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Beyond Presumption? Explaining Extraterritorial Variation over Civil Claims

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The primary purpose of this article is to present a comprehensive theory of judicial decision-making in U.S. federal courts with respect to extraterritorial jurisdiction and to discuss its implications for rules of decision rules regarding extraterritorial jurisdiction. To explain the choice of U.S. courts to regulate extraterritorially (or not) I look to their responsibilities and capacities at the domestic level, together with constraints imposed by the broader international environment. I argue that U.S. courts opt to regulate extraterritorially when necessary to maintain the *domestic* efficacy of regulatory rules and policies, or to enforce respect for what I call ‘basic rights’—and rarely otherwise.

The article proceeds as follows. I first elaborate a set of questions surrounding the varying responses of U.S. federal courts faced with extraterritorial civil claims in which there is some uncertainty with regard to the reach of statute for purposes of subject matter jurisdiction. In section two I further elaborate my explanatory account for variation in the propensity of U.S. courts to resolve disputes involving extraterritorial conduct and contrast it with those of other legal scholars. The third section briefly summarizes my prior work developing this idea and testing it against alternative accounts using statistical methods and an original dataset of 435 federal court decisions involving civil claims handed down between 1945 and 2003. The fourth section applies the logic of this explanation to a long-standing puzzle in international intellectual property—namely, why U.S. courts have been consistently assertive in finding and exercising jurisdiction over extraterritorial trademark infringement claims since the 1950’s, but not with respect to similar claims involving U.S. patents and copyrights. A fifth section discusses the implications of these findings for the ongoing debate concerning the normative and practical desirability of various default rules of decision judges may apply when confronted with new claims with an extraterritorial center of gravity.