Manchuria) (p. 319), noting that France and Britain recognized Italy's territorial gain while the United States did not.[22] The conclusion Hathaway and Shapiro reach is this: "Might still produced *military* victories. But it could no longer provide lasting *legal* victories" (p. 316).

However, the benefits of such a finding depend upon a particular perspective. The book only briefly mentions Europe's scramble for Africa by discussing how the norms set in motion in 1928 offered protection as "colonies no longer had to worry that they would be reconquered if they became independent" (p. 342) while omitting deeper engagement with how these very same norms would allow European nations to keep territories conquered by force during colonization with all the harms that accompanied such prowess.[23] Thus, an achievement that was lauded for the so-called civilized nations of the day served to perpetuate the horrors caused by colonialism against the millions of people throughout Africa, and elsewhere, for whom this norm did not apply. Furthermore, the end of conquest between nations during the interwar period did nothing to improve the plight of indigenous peoples within nations that were still subject to conquest, as governments continued to move indigenous peoples by force off of desirable land, or worse, committed acts amounting to genocide.[24] In its aim to celebrate a new world order, *The Internationalists* could have better acknowledged the harms and discrimination that this order continues to impose on peoples throughout the world whose histories are not represented in the book.

In sum, *The Internationalists* offers a fresh telling of an old history. The book calls for a reinvestigation of the very purpose of international law and its power in our world. It richly weaves together valuable discourses connecting disparate fields of legal history, international law and international relations. Finally, it sparks a much-needed conversation about our collective future. *The Internationalists* asks us to appreciate how and why we benefit from a new world order and just how precarious the existence of such a world is. Here, the authors are at their most inspired and inspiring as they impart upon us their final lesson that "[w]e all bear responsibility for the world in which we live" and "[e]ach of us, even those far outside the halls of government, has the capacity to make a difference" (p. 423). In doing so, the authors model "how to make a book about international law sound interesting" (p. 430). They care deeply about law and the quest for peace in the world. Their book is a timely reminder that we all should do the same.

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[22] E.g., on pp. 172–174, the authors describe Emperor Haile Sallese charging Italy with aggression for its military invasion in 1934 and the League of Nation's reluctance to apply the policy of nonrecognition of territory acquired by conquest against Italy, describing the U.S. response as "lackluster" (p. 173) but saying nothing about the underlying racial animus behind these responses.

[23] E.g., p. 317 ("After a brief slowdown in the 1850s and 1860s, that number shot up to between 5.9 million and 8.8 million square kilometers a decade for the rest of the century—a good deal of it caused by the European scramble for Africa."); p. 342 ("During the scramble for Africa, for instance, local leaders frequently agreed to the creation of protectorates as a defensive move to prevent more aggressive assertions of authority.").

[24] For a comprehensive history and analysis see James Anaya, Indigenous Peoples in International Law (2d ed. 2004).

Courts Without Borders: Law, Politics and U.S. Extraterritoriality. By Tonya L. Putnam. Cambridge, U.K.: Cambridge University Press, 2016. Pp. xiii, 315. Index. $99.99, £64.99.

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Practitioners and scholars addressing issues of extraterritorial application of U.S. laws or regulations will find valuable insights in the study by Tonya Putnam, associate professor of political science at Columbia University, of *Courts Without Borders: Law, Politics and U.S. Extraterritoriality*. Drawing on her dual formation as a political scientist and legal scholar and based on her extensive research including innovative economic analysis

of domestic cases, Putnam assumes the considerable challenge of demonstrating that empirically verified understandings of judicial behavior could bear on the actual outcome of cases and assist in arguing and deciding future cases. Her resulting volume reflects the fruits of hard thinking and careful synthesis.

For the reviewer, the key questions are whether the work adds to our knowledge of how courts decide cases involving extraterritoriality issues and, in particular, whether her findings facilitate shaping arguments to courts in such cases and predicting their likely ruling on the merits? Further, does her analysis provide insights not already articulated by the courts or commentators in deciding or commenting on these cases? Toward the end of the volume, she states that her book offers "support to those who view heavy-handed versions of the presumption against extraterritoriality as unnecessary, and potentially damaging to U.S. legal influence globally" (p. 271). Does her work fulfill this objective?

While we are not persuaded that Putnam's work necessarily provides a comprehensive explanation for outcomes in cases raising issues of extraterritoriality or that she succeeds in showing that other well-argued explanations for similar results are necessarily without merit, her book contributes importantly to thinking about such cases. Putnam's reliance on empirical methods is not only fresh and creative, but also demonstrates the benefit of clarity, coherence, and objectivity that empirical verifications could provide to legal theorization in general. By proposing to examine the politics in, and of, judicial assertions of jurisdiction over extraterritorial claims, Putnam significantly advances existing research committed to demystifying judicial decision-making processes. Crucially for a U.S. policy audience, she elaborates the basis for her conclusion that "judicial minimalism in determining jurisdiction in privately initiated extraterritorial claims" is a "phenomenon that is likely to continue and to gain force" as a result of the impact on U.S. courts of the "apparent waning of U.S. hegemony in economic and regulatory affairs" and the corollary contractions of U.S. enforcement capacity that attends such waning geo-economic influence (p. 27).

Putnam begins by noting that "the extraterritorial regulatory behavior of U.S. courts exhibits a puzzling empirical pattern from a legal perspective" (p. 3). She then seeks to answer two questions: What causes U.S. courts to rule that certain extraterritorial conduct is subject to the jurisdiction of U.S. laws and regulations and other conduct is not? Second, how have rulings in such instances "influenced broader processes of international and transnational rulemaking and rule diffusion?" (*id.*).

Drawing on a solid background in international relations theory, Putnam acknowledges the importance that contemporary international relations theory attributes to "state power in determining winners and losers in international political and regulatory contests" (p. 8). She seeks to supplement the understanding of "the influence of mobilized domestic actors in setting government policies and preferences for international bargaining" by focusing on "some less common actors and themes—beginning with domestic courts and judges" (*id.*). She also seeks to highlight the "strategic behavior of actual and prospective litigants" since only through their disputes can courts be called upon to act extraterritorially (*id.*). She argues that a clear theoretical discrepancy exists, on the one hand, between *a priori* rationalizations of U.S. extraterritorial conduct, which she views as consistently lacking empirical support, and, on the other hand, the often imperceptible actual determinants of judicial decision-making that only a rigorous empirical inquiry can reveal to us. In effect, perhaps her most important contribution through this volume comes in her attempt to show the inadequacy of ideology-driven or inchoate rationalizations that are often used to explain rulings by U.S. courts on the extraterritorial reach of U.S. law and regulation.

Putnam succinctly summarizes her argument in the first two chapters of her book. In the first, she elaborates on her explanations for why U.S. courts and litigants have ruled in cases involving potential extraterritorial application of U.S. law and regulation. U.S. courts, Putnam

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observes, are routinely invited, mostly by design and sometimes by default, to bring U.S. law to bear on persons and conduct outside U.S. territory. In such instances, Putnam contends that U.S. judicial decision-making abides by two ordering logics. Her bottom line is that "U.S. courts can be expected to find and exercise jurisdiction extraterritorially in two types of situations" (p. 33). The first, which is the "*domestic rule integrity logic*" or "*regulatory logic*" compels U.S. courts to find jurisdiction where extraterritorial conduct threatens to unwind the intra-territorial functioning of U.S. law, i.e., when "conduct outside U.S. borders threatens the future integrity or operation of a domestic regulatory law or regime" (pp. 4, 33). The second, which is the "*rights-based logic*," thrusts the courts in an avant-garde role where violations of rights loosely defined as being at the "core of American political identity" would otherwise be left without judicial remedy, especially where such violations are committed by U.S. citizens or persons with close U.S. ties who, if allowed to act with impunity, risk undermining American values everywhere.

She identifies three conditions for the application by courts of the "regulatory logic" in determining the extraterritorial reach of legislation or regulation. In brief, (1) where the contested extraterritorial conduct is prohibited inside the United States, (2) causes actual harm in the United States, and (3) is undertaken to bring net benefits to those engaging in such conduct. Putnam concludes that in these situations the failure to apply U.S. law will often "undercut both the domestic operation of the law in question, and the public policy that law is meant to serve" (p. 34).

The second situation for applying U.S. law extraterritorially—"rights-based logic"—arises when U.S. courts are asked to address "outside acts by, or against, a U.S. citizen or another entity with close U.S. ties" and those acts are "plausibly alleged to violate a short list of staunchly protected 'basic rights'" (p. 33). In this situation, U.S. courts are called upon to reinforce "core norms of the American political community." Judicial assertions of the applicability of U.S. law proceed from a desire to protect "a short list of 'basic rights,'" and depend primarily on the "defendant's association with the U.S. polity through citizenship, residence, or transactional ties" (p. 34). In effect, the requirement to show "a territorial nexus" between the impugned conduct or its demonstrable effects and the United States is "correspondingly weaker" (*id.*).

Putnam does not conceive of these ordering logics as two independent parallel streams with waters that do not mix. Rather, they sometimes possess mutually reinforcing content. As Putnam puts it, "[m]ost law is not about establishing rights, but is instead, concerned with incentivizing situations, individuals and institutions to behave in socially and politically desirable ways" (p. 31). In effect, the rights-based logic necessarily or often involves a regulatory objective. For instance, Putnam explains how the U.S. Supreme Court in the Guantánamo Bay cases recognized the jurisdictional competency of U.S. courts over claims brought by detainees in Guantánamo and were animated in doing so by a rights-based logic to reaffirm fundamental norms. We believe that her analysis also shows that such decisions have as well a "regulatory logic" since they reduce the incentive for extraterritorial circumvention of, or noncompliance with, U.S. laws by the government. At other times however, the regulatory logic may prevail over the rights-based logic as Putnam contends this was what animated the majority in the *Kiobel* decision with its heavy focus on the conduct at issue occurring entirely outside the United States and, as a result, not implicating "the integrity of legal prohibitions operative inside U.S. territory" (p. 223).[1]

Relying on her view that the "U.S. economic hegemony has eroded further in the post-Cold War era," Putnam finds from her review of the cases that "the willingness of U.S. domestic courts to interpret the extraterritorial reach of U.S. laws expansively has in many instances also gradually declined. . ." (p. 35). She adds that her "theory expects" that U.S. courts will continue to apply U.S. law in the two instances

[1] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

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that she has identified "but"—and this is critical to her overview—"rarely otherwise" (p. 36).

Putnam states that her reference to extraterritorial reach of U.S. federal courts is a "shorthand" for "three different jurisdictional elements"—prescriptive jurisdiction, subject matter jurisdiction, and personal jurisdiction" (*id.*). In fact, virtually all of her focus seems to be on prescriptive jurisdiction with rather little attention to the scope and applicability of the decisions of federal courts concerning general and specific personal jurisdiction for which the Supreme Court has recently decided so many cases of importance. Thus, she cites *International Shoe*[2] and *Daimler*[3] (p. 39) but does not consider the specific jurisdiction issues that the Supreme Court recently addressed. She devotes several paragraphs to discussing personal jurisdiction and concludes that in deciding the sufficiency of contacts "U.S. judges must square broad principles of due process with the regulatory objectives of particular rules" (p. 40). She notes that international actors may seek to avoid U.S. personal jurisdiction and operate to defeat enforceability of judgments rendered by non-U.S. courts. She does not elaborate on the focus of recent Supreme Court general jurisdiction rulings on the rights and liberty interests of the defendant. Nor does she explain how the key features of the personal jurisdiction decisions impact upon the regulatory rights logic paradigm that she presents and that may be best suited for a prescriptive jurisdictional analysis. Perhaps personal jurisdiction cases present a third category of "adjudicative logic" with its own criteria for determining when U.S. courts have adjudicative authority over events occurring, in part, outside the United States.

Putnam includes a discussion of the behavior of judges and litigants, which she introduces with the following assumption: "judges and litigants are self-interestedly rational actors with Bayesian instincts, [meaning decision-making on prior knowledge or beliefs rather than probabilities], but that their information about the environments in which they operate is incomplete" (*id.*). To determine if, for example, Anne-Marie Slaughter correctly explained in her seminal 2003 and 2004 articles why judges hold in favor or against extraterritoriality, Putnam discusses and tests what she calls Slaughter's "regime-affinity" explanation for extraterritoriality in U.S. court decisions (p. 45). She also tests Jonathan Turley's thesis that courts are more likely to apply U.S. law to cases involving protection of U.S. economic interests than in cases involving social policy. Putnam specifically challenges Turley's expectation that U.S. courts would "exercise jurisdiction extraterritorially far more often in economic ('market') disputes, like antitrust and securities regulation, than in social policy ('non-market') disputes—for example, those involving environmental protection and labor regulation" (p. 44).

Putnam opposes Slaughter's view that perceptions by U.S. courts of procedural similarity ("affinity") with alternative judicial forums correlate inversely with whether U.S. courts dismiss claims on the basis of deference to foreign states. Putnam contends that although Slaughter presents several supporting cases, she fails to indicate whether these cases are "representative of the relevant universe of claims . . . [and as a result] Slaughter's conclusions about general patterns of judicial behavior may be broader than her evidence can reasonably support" (p. 46). Similarly, Putnam considers Turley's thesis to be inchoate and severely restrained by the fact that Turley relies, in Putnam's view, on an inappropriate and unrepresentative sampling of contested cases, offers little guidance on the criteria he uses to distinguish different types of market and non-market disputes, and relies on determinants of judicial behavior which may have been overtaken by changes in the transnational legal and regulatory environment since 1990 when Turley's work was published. (pp. 44–45)

Putnam proposes to test the limits of Slaughter and Turley's approaches as well as validate her own hypothesis by relying on "multivariate logistic regression techniques" (*id.*). We are regrettably not in a position to evaluate from a technical perspective the techniques utilized by Putnam and applied to a sample of 659 civil

[2] Int'l Shoe v. State of Washington, 326 U.S. 310 (1945).

[3] Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

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cases raising the question of extraterritorial jurisdiction that U.S. federal courts decided between 1945 and 2010. Putnam analyzes these cases based on positive or negative outcome, by trends over time, and by categories of substantive claims. She utilizes these statistical methods because they "are useful when seeking to identify and quantify the marginal effect of specific variables across a large number of cases" and, hence, the "determinants of outcomes in contentious [extraterritorial] claims" (p. 49). Putnam elaborates in detail on how her analysis provides insights into predicting the outcome in specific cases and identifying the reasons why in some instances such predictions prove valuable and in other instances not entirely reliable.

In the end, we can look at the bottom line of Putnam's approach to the cases. She concludes that her statistical analysis supports her overall view that when U.S. courts do not have clear legislative guidance, the courts rely heavily on whether failing to assert jurisdiction would "frustrate the core purpose of an act of Congress." She also finds support from this analysis for her other conclusions, namely that regulatory jurisdiction is unlikely to be asserted, even if there is conduct within the United States, if "the harmful effects of contested behavior are concentrated outside the United States" (*id.*) Further, she finds some support through her analysis for her view that extraterritorial jurisdiction will be asserted over entities with "close U.S. ties" if extraterritorial violations of core rights are alleged to have been committed (p. 69).

For those less committed to Putnam's framework, it seems entirely possible that the explanations of Turley and Slaughter for extraterritoriality rulings can be reconciled with Putnam's approach. We are not persuaded that it is appropriate to cast aside the valuable insights in understanding the cases to be gained from the focus on affinity in Slaughter's case or market disputes in Turley's case. Putnam regrettably does no more than note that her regression analysis "generates support neither for Turley's economic openness argument *as a stand-alone explanation*, nor for Slaughter's regime affinity argument" (p. 55, emphasis added). That conclusion seems to beg the question whether, taken with other important considerations, Turley and Slaughter contribute importantly to understanding the extraterritoriality outcome and the thinking of the judges in the cases that they discuss without necessarily providing a "stand-alone" rationale for those rulings.

In Chapter 3, Putnam focuses on how litigants act when laws of the United States are more restrictive than those of other nations are. In a prior chapter she suggests that if U.S. actors cannot change U.S. law, they should "try to level the regulatory playing field" by having U.S. law apply to foreign actors and conduct (p. 25). In addition, U.S. actors seek to apply laws extraterritorially to prevent competitors escaping similar U.S. regimes. Her third chapter begins by justifying the importance of studying the reach of laws affecting only private parties and whose impact is important for international law, even though it is not focused on state-to-state activity (pp. 71–72). She finds private enforcement especially important in extending the reach of U.S. laws. She contrasts such private vigilance to the alleged "'sporadic' at best" enforcement of the Foreign Corrupt Practices Act (FCPA) in the twenty-five years after its enactment. She seems to attribute this circumstance to the statute's providing for no private right of action (p. 73).[4] While her summary of the statute is correct, no major U.S. multinational corporation would accept her apparent view that the statute from the date of its enactment had limited impact and extraterritorial effects because there was "only" one enforcement case each year or that enforcement was left to the Justice Department and Securities and Exchange Commission (SEC). By requiring that U.S. issuers maintain accurate books and records, the FCPA had the effect of mandating annual review by their outside auditors of internal corporate practices of every issuer on U.S. stock exchanges. Those practices had previously received no similar intense scrutiny, which numerous public disclosures made clear had allowed or even encouraged

[4] Citing the Foreign Corrupt Practices Act and noting that it "does not allow for private rights of action."

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improper payments. Further, the State Department disclosure regulations under the International Traffic in Arms Regulations had a significant effect on the behavior of U.S. companies in the defense industry, in which many of the cases occurred that initially led to the FCPA's enactment.[5] In short, enforcement occurred and the U.S. regulatory regime applied extraterritorially through enforcement mechanisms other than prosecutions by the Justice Department or suits by the SEC.

Putnam contrasts European and U.S. approaches to when courts have jurisdiction, saying whereas the U.S. approach "emphasizes unilateral action tempered by concerns about unfair exercises of power over individuals by states"—"a view that, not coincidentally, privileges its own regulatory power"—"the European approach is more centrally concerned with the allocation of regulatory authority among co-equal sovereigns." As Putnam surmises, the "European view . . . holds that jurisdiction properly lies in only one venue, as predetermined by a comprehensive framework that purports to give full respect to the sovereign authority of all concerned states and to provide for the recognition and enforcement of foreign judgments" (p. 83). Putnam's conclusion in this respect arguably overlooks a series of recent cases decided by the Court of Justice of the European Union concerning jurisdiction for personal torts and for intellectual property rights that, from a U.S. perspective, appear heavily weighted toward creating a forum for allegedly injured parties and permitting multijurisdictional claims for damages.[6]

Putnam emphasizes the impact that an issue of extraterritoriality may have on understanding of the content of domestic legislation. As she puts it,

> In short, once a court is seized of an issue, *anything it does alters the legal status quo.* It either reinforces prior understandings of what the law requires, and expands their applicability to novel configurations of facts, or it alters earlier holdings by modifying their scope or content. (Pp. 97–98, emphasis in original)

Putnam also suggests that this can result in "new law" in rare cases and that this is true for jurisdictional issues as for other areas of the law.

Putnam cites a number of cases to illustrate her analysis. As previously noted, she sees *Kiobel* as an example of courts choosing a regulatory approach instead of a human rights approach. In that case, U.S. extraterritoriality did not end up being held "protective of liberal values, and thus . . . [contributing] to the maintenance of a pluralistic international system" (p. 273). At the same time, she acknowledges that many foreign governments argued against a human rights approach because they saw the case as involving U.S. law "overriding, or substituting for, local enforcement that would otherwise occur" (*id.*). Noting that "states and governments care a great deal about who regulates," Putnam reminds that in *Kiobel* a Netherlands court had proceedings underway to hear the same claims against the same defendant, which was a Dutch company (p. 273).

In Chapter 7 on "The Waning of U.S. Extraterritoriality?," Putnam summarizes the ends of the regulatory logic arm of her theory thusly—"it is the threat of *public* harm inside the United States from extraterritorial acts that triggers the judicial willingness, or necessity, to interpret U.S. law as applying outside U.S. territory" (p. 258, emphasis in original). She considers that private harm alone is not sufficient, "unless the conduct under dispute creates (or reveals) opportunities and incentives for others to evade U.S. law in ways that impair its operation inside the United States" (*id.*). On the other hand, her second rights logic, according to Putnam, anticipates that U.S. courts will exercise extraterritorial jurisdiction over disputes concerning "a small set of basic rights" (*id.*). Except that "here the impetus is not the protection of domestic sovereignty . . . [but rather] to ensure respect for rights and values at the core of American political identity" (*id.*).

[5] 22 C.F.R. Part 130 (Political Contributions, Fees and Commissions).

[6] Case C-523/10, Winstersteiger AG v. Products 4U Sondermaschinenbau GmbH, ECLI:EU:C:2012:220 (CJEU Apr. 19, 2012); Joined Cases C-509/09 & C-161/10, eDate Advertising and Others, ECLI:EU:C:2011:685 (CJEU Oct. 25, 2011).

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Putnam contrasts the U.S. "unilateralist" approach with the European "multilateralist" approach in the determination of what she calls the "proper venue," or where a dispute may be heard. She states that while the American approach inquires only whether U.S. courts have jurisdiction over the substance of a dispute, along with the parties implicated, the European approach focuses instead on "justifying assertions of adjudicatory jurisdiction to other States that might plausibly claim it" (p. 259). Putnam conceives in effect that unilateralism allows for many states to assert jurisdiction; multilateralism permits only one. For this proposition, she relies on an article by Professor Ralf Michaels, which she reads to say that European courts claim jurisdiction that they can justify to other states that might claim it in order to "avoid intruding on foreign sovereigns" (p. 260).[7] In fact, we understand Michaels to be contrasting a somewhat different point. He explains that

> [t]he real question [for civil-law courts in Europe] is which of several states' courts are the most appropriate to deal with a type of litigation. Jurisdiction is justified vis-à-vis other states with a plausible claim to jurisdiction, not vis-à-vis the defendant and her interest in protection from the court.[8]

Michaels draws on Professor Arthur von Mehren's three theories for personal jurisdiction: relational theories, power theories, and fairness theories (also termed "convenience" by Professor Lea Brilmayer). In the end, he shows that the European approach may result in less sovereign intrusion, but that this is achieved principally through the lens of locating the appropriate forum for a particular type of dispute—not necessarily in avoiding a clash with another sovereign. Further, in many instances European courts can ameliorate the clash of sovereign interests by the application of foreign law.

In the end, Putnam argues that "U.S. enforcement capacity is experiencing a long, slow decline tied to the decreasing centrality of the United States in the global economy" (p. 265). She sees a "growing trend toward U.S. judicial minimalism in U.S. extraterritorial practice" For her, *Morrison*[9] and *Kiobel* illustrate these statements.

Putnam summarizes the evolution of the presumption against extraterritorial reach of U.S. legislation (pp. 267–69). Her analysis is enhanced by taking into account the formulation of the presumption in the draft *Restatement (Fourth) of the Foreign Relations Law of the United States* and the valuable overview of its evolution, rationale, and application in the extensive Reporters' Notes. The draft *Restatement* records the limits on the presumption in that it applies only to "substantive provisions of federal statutes and to express and implied federal causes of action."[10] Also the presumption does not apply to subject matter jurisdiction of federal courts or to state statutes, although state courts may have fashioned their own presumption.

Putnam asserts that foreign governments "generally frame arguments against U.S. extraterritoriality in terms of international law." She contrasts this with U.S. practice where "the dominant discourse in recent years has been mainly constitutional and is becoming more so" (p. 271). This statement receives some support in the draft *Restatement (Fourth) of the Foreign Relations of the United States* where the reporters say the following: "[t]he presumption against extraterritoriality rested initially on the presumed desire of Congress to avoid violations of international law."[11] However, her statement does not address expressly what the Restatement reporters citing the leading cases find to be the basis for the "modern presumption": first, avoiding unintended conflicts between U.S. law and the law of other nations and, second, Congress's primary concern with domestic conditions. Neither of these grounds appears to

[7] Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1027–29, 1045 (2005).

[8] *Id.* at 1045.

[9] United States v. Morrison, 529 U.S. 598 (2000).

[10] *See* Restatement (Fourth) of the Foreign Relations Law of the United States, §203, cmt. a (tentative draft no. 3, Mar. 20, 2017) (not yet approved by the members of and not yet the position of the American Law Institute).

[11] *Id.*, §203, Reporters Notes 2 (Rationales for the Presumption).

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emphasize a constitutional perspective. The reporters also remind that the Supreme Court has made clear that the presumption applies without regard to whether an actual conflict exists between the U.S. statute and relevant foreign law.

In her concluding sections, Putnam refers to what she calls the "de-privatization" of U.S. extraterritoriality through a process in which private actors relying on private rights of action have a lesser role in asserting extraterritorial application of U.S. law and government plays a greater role. She suggests that "because the U.S. executive branch is the initiator, courts need not trouble themselves over any foreign affairs implications—though they may still have to wrestle at times with constitutional questions regarding the balance between executive and legislative power" (p. 272). This perspective seems to take rather little account of comity considerations that would surely be raised in U.S. courts by private parties whose interests are implicated by such government-initiated claims. Perhaps that explains, as discussed in the chapter in "Questions for the Future," the "need for more theoretical and empirical attention to the rule-generating character of private strategic behavior and its normative implications" (p. 274).

What clarifications or reservations do we have about Putnam's argument and conclusions and what would we urge be raised by those who have the opportunity to debate its findings? First, public international law students may be tempted to lessen the "domestic rule integrity logic" as being a semantic reformulation of the long-recognized "effects doctrine," which permits states to extend their regulatory authority over conduct that, although occurring wholly outside the territory of the state, produces effects within the state. However, Putnam's domestic rule integrity logic seems much more granular and restrained than the generic "effects doctrine." Her focus is not upon the effects of extraterritorial conduct within the United States writ large. Rather, Putnam is preoccupied with only the impact of conduct outside the United States that, when aggregated, could frustrate, or undermine the exercise of domestic regulatory authority. In effect, she suggests, "the regulatory logic would favor eliminating extraterritorial jurisdiction except where the integrity of legal prohibitions operative inside U.S. territory is at stake" (p. 223).

Putnam concedes that her account does not "explain every twist and turn in the development of judicial doctrine around extraterritoriality" (p. 16). Our concern is not simply that her account and her criticism of others inevitably stumbles on a handful of non-confirming judicial decisions, "twists and turns" to use her words, that refuse to line up with her overall thesis. She appears to depend on certain intuitive or *post facto* rationalizations to fill the gaps that appear in the bottom line of her adopted empirical research method, thereby potentially weakening the general rigor of her account's empiricism. For instance, Putnam observes that the data appears to show that "having an American entity on the plaintiff side of a lawsuit increases the likelihood of a U.S. court applying U.S. law extraterritorially by a non-trivial degree but having an American defendant does not" (p. 60). In explaining this variance, Putnam summarily dismisses "bias" on the ground that having an American defendant does not seem to tip the balance. She then rather unexpectedly suggests, without empirical support, that "it could be that American plaintiffs are systematically better at identifying extraterritorial claims that are likely to succeed in U.S. Courts than are foreigners—or at least at hiring lawyers capable of doing so" (*id.*).

Finally, Putnam admits to relying on behavioral assumptions that project private litigants and courts as "self-interestedly rational actors with Bayesian instincts" (p. 40). Even though Putnam concedes that the rationality of these actors may be "bounded" as a result of "cognitive, institutional and resource-based capacities," it is unclear how significant that concession is to the ultimate conclusions reached or even to how the data the book relies on is interpreted. Putnam appears routinely more attached to the "rule-generating character of private strategic behavior and its normative implications," as well as to choices that "rationally efficient" economic actors, judges, defendants, and plaintiffs make to "maximize private utility by weighing the expected benefits and costs of their actions against the

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strength of their preferences" (pp. 40, 227, 274). However, the reliance on the rationality and purposiveness of various actors in the judicial process in order to legitimize the law and its institutions has increasingly been contested by insights from disciplines focused on systematic divergences from the rationality model.[12] These insights, which Putnam only tersely acknowledges, reveal that human—and consequently institutional—decision-making processes are prone to nonrational, yet systematic, tendencies; that decision-making is subject to cognitive illusions that are not capable of being unlearned; and that those cognitive limitations affect various actors "with uncanny consistency and unflappable persistence."[13] In an empirical project of this magnitude, it would have been interesting to critically explore judicial tendencies that deviate from the perfect rationality model. In addition, it would have been helpful to review how "nonstrategic" behavior of litigants impacts the diagnosis and articulation of functional juridical problems, the vocabulary of legal argumentation, and of normative solutions, as well as the functioning and conceptualization of juridical institutions and judicial interpretative agency.

Perhaps Putnam will turn to those questions in her future publications regarding extraterritoriality. For now, she has written a most interesting and challenging book whose argument will surely require consideration and commentary by those writing on this subject in the future.

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Grasping Allott's Ambitious Undertaking

It is not by chance that Philip Allott, professor emeritus of international public law and fellow of Trinity College, University of Cambridge, UK, offers unusual guidance to readers in the opening sentence of the Preface to *Eutopia*: "The reader may want to read this book more than once, and to read it with unusual care" (p. vi). If anything, this advice is understated. Allott has written a learned, conceptually intense, and wildly ambitious book that demands the most dedicated attention taxing the perseverance of even the most diligent of readers. Allott challenges us on every page, really on each of its paragraphs given a systematic inflection by being numbered as if elements of a mathematical proof. Putting the bar of comprehension so high raises preliminary awkward questions—is the immense burden imposed on the reader sufficiently rewarded by the contribution that Allott makes to our understanding of the human condition? There is a second subsidiary question—is Allott's distinctive methodology an effective and necessary means by which to raise and resolve such fundamental issues? and for what audience is this undertaking intended? I will return to these matters at the end of my attempt to assess Allott's undertaking, which by any measure is extraordinary. It is nothing less than a philosophically coherent depiction of a

[12] *See generally* Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449 (2003); Lauge N. Skovgaard Poulsen, *Bounded Rationality and the Diffusion of Modern Investment Treaties*, 58 INT'L STUD. Q. 1 (2014); Lauge N. Skovgaard Poulsen & Emma Aisbett, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65 WORLD POL. 273 (2013); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, STANFORD L. REV. 1471 (1998); Haksoo Ko, *Behavioral Law and Economics*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS 1 (Jürgen Backhaus ed., 2021), *available at* http://dx.doi.org/10.1007/978-1-4614-7883-6_100-1.

[13] Adam Benforado & Jon D. Hanson, *Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights*, 57 EMORY L.J. 1087, 1118 (2008).