldwide service, it could be argued that they justify the extraterritorial application of the Code. But, the Advisory Committee Notes state that Rule 7004 was amended to bring it into conformity with Rule 4, not with substantive bankruptcy law.¹¹⁶ The Federal Rules of Civil Procedure have authorized worldwide service of process since 1993, during which time the presumption against extraterritoriality has continued to apply to many of the substantive laws governed by the Federal Rules of Civil Procedure.¹¹⁷ Enacting wider-ranging procedural rules for bankruptcy would not then have the inverse effect of pulling the substantive law of bankruptcy away from the presumption against extraterritoriality.

7. The Primary Effects Exception in Bankruptcy

The primary effects caveat to the presumption against extraterritoriality risks gutting basic protections afforded by the presumption. Many courts have declined to apply the presumption because the conduct in question resulted in domestic effects.¹¹⁸ *In re Simon* involved the bankruptcy of the principal

¹¹⁰ FED. R. BANKR. P. 7004.

¹¹¹ *Id.* at cmt. on subdiv. g.

¹¹² FED. R. CIV. P. 4(f); *id.* at cmt. C4–6.

¹¹³ See WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE §152:2 n.26 (2d ed. 1994).

¹¹⁴ FED. R. BANKR. P. 7004; Nationsbank, N.A. v. Macoil, Inc. (*In re Med-Atlantic Petroleum Corp.*), 233 B.R. 644, 652–53 (Bankr. S.D.N.Y. 1999).

¹¹⁵ *In re Med-Atlantic Petroleum Corp.*, 233 B.R. at 653.

¹¹⁶ See FED. R. BANKR. P. 7004 cmts.

¹¹⁷ See *supra* notes 28–31 and accompanying text.

¹¹⁸ See *supra* Part I.B.

shareholder of a British Virgin Islands corporation.¹¹⁹ The principal personally guaranteed the debt of his corporation to a Hong Kong bank before declaring bankruptcy in the United States.¹²⁰ The creditor filed a proof of claim, but failed to object to the discharge, instead arguing that the discharge was only valid within the United States.¹²¹ The possibility of a foreign creditor disobeying a discharge injunction was sufficient to trigger the exception to the presumption because the disobedience would have had adverse effects for United States creditors.¹²² Conversely, the court in *In re Maxwell Communication Corp.* (“*Maxwell*”)¹²³ came to the opposite conclusion on similar facts. *Maxwell* involved a petition by an English corporation to recover allegedly preferential transfers to French and English banks.¹²⁴ *Maxwell* considered the payments extraterritorial because the center of gravity of the transfers was outside the United States, thereby allowing application of the presumption.¹²⁵ Practically the sole domestic aspect of *Maxwell* was that all the parties were subject to the jurisdiction of the court.¹²⁶

Although the primary effects exception has utility in other contexts, such as tort claims, in bankruptcy the exception threatens to subsume the larger rule. Bankruptcy is often a zero-sum game.¹²⁷ In any zero-sum situation, a domestic creditor would suffer by definition whenever a foreign creditor retains a transfer, thereby diminishing the estate. In this regard, the *Maxwell* formulation is preferable. *Maxwell*'s center of gravity analysis gives due regard for the interests of domestic creditors without creating an overly broad exception that will apply in all foreign transfer avoidance scenarios. Even where the effects exception applies and the center of gravity of a transfer is

¹¹⁹ 153 F.3d 991, 994 (5th Cir. 1998).

¹²⁰ *Id.*

¹²¹ *Id.* at 997.

¹²² *Id.* at 996–97. The *Simon* decision is somewhat convoluted about extraterritoriality. The court initially found that § 541 of the Code applied extraterritorially. *Id.* at 996. The court still invoked the exception to the presumption against extraterritoriality to enjoin foreign collection attempts. *Id.* at 996–97.

¹²³ 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996).

¹²⁴ *Id.* at 801.

¹²⁵ *Id.* at 809. Although the nomenclature “center of gravity” and “effects” differ, the principles behind them remain similar: the degree of contacts within the United States sufficient to consider regulation domestic.

¹²⁶ *Id.* The English debtor had major subsidiaries in the United States, while the banks were large financial institutions with branches in New York. *Id.* at 803, 806–07.

¹²⁷ This statement is certainly true of liquidation bankruptcies. It has less merit in reorganizations, where collective action has the potential to increase the eventual size of the estate.

domestic, extraterritoriality is the penultimate step of the inquiry.¹²⁸ Comity provides reasons to limit the reach of United States bankruptcy law.

II. COMITY

Broadly, comity is the deference that nations pay to each other. Early statements of the doctrine considered it not so much a courtesy as a “paramount moral duty.”¹²⁹ Later formulations have considered it anything from duty to courtesy to an issue best avoided.¹³⁰ As a matter of substantive law, indefiniteness best defines comity: the doctrine has engendered innumerable different standards throughout its history and has suffered nearly as many recent criticisms for its lack of transparency.¹³¹ Nevertheless, the doctrine has remained an important part of American conflict of laws jurisprudence even as the law has gradually inched away from the territorial precepts upon which comity was founded.¹³²

A. Overview

Comity has been considered both an independent doctrine and an aspect of the presumption against extraterritoriality.¹³³ Moreover, comity includes several doctrines with independent rationales and different situations where those doctrines should apply. In this respect, confusion over comity is a problem of terminology; the word applies haphazardly to each idea for lack of a better alternative.

¹²⁸ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814–15 (1993) (Scalia, J., dissenting).

¹²⁹ *Hilton v. Guyot*, 159 U.S. 113, 165 (1895) (quoting STORY, CONFL. LAWS §§ 23, 24).

¹³⁰ Compare *id.* at 163 (“‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.”), with Michael D. Ramsey, *Escaping “International Comity,”* 83 IOWA L. REV. 893, 893 (1998) (summing up comity as “an expression of unexplained authority, imprecise meaning and uncertain application”).

¹³¹ Ramsey, *supra* note 130, at 893.

¹³² The doctrine itself goes back to Frisian Ulrich Huber, a seventeenth century jurist. Susan E. Burnett, Comment, *U.S. Judicial Imperialism Post Empagran v. F. Hoffmann-LaRoche? Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust*, 18 EMORY INT’L L. REV. 555, 617 (2004). Huber outlined three rules which later influenced Justice Story’s seminal treatise on conflict of laws:

(1) a nation’s laws have “force only within the limits of its own government”; (2) persons within the limits of this government are subject to its laws; and (3) although the laws of one nation are non binding on persons in another nation, these laws “ought to have the same force . . . so far as they do not prejudice the powers or rights of other governments. . . .”

Id. at 617 n.300 (quoting STORY, CONFL. OF LAWS § 29).

¹³³ Compare *Hartford*, 509 U.S. at 814–15 (Scalia, J., dissenting), with *Hilton*, 159 U.S. at 163.

In his dissent in *Hartford Fire Insurance Co. v. California*, Justice Scalia articulated the difference between two strands of comity: prescriptive comity and comity of the courts.¹³⁴ Prescriptive comity is “the respect sovereign nations afford each other by limiting the reach of their laws.”¹³⁵ This conception of comity represents an affirmative restraint on the effects of United States laws in foreign nations.¹³⁶ Comity can also describe the inverse scenario where the United States allows the law of foreign nations to have domestic effect:

it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.¹³⁷

Comity also refers to “comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere.”¹³⁸ This type of comity reflects notions such as lack of jurisdiction.¹³⁹

Perhaps because of this confusion regarding definitions of comity, comity analyses also suffer from a lack of clear standards. In *Hartford*, both the majority and minority opinions applied Restatement (Third) of Foreign Relations Law section 403 to determine whether comity dictated abstention by the Court.¹⁴⁰ The majority read section 403 to require a “true conflict between domestic and foreign law” before abstention would be appropriate under comity.¹⁴¹ Justice Scalia’s dissent read section 403 to simply require that affirmative American jurisdiction be reasonable.¹⁴² The dissent’s

¹³⁴ 509 U.S. at 817 (Scalia, J., dissenting).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Hilton*, 159 U.S. at 163. Justice Scalia traced prescriptive comity back to Justice Story’s principle of the comity of nations. *Hartford*, 509 U.S. at 817 (Scalia, J., dissenting). This principle also dominated the rationale of *Hilton*. Nevertheless, Justice Scalia’s definition of prescriptive comity seems not to include deference to foreign laws. To the extent that his definition does not encompass deference, his dichotomy between prescriptive comity and comity of the courts fails to describe fully the doctrine of comity.

¹³⁸ *Hartford*, 509 U.S. at 817 (Scalia, J., dissenting).

¹³⁹ *Id.* at 818 n.9.

¹⁴⁰ *Id.* at 821.

¹⁴¹ *Id.* at 798 (majority opinion) (quoting *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part)).

¹⁴² *Id.* at 821 (1993) (Scalia, J., dissenting).

interpretation more accurately characterized the distinction between section 403 and traditional notions of comity.¹⁴³

The Restatement (Third) of Foreign Relations Law section 403 mirrors Justice Scalia's definition of prescriptive comity by limiting the prescriptive jurisdiction of the United States to reasonable circumstances.¹⁴⁴ Section 403(2) lists policy factors of prescriptive comity to determine if a particular exercise of jurisdiction is reasonable.¹⁴⁵ Thus, section 403 governs the affirmative reach of American law, often irrespective of whether or not there is a competing or conflicting foreign regulation.¹⁴⁶ Comity, on the other hand, is partly a function of deference to foreign nations.¹⁴⁷ Although the principle of deferring to a stronger foreign interest underlies section 403 and comity alike, the principle does not have equal weight in each. Section 403 roots the principle of deference in a much stronger notion of territoriality and nationality.¹⁴⁸

Despite the clear language of section 403 and the prevalence of its citation as an authority, a dominant standard of comity is difficult to discern. Some courts follow the true conflict standard enumerated by the *Hartford* majority.¹⁴⁹ Others follow the factor analysis of the *Hartford* dissent based on the reasonableness factors of section 403.¹⁵⁰ Because the dissent's formulation

¹⁴³ See Coulson, *supra* note 107, at 283 (echoing Justice Scalia's distinction that Section 403 of the Restatement (Third) of Foreign Relations and international comity reflect different principles).

¹⁴⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987). This section has been accepted with near unanimity, if not applied with the commensurate uniformity. Compare *Hartford*, 509 U.S. at 818–19 (Scalia, J., dissenting), with *id.* at 799 (majority opinion). While the *Hartford* dissent applied section 403 mechanically, the majority used section 403(3) in isolation to avoid a factor analysis. *Id.* Justice Scalia rightly criticized the majority for selective quotation, which allowed the majority to assume that the dual regulation was reasonable without applying the very factors used to determine reasonableness. *Id.* at 821 (Scalia, J., dissenting). Somewhat surprisingly, however, commentators have been even more acerbic than Justice Scalia of Justice Souter's interpretation. See Griffin, *supra* note 54, at 522 (“The drafter of the relevant portion of the Restatement (Third) has confirmed that the Court's majority misunderstood and misapplied it.”).

¹⁴⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(1). This subsection reflects the symbiotic nature of sections 402 and 403. Section 402 broadly defines acceptable categories of jurisdiction, including, inter alia, “conduct outside its territory that has or is intended to have substantial effect within its territory” and “activities . . . of its nationals outside as well as within its territory.” *Id.* § 402. Section 403 subjects these bases of jurisdiction to a reasonableness factor analysis. *Id.* § 403. See discussion *infra* Part II.E.

¹⁴⁶ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403; Coulson, *supra* note 107, at 283.

¹⁴⁷ See *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895); Coulson, *supra* note 107, at 283.

¹⁴⁸ This basis is in part by reference to § 402, which explicitly indicates territoriality and nationality as bases of jurisdiction. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402.

¹⁴⁹ See, e.g., *In re Interbulk, Ltd.*, 240 B.R. 195, 199 n.4 (Bankr. S.D.N.Y. 1999).

¹⁵⁰ See, e.g., *In re Maxwell Commc'n Corp.*, 170 B.R. 800, 815 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996).

has been more widely followed¹⁵¹ and remains less susceptible to criticism than the majority's position,¹⁵² courts considering avoiding foreign transfers should employ Justice Scalia's approach.

B. *Justifications of Comity*

Many rationales validate the doctrine of comity, both for the parties subject to the doctrine and for the nations that employ it.¹⁵³ First, comity respects the sovereignty inherent in every nation.¹⁵⁴ Although reciprocity is not a requirement for comity, the principle of mutuality underlies the doctrine.¹⁵⁵ On the theory of reciprocity, proffering respect to other nations bolsters sovereignty accorded to the domestic state. Mutuality also benefits a nation by creating an incentive for the nation to cause conflicts selectively. No nation wishes to expend its international political capital on disputes that have minimal domestic effect. Conversely, a nation maximizes prestige, respect, and good will by adjudicating only disputes in which the nation has a legitimate interest.¹⁵⁶

Second, comity averts these costly international squabbles entirely by avoiding negative reciprocity.¹⁵⁷ By preventing unreasonable exercises of American prescriptive jurisdiction, comity obviates the need for foreign states to object to American policies. Empirically, other nations do object to American extraterritorial jurisdiction.¹⁵⁸ Although some nations may offer

¹⁵¹ *See id.*

¹⁵² Griffin, *supra* note 54, at 522 (“The drafter of the relevant portion of the Restatement (Third) has confirmed that the Court’s majority misunderstood and misapplied it.”).

¹⁵³ Justice Breyer delivered the most succinct justification: “[I]f America’s . . . policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.” *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004).

¹⁵⁴ *Id.* at 176 (Scalia, J., dissenting).

¹⁵⁵ *Hilton v. Guyot*, 159 U.S. 113, 228 (1895); *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

¹⁵⁶ *See F. Hoffmann-La Roche*, 542 U.S. at 165 (“[A]pplication of those laws creates a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs. But . . . the justification for that interference seems insubstantial.”).

¹⁵⁷ *See id.* at 164–65 (stating that comity “helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today’s highly interdependent commercial world”); *cf. Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953) (“[Maritime law] aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own.”).

¹⁵⁸ *See, e.g., F. Hoffmann-La Roche*, 542 U.S. at 167–68 (noting several nations who objected as *amici curiae* to a foreign application of United States anti-trust laws).

minimal resistance by attempting to negotiate differences,¹⁵⁹ others will take harsher countermeasures.¹⁶⁰ The latter reaction reflects negative reciprocity. Where a nation sees its own valid interests ignored, it has an incentive to give less recognition to the sovereign interests of the United States.¹⁶¹ Negative reciprocity can lead to a negative sum game, whereby all states and parties suffer by foregoing the benefits of harmonious interaction.

Blocking statutes exemplify this type of situation.¹⁶² By raising barriers to the easy resolution of disputes, these statutes increase the complexity of disputes, reducing the certainty of outcomes, leading to transaction costs and more risk. Blocking statutes may not limit themselves to the offending application of American law. Thus, a blocking statute could widen the conflict by prohibiting foreign applications of American law that would have otherwise been acceptable.¹⁶³ If reducing barriers to trade constitutes a premise of economic cooperation, then a robust doctrine of comity stimulates economic interdependence by removing such barriers.

Aside from the absence of these barriers, other benefits of comity accrue to individuals. Primary among them is the clarity as to the substantive law that arises from a territorial system.¹⁶⁴ When the law of the location of an asset controls, all interested parties have notice of the substantive law and can plan accordingly.

C. *Universality and Territoriality*

The principle of deference to the location of an asset under comity could be criticized as inhibiting a universal system of bankruptcy. Universalism broadly

¹⁵⁹ See generally Sinclair, *supra* note 55, at 217–22.

¹⁶⁰ See *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 21 (1963) (noting that exercising jurisdiction over Honduran vessels invites international discord and retaliatory action). See generally April, *supra* note 57, at 223–36.

¹⁶¹ *Lauritzen*, 345 U.S. at 582 (“[I]n . . . international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; . . . any contact which we hold sufficient to warrant application of our law to a foreign transaction will . . . warrant . . . a foreign country to apply its law to an American transaction.”).

¹⁶² See generally April, *supra* note 57, at 223–36.

¹⁶³ See *Lauritzen*, 345 U.S. at 582. Such a response would likely be met by an unfriendly response by the United States. From the perspective of game theory, these situations can devolve into retaliation ad infinitum as each side has an incentive to create a disincentive for the opposing party to retaliate. Such retaliation defines a negative sum game.

¹⁶⁴ John A. E. Pottow, *Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to “Local Interests,”* 104 MICH. L. REV. 1899, 1904 (2006).

desires a single proceeding to govern the worldwide assets of a debtor.¹⁶⁵ To the extent that comity would require different nations to adjudicate estate property, the doctrine violates the tenets of universalism.¹⁶⁶ In this respect, comity's territorial underpinnings benefit individual parties to insolvencies. Local creditors gain most from territorial insolvency proceedings.¹⁶⁷

Universalists, however, argue that losses and gains to local creditors even out because every nation can expect an even distribution of cases in a forum.¹⁶⁸ Thus, gains to a local forum in one proceeding will cancel losses from another proceeding.¹⁶⁹ This theory suffers from two faults. First, equality of outcomes for a forum under territorial or worldwide regimes does not mean that individuals within a given forum will have equal outcomes.¹⁷⁰ Different categories of creditors will win in local proceedings and lose in foreign proceedings. For example, labor creditors of the debtor would lose disproportionately in foreign proceedings and win disproportionately in local proceedings. Courts will likely deal sympathetically with local wage claims. Laborers are also most likely to be inconvenienced by the difficulty of litigating in a distant forum, at least in comparison to sophisticated multinational creditors.¹⁷¹ The inherent injustice of a consistently prejudicial insolvency system necessitates upholding the territorial roots of bankruptcy law.¹⁷²

Second, asymmetries prevent the "rough wash" from occurring. Not all economies are equally globalized. Under a universalist system a relatively globalized country would have a larger percentage of its assets adjudicated in a foreign proceeding than a relatively isolated country. Hence, creditors from

¹⁶⁵ Westbrook, *supra* note 61, at 514–15.

¹⁶⁶ See *supra* note 132 and accompanying text.

¹⁶⁷ See Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 711 (1999); Westbrook, *supra* note 61, at 518.

¹⁶⁸ Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 464–65 (1991) (explaining the "rough wash" argument).

¹⁶⁹ *Id.*

¹⁷⁰ Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2217–18 (2000).

¹⁷¹ The sophistication distinction may not always hold true. Organized labor could potentially litigate effectively anywhere in the world. On the other hand, non-unionized labor from developing nations would face a more daunting task to represent their claims.

¹⁷² See Westbrook, *supra* note 168, at 466. Yet, it is impossible to provide equal distribution without first choosing the priority scheme. Creditors disfavored under one priority scheme will not consider that scheme equal. Because insolvency laws differ significantly between countries, the promise of altruism from a non-territorial system will disappoint.

the United States, one of the most globally integrated economies, would be the disfavored foreign creditor with relative frequency.¹⁷³

Moreover, assets have asymmetrical values; one forum can subjectively value an asset more than another forum. Strategic and cultural assets provide two examples of asymmetrically valued assets.¹⁷⁴ Their value in strategic or cultural terms imposes some intangible benefit on the domestic forum beyond the economic value that can be distributed from their revenue stream. A foreign jurisdiction will be unlikely to share domestic concerns for the domestic forum's strategic or cultural welfare.¹⁷⁵

Asymmetrical valuation problems go beyond mere financial appraisal. Insolvency schemes reflect the vastly different moral values of nations.¹⁷⁶ Thus, non-territorial bankruptcy exports the social policies of the adjudicating state.¹⁷⁷ It is reasonable for local creditors to desire that their assets be adjudicated according to their own moral sensibilities. Territorial bankruptcy laws enable this correlation between applicable law and morality by assuring that domestic political processes create the law governing domestic assets.

D. Comity in Bankruptcy

Bankruptcy courts apply different principles and tests of comity depending on the facts of the dispute. Cases with extant foreign proceedings tend to analyze international comity under the comity sections of the Code, either old § 304 or new § 1507.¹⁷⁸ Old § 304 applied directly to ancillary petitions only, but it influenced larger issues of abstention under § 305 and general principles of comity because it reflected Congress's favor for comity in international bankruptcy.¹⁷⁹ Cases involving the attempted subordination of domestic issues to a foreign proceeding tended to be resolved under § 304, whether or not the

¹⁷³ This concern would be somewhat mitigated in the United States because it is a net importer of bankruptcies due to the availability of protections such as debtor-in-possession status. Pottow, *supra* note 164, at 1914, 1915 n.66 (arguing that a forum will be universalist or territorialist depending on whether they expect to be net importer or net exporters of bankruptcies).

¹⁷⁴ See *supra* note 89.

¹⁷⁵ Cf. Tung, *supra* note 49, at 52.

¹⁷⁶ *Id.* at 48 (“[E]ach state’s bankruptcy regime embodies its own myriad social policies.”).

¹⁷⁷ *Id.* at 49.

¹⁷⁸ See *Remington Rand Corp.-Del. v. Bus. Sys. Inc.*, 830 F.2d 1260, 1271–72 (3d Cir. 1987). The new § 1507 has codified the old jurisprudence on § 304, lending it the same influence as its predecessor. H.R. REP. NO. 109-31, at 109 (2005).

¹⁷⁹ *In re Maxwell Comm’n Corp.*, 170 B.R. 800, 816 (Bankr. S.D.N.Y. 1994), *aff’d*, 186 B.R. 807 (S.D.N.Y. 1995), *aff’d*, 93 F.3d 1036 (2d Cir. 1996); *Remington Rand*, 830 F.2d at 1271–72.

action narrowly was for an ancillary petition.¹⁸⁰ On the other hand, where a trustee chose not to use § 304, a court analyzed comity under an entirely different set of factors.¹⁸¹ Nevertheless, within the limited context of the avoidance of foreign transfers, courts have applied a more consistent standard of comity: Justice Scalia's formulation of the doctrine in his dissenting opinion in *Hartford*.¹⁸²

Maxwell followed the *Hartford* dissent's formulation of international comity.¹⁸³ The case involved dual insolvency proceedings in New York and England regarding preferential payments from an insolvent English parent company with American subsidiaries to banks in England and France.¹⁸⁴ The court in *Maxwell* held that principles of international comity weighed in favor of dismissal, even if the presumption against extraterritoriality had not been met.¹⁸⁵ Examining both the prescriptive comity principles of the Restatement (Third) of Foreign Relations Law section 403 and the general comity principles of former § 304, the totality of the facts displayed the predominant English interest in the dispute.¹⁸⁶ The presence of a majority of creditors outside the United States, a dual insolvency proceeding occurring in England, and English interest in applying its own preference laws to transfers made in England to English transferees mandated applying English law.¹⁸⁷ Even the possibility that the comity would permanently exclude the transfers from the estate was not fatal.¹⁸⁸

On the other end of the spectrum, the court in *French* took an entirely different view of international comity. In *French*, both the debtor and the

¹⁸⁰ See *Remington Rand*, 830 F.2d at 1271–72.

¹⁸¹ *Id.*

¹⁸² One exception to this statement is *Interbulk*, which looked at the true conflict test as articulated by the *Hartford* majority. *In re Interbulk, Ltd.*, 240 B.R. 195, 199 n.4 (Bankr. S.D.N.Y. 1999). Other foreign transfer avoidance cases have followed the *Hartford* dissent and the Restatement (Third) of Foreign Relations section 403 with relative consistency. This could be because the limited existing case law on this issue involves the application of American bankruptcy law elsewhere in the world, whereas most comity cases involve deference to foreign proceedings.

¹⁸³ *Maxwell*, 170 B.R. at 814 n.19. The court distinguished the *Hartford* majority analysis as only applying when it is possible for the parties to comply with both domestic and foreign laws. *Id.* Because American and British law differed on the recoverability of preferential transfers, the court opted for the dissent's formulation of comity. *Id.*

¹⁸⁴ *Id.* at 801.

¹⁸⁵ *Id.* at 818.

¹⁸⁶ *Id.* at 815–18.

¹⁸⁷ *Id.* at 818.

¹⁸⁸ *Id.*

transferee of real property located in the Bahamas were American citizens.¹⁸⁹ In voiding the transfer as constructively fraudulent, the court in *French* declined to abstain under the *Hartford* dissent's formulation of comity.¹⁹⁰ Analyzing the Restatement factors, the absence of non-United States resident parties allowed the court to distinguish *Maxwell* and reinforced the American interest in the dispute.¹⁹¹ The absence of a parallel proceeding removed any chance of conflict with Bahamian law.¹⁹² Despite the *situs* of the property, the court in *French* considered the transfer to have occurred in the United States.¹⁹³ Indeed, the court found the *situs* to be the only factor in favor of abstention, but concluded that American interests otherwise sufficiently outweighed Bahamian interests to justify the exercise of jurisdiction.¹⁹⁴

E. Restatement Section 403 Factors in Bankruptcy

Of the two courts, the court in *Maxwell* applied the standard more appropriately. As with any factor analysis, the facts clearly matter. The existence of a foreign proceeding, as in *Maxwell*, makes deference an easier proposition.¹⁹⁵ On the other hand, *French* provided a difficult fact pattern for voluntarily limiting the court's jurisdiction because there was no foreign proceeding and the transferees had significant contacts with the United States.¹⁹⁶ Yet, the court in *French* should have abstained from jurisdiction under considerations of comity and section 403 of the Restatement (Third) of Foreign Relations.¹⁹⁷ A bankruptcy court should not have prescriptive

¹⁸⁹ *In re French*, 440 F.3d 145, 148 (4th Cir. 2006).

¹⁹⁰ *Id.* at 153. The court essentially applied the dissent's formulation by evaluating factors for reasonable jurisdiction, although it cited the *Hartford* majority to prove that "there is some dispute as to the precise contours of this doctrine." *Id.* at 152–53. Despite any uncertainty over the outer bounds of international comity, Justice Scalia's standard seems to be the most enduring, given that it has been the standard of choice for the courts in both *Maxwell* and *French*.

¹⁹¹ *Id.* at 154.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 153–54.

¹⁹⁵ See *In re Maxwell Commc'n Corp.*, 170 B.R. 800, 802 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996) (explaining the cooperation by English and American courts to harmonize the dual proceedings).

¹⁹⁶ *French*, 440 F.3d at 148. On the other hand, the involvement of real property rather than personal property provided a strong impetus for the opposite result. For simplicity, the rest of this section will deal primarily with this fact pattern.

¹⁹⁷ These two principles are not identical. See *supra* notes 144–48 and accompanying text. Section 403 applies more readily in this situation where there is no foreign proceeding because it deals strictly with whether to apply American law without reference to the principles of deference at issue in comity. The absence of any mention of actual foreign proceedings from the factors in section 403, which make American

jurisdiction to avoid transfers of foreign real property.¹⁹⁸ Under section 403, which governs the reasonableness of American prescriptive jurisdiction, most factors weigh heavily against foreign application of the Code in this context.

Section 403(2)(f), concerning the traditions of international law, overwhelmingly weighs in favor of limiting American prescriptive jurisdiction in bankruptcy.¹⁹⁹ Both the history and current state of international bankruptcy law are deeply rooted in notions of territoriality.²⁰⁰ Although some cases, including *French*, have avoided foreign transfers or applied the Code extraterritorially, the bankruptcy system is functionally an in rem proceeding.²⁰¹ In rem jurisdiction has traditionally been limited to situations where a court controls property within its territory.²⁰² American bankruptcy courts have only defeated this tradition by resorting to a suspect fiction that they have in rem jurisdiction over property located anywhere in the world.²⁰³ Consequently, this factor remains unpersuasive as a justification for prescriptive jurisdiction.

Because of the interests of other nations in regulating property located within their borders, section 403(2)(g) gives the most coherent rationale for limiting American avoidance power.²⁰⁴ Even the *French* court recognized the strong interest of the *situs* of real property in adjudicating property-related

prescriptive jurisdiction reasonable, illustrates this distinction. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2) (1987).

¹⁹⁸ This section predominantly deals with real property because the interests of fora in personal property are too varied to deal with in a concise but meaningful way. Nevertheless, the Code should not freely prescribe to foreign personal property for the same reasons that it should not apply *carte blanche* to transfers of foreign real property. The Restatement (Second) of Conflict of Laws section 222 states the general rule regarding all property, that the law of the state with the most significant relationship should govern. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 222 (1971). The United States will not always have the most significant relationship to the foreign property of a debtor. See, e.g., *Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos Human Rights Litig.)*, 94 F.3d 539, 543 n.5 (9th Cir. 1996); LoPucki, *supra* note 170, at 2233–34 (2000) (noting that even intangible assets such as bank accounts have a physical location under the traditional notions of international law).

¹⁹⁹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403(2)(f).

²⁰⁰ LoPucki, *supra* note 170, at 2218 (“Territoriality—the idea that each country has the exclusive right to govern within its borders—is such a basic principle of international law that it often goes unnoticed. It is the default rule in every substantive area of law, including . . . bankruptcy.” (citations omitted)).

²⁰¹ *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362 (2006) (“Bankruptcy jurisdiction, at its core, is *in rem*.”).

²⁰² *Cf. United States v. Ursery*, 518 U.S. 267, 277 (1996) (explaining that actions in rem typically depend on seizure of a physical object).

²⁰³ See *supra* notes 81–82 and accompanying text.

²⁰⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2)(g).

disputes.²⁰⁵ Several reasons bolster this interest. First, the *situs* holds a unique position to adjudicate the dispute. Because of its proximity to the property, the *situs* is the most convenient location for resolving disputes over the property. This concern could arise, for example, in the context of evidentiary issues relating to valuation of the transfer. Second, states traditionally have derived sovereignty from land and jurisdiction from sovereignty. Consequently, to impose jurisdiction on a foreign nation both robs that state of its sovereignty and simultaneously oversteps the sovereignty of the prescribing nation. Such an action offends the principles underlying comity and the presumption against extraterritoriality.²⁰⁶ Third, practical concerns of effective recording systems require that the *situs* of property govern disputes.²⁰⁷ Subsequent transferees of foreign property would be presumptively liable for violating an American automatic stay order,²⁰⁸ but the transferee would have no notice of the stay in a foreign jurisdiction.

French countered these arguments by stating that the property “is part of an aggregate . . . best dealt with as a whole.”²⁰⁹ *French* cites a secondary authority based on state law for this proposition.²¹⁰ Yet, the most prevalent aggregate under state law, the testate or intestate estate, is most often dealt with piecemeal by the *situs* of property.²¹¹ Moreover, dealing with property as an aggregate on the state level is a rare exception to the general rule. Hence, the result in *French* belies the relative frequency with which domestic courts treat real property as an aggregate versus individually by its location.²¹² Especially considering that the *situs* of real property most often governs disputes between

²⁰⁵ *In re French*, 440 F.3d 145, 153 (4th Cir. 2006).

²⁰⁶ See *supra* notes 53–61 and accompanying text.

²⁰⁷ RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Ch. 9, Topic 2, Introductory Note (1971).

²⁰⁸ 11 U.S.C. § 550 (2000).

²⁰⁹ *French*, 440 F.3d at 154.

²¹⁰ The notion of aggregates comes from the Restatement (Second) of Conflict of Laws. See *id.* at 153.

²¹¹ See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 236–243 (regarding “Succession on Death”). The law of the *situs* governs domestic conflicts of law over real property. See, e.g., *Beale v. Beale*, 807 So.2d 797, 798 (Fla. Dist. Ct. App. 2002) (“[L]aws of the situs of the real property govern.”); *accord Carnes v. Interbay Funding LLC (In re Carnes)*, 331 B.R. 229, 231 (Bankr. W.D. Pa. 2005) (“The scope of the Trustee’s strong-arm powers is defined by the law of the situs where the subject property is located.”). The law of the decedent’s domicile governs for personal property. See, e.g., *In re Estates of Garcia-Chapa*, 33 S.W.3d 859, 861 (Tex. App. 2000).

²¹² Indeed, the use of aggregate (about a mass of property at least partly immovable) within the Restatement (Second) of Conflict of Laws is restricted to one other section in the entire Restatement. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 cmt. b. Neither of these references within the Restatement cite any authority considering real property as part of an aggregate. See *id.* From a cynical point of view, this bare discussion of aggregation in the Restatement was a serendipitous means to defeat the concrete interests of the *situs*.

the several states, the imposition of federal bankruptcy law on foreign nations reeks of judicial imperialism.

A more practical counterargument than the one raised in *French* considers comity immaterial because the foreign court ultimately will have to approve of the domestic order to cause any foreign effect. By extension, a domestic court should do whatever it pleases knowing that there will be no consequence without foreign endorsement. Nevertheless, this argument suffers from myopia. A domestic court cannot rule in a vacuum, hurling its avoidance orders at foreign courts. Sooner or later the foreign jurisdiction will react with reciprocal indifference for American interests. Foreign nations have enacted blocking statutes in response to other American regulations,²¹³ and could do so in response to extraterritorial application of the Code.

Section 403(2)(a) concerns “the link of the activity to the territory of the regulating state.”²¹⁴ A transfer of foreign real property has little link to the United States. Some contend that the link is strong when the transfer occurs within the United States,²¹⁵ or has a “substantial effect” within the United States.²¹⁶ But, these arguments personify a transfer to give it a corporeal quality. In truth, a transfer is ephemeral. It exists, if anywhere, where the property in question exists, manifested by physical actions such as the occupation of property or the recording of a deed.²¹⁷ In bankruptcy, the notion that a transfer of foreign property can exist within the United States contradicts the reality of where the true effect of the transfer occurs.

Section 403(2)(c) relates to the importance of the regulation to the United States and the foreign state.²¹⁸ Most nations have bankruptcy laws, all for the same reasons. This factor should be relatively inconclusive given that all states have similar and obvious interests in regulating insolvency. A judgment that an asset will be more important to one forum than another will be purely

²¹³ See *supra* notes 53–61 and accompanying text.

²¹⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2)(a) (1987).

²¹⁵ *French*, 440 F.3d at 154.

²¹⁶ *Id.* at 149–50.

²¹⁷ The transitory nature of a transfer is particularly bewildering in the context of *French*, where the transfer seems to have knocked a miraculous hole in the time-space continuum. The court first determined that a transfer occurred in 2000 when the deed was recorded in the Bahamas. *Id.* at 148 n.1 (stating that under 11 U.S.C. § 548(d)(1) the transfer occurred at the time it was perfected). But the transfer also somehow occurred in Maryland in 1981. *Id.* at 150 (“[T]he transfer was made in the United States as well—whether we consider the relevant decision to be Mrs. French’s gift of the deed in 1981, or the transferees’ recordation of the deed in 2000.”).

²¹⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2)(c).

normative. Especially where the estate comprises fungible assets, few logical factors will justify one forum over another. The factor should weigh in favor of limiting American jurisdiction, especially where the United States notes the validity of a foreign state's regulations.²¹⁹ These concerns are also true of the section 403(2)(e) factor concerning the importance of the regulation. In this context, where the dispute arises over which state's bankruptcy law should control, the importance of bankruptcy law in general is irrelevant to the decision.

Section 403(2)(d) regards expectations arising from the regulation.²²⁰ Many parties have legitimate expectations in the context of foreign transfer avoidance. Granting prescriptive jurisdiction to avoid a foreign transfer would protect the expectations of domestic creditors, who likely assume that every asset is automatically included within the estate. On the other hand, extraterritorial jurisdiction likely prejudices the expectations of transferees of foreign property.²²¹ This is especially true of foreign local creditors, who are unlikely to understand the implications of American avoidance law.²²²

The concern of conflict with another nation, embodied in section 403(2)(h), weighs in favor of abstaining from jurisdiction over foreign real property. Most nations do not share identical bankruptcy provisions with the United States.²²³ Most nations have not replicated the Byzantine nature of United States avoidance laws, leading to several possible disputes as to what transfers could be avoided under the conflicting laws.²²⁴ These conflicts would cut in favor of abstaining from jurisdiction.

Of all the factors, section 403(2)(b), which concerns the connections of the parties to the regulating state,²²⁵ gives some of the most persuasive reasons for

²¹⁹ *In re Commodore Int'l, Ltd.*, 242 B.R. 243, 260 (Bankr. S.D.N.Y. 1999) (dismissing an avoidance action under §§ 547 and 548, inter alia, on the grounds of *forum non conveniens* and international comity, noting that Bahamian insolvency law commands respect).

²²⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2)(d). The Restatement lends little guidance as to whose expectations count.

²²¹ Many transferees of foreign property may not be United States citizens, like the transferees in *French*, who were United States residents. See *French*, 440 F.3d at 148.

²²² For a discussion of how the interests and expectations of local creditors are harmed generally by expansive jurisdiction, see *supra* Part II.C.

²²³ With impartial judges, uniform national bankruptcy laws would moot the entire discussion of choice of law in bankruptcy. See LoPucki, *supra* note 170, at 2251.

²²⁴ See *French*, 440 F.3d at 149 (transferees claimed that the transfer was not avoidable under Bahamian law).

²²⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2)(b).

giving American courts prescriptive jurisdiction over foreign transfers. This reasoning certainly holds true in situations like *French*, where the transferor, transferees, and all but one creditor were American.²²⁶ In such a situation, the issue then becomes the relative weight of the nationality of the parties versus the force of the other factors.²²⁷ Especially considering that trustees and creditors can avail themselves of foreign courts with relative ease, the relationship of parties to the domestic forum is an insufficient reason for prescribing against the weight of the majority of factors.

On balance, these factors support abstention from avoiding foreign transfers of real property. Even where American law will not conflict with a foreign nation, the numerous benefits that flow from comity counsel against prescriptive jurisdiction over foreign transfers.²²⁸

CONCLUSION

For all of these reasons the Code should not permit avoidance of foreign transfers. The Code lacks any affirmative evidence sufficient to overcome the presumption against extraterritoriality. The avoidance sections themselves contain no explicit statement of their reach. Only through tortuous inference could one conclude that other provisions imply Congressional intent to avoid foreign transfers. When read as a unit rather than in component parts, the most sensible interpretation of the Code mandates non-extraterritorial application of American bankruptcy law. Nevertheless, courts evoke the “primary effects” exception to the presumption against extraterritoriality to avoid foreign transfers. Although this exception is often an overly broad attempt to engineer a result, overcoming the presumption against extraterritoriality does not end the inquiry into the probity of a domestic court’s ability to adjudicate. The presumption is the first, but penultimate, step of the inquiry.²²⁹ Comity supplies ample policy factors to either defer to a foreign proceeding or affirmatively limit American prescriptive jurisdiction. Especially where the foreign transfer comprises real property, the United States should respect the greater interests of foreign nations in regulating their own property.

²²⁶ *French*, 440 F.3d at 150. Needless to say, the influence of this factor would change in a situation such as *Maxwell*, where most parties were foreign. See *In re Maxwell Commc’n Corp.*, 170 B.R. 800, 801 (Bankr. S.D.N.Y. 1994), *aff’d*, 186 B.R. 807 (S.D.N.Y. 1995), *aff’d*, 93 F.3d 1036 (2d Cir. 1996).

²²⁷ The Restatement takes pains to base the priority of the factors on the circumstances. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. b

²²⁸ See *supra* Part II.B.

²²⁹ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814–15 (1993) (Scalia, J., dissenting).

Critics of the presumption have dismissed concerns of international discord as a reason for upholding the traditional roles of the presumption against extraterritoriality and comity.²³⁰ Nevertheless, fear of discord remains even more relevant in today's interconnected world than when it was first expressed centuries ago. As a practical matter, foreign nations continue to protest vociferously against the extraterritorial application of American laws.²³¹ They see extraterritorial application as a violation of their sovereignty and often react accordingly. Whether foreign states react through blocking statutes or other reciprocal foreign legislation, their reactions create counterproductive conflicts among economically interdependent nations. Avoiding such unnecessarily destructive conflicts constitutes a prudent course of action, especially where the legal authority to avoid foreign transfers remains dubious. The increasing frequency of international disputes necessitates legal mechanisms, such as the presumption against extraterritoriality and comity, that avoid these disputes or at least minimize their consequences. The presumption against extraterritoriality and comity both serve to avoid disputes by assuring that the nation most centrally connected to the debtor's asset will adjudicate any dispute over that asset.

Congress should articulate whatever intent it has for American law to dominate the global insolvency arena. An indication would be appropriate because domination would result from extraterritorial application of the Code without reference to international concerns. International debtors, such as Yukos, already manufacture minimum domestic contacts to allow filing in the United States.²³² They already flock to American bankruptcy proceedings to enjoy protections, such as the automatic stay or the status of debtor-in-possession, afforded to domestic debtors.²³³ Unbridled jurisdiction by American bankruptcy courts to avoid foreign transfers would only create a further incentive for international debtors to game the system by choosing a forum with favorable insolvency laws. Given the relative frequency with

²³⁰ Bradley, *supra* note 42, at 232–38.

²³¹ See *supra* notes 158–59 and accompanying text.

²³² Mayr, *supra* note 100, at 25–67.

²³³ See Pottow, *supra* note 164, at 1914–15 n.66 (stating that the United States will be a net importer because it allows protections such as debtor-in-possession status).

which American courts already apply the Code extraterritorially for domestic debtors,²³⁴ foreign debtors would likely be the primary beneficiaries of extraterritorial avoidance power. A legitimate American interest in providing a forum to such debtors is hard to find.

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²³⁴ See *supra* note 62.

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