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The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction

Julie R. O'Sullivan

Georgetown University Law Center, osullij1@law.georgetown.edu

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The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction

JULIE ROSE O'SULLIVAN*

Under what circumstances can crimes that cross national boundaries be prosecuted in federal court? This question is critical given the increasing frequency with which criminal conduct crosses borders. This Article provides a guide through extant extraterritoriality analysis—warts and all—and then considers what the answer should be.

First, this Article provides a step-by-step roadmap for those seeking to answer the questions of where a crime that spans borders was committed and, if it is deemed to have been committed outside the territory of the United States, whether the applicable statute and Constitution would countenance such a prosecution. This roadmap will reveal the myriad uncertainties and questions that confront courts daily. This Article resolves two of these doctrinal uncertainties: the continuing relevance of the Charming Betsy canon of construction and United States v. Bowman. Courts frequently invoke the Charming Betsy canon of construction to resolve extraterritoriality questions, but that canon is no longer relevant given the Supreme Court's latest cases. In those cases, the Supreme Court has applied a strong presumption against the extraterritorial application of federal statutes to conduct occurring outside the United States. Federal courts, however, rarely apply this presumption in criminal cases, instead regularly relying on a 1922 Supreme Court case, United States v. Bowman, to hold that federal criminal statutes have extraterritorial reach. But Bowman, given recent developments and viewed in light of the history of the Court's presumption, is an anachronism.

Second, this Article rebuts the near universal conclusion, reached by both courts and commentators, that extraterritoriality analysis should be the same in civil and criminal cases. Fundamental separation of powers considerations and criminal law's foundational legality principle require that Congress, not courts, clearly and prospectively specify the content of criminal prohibitions. If there is ambiguity regarding whether

* Professor, Georgetown University Law Center. © 2018, Julie Rose O'Sullivan. Michael Lepage, my research assistant, has my gratitude for his insights, professionalism, patience, and hard work. I would also like to thank our library staff, and particularly Thanh Nguyen, for their unfailing help and diligence.

a statute applies extraterritorially and in what circumstances, the operational arms of the legality principle, the rule of lenity, and (perhaps) the vagueness doctrine, demand that this ambiguity be resolved in favor of the defendant. In short, where a criminal statute is geoambiguous, a strong presumption against extraterritoriality ought to apply. These same principles do not apply in civil cases, and the rationales for the strong modern presumption that federal civil statutes do not apply to conduct beyond the boundaries of the United States advanced by the Supreme Court and scholars are not convincing.

The current state of affairs—in which courts apply a strong presumption against extraterritoriality in civil cases but decline to do so in criminal cases—is, in short, profoundly wrong-headed. Congress ought to act promptly to enact a general provision that provides uniform guidance on these questions in criminal matters.

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INTRODUCTION

In the recent “WannaCry” malware attack, the perpetrators penetrated computer systems across the globe and threatened to block access to critical data unless a ransom was paid. This type of ransomware attack is illegal in most countries (referred to as States). But where was the crime committed? In the State in which the perpetrators released their malignant code? Where the violated computers’ servers were? Or perhaps where the actual and intended effect of the criminal activity was felt—for example, in Great Britain, where the malware crippled the National Health Service? If the crime was not deemed to have been committed in the United States but federal prosecutors still wish to prosecute the miscreants because a few U.S. companies were victimized, they may face a number of legal objections common in such extraterritorial prosecutions. Defendants may argue, for example, that Congress does not have the Article I power to regulate overseas conduct in this context, that Congress did not intend the applicable computer crime statute to apply extraterritorially, and that the Due Process Clause prohibits this type of prosecution.

With the explosion in cross-border criminality made possible by modern technology and transportation systems, the globalization of commerce and finance, and the Internet, these are issues that courts attempt to answer on a daily basis. But thousands of federal crimes¹ were enacted before these circumstances conspired to make criminality increasingly transnational, and thus the statutes say nothing about their geographical scope. Courts struggle to determine whether to apply federal statutes to trans-border criminal activity because “[t]he case law is so riddled with inconsistencies and exceptions.”² “[T]he only thing courts and scholars seem to agree on is that the law in this area is a mess.”³ The objectives of this Article are twofold: to provide a guide through extant extraterritoriality

1. See, e.g., Julie R. O’Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 648–49 (2006) (estimating that as many as 300,000 federal crimes may have been on the books in the mid-1990s). My focus is on federal criminal law, but the Supreme Court has held that U.S. states may regulate extraterritorially on the same terms as the federal government, at least where the state has a legitimate interest and its laws do not conflict with acts of Congress. See *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941). The geographic scope of state criminal statutes is a question of state law, absent preemption issues. In resolving such questions, some U.S. state courts apply a presumption against extraterritoriality. See, e.g., *Glob. Reinsurance Corp. v. Equitas Ltd.*, 969 N.E.2d 187, 195 (N.Y. 2012). A comprehensive analysis of state practice is beyond the scope of this Article.

2. Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1028 (2011); see also Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505, 507 (1997); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85, 89–90 (1998); John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351, 351–52, 396 (2010); Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT’L L. 750, 752 (1995); Austen Parrish, *The Effects Test: Extraterritoriality’s Fifth Business*, 61 VAND. L. REV. 1455, 1460–61 (2008); Jonathan Turley, *“When in Rome”: Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U.L. REV. 598, 599–601 (1990).

3. Colangelo, *supra* note 2, at 1028.

analysis in criminal cases—warts and all—and to consider what the analysis should be.

First, this Article seeks to provide that which others have not: a step-by-step roadmap for extraterritoriality analysis. My aim is to lay out the sequential analytical questions that courts encounter in cases that have transnational elements. In aid of this mission, Part I will introduce readers to the international law that controls prescriptive (legislative) jurisdiction. These customary international law principles answer the basic question of when State A has the authority to extend the reach of its criminal law to conduct by nationals or non-nationals that occurs, in whole or in part, outside the territory of State A. United States courts currently recognize five principles justifying prescriptive jurisdiction: territoriality (subjective and objective), nationality, passive personality, protective, and universal jurisdiction.⁴ Subjective territorial jurisdiction permits a State to sanction conduct committed on its territory whereas objective territorial (or effects) jurisdiction justifies prosecutions where some or all of the objectionable conduct takes place overseas, but substantial detrimental effects of that conduct are felt within the territory of the prosecuting State. Nationality jurisdiction authorizes application of criminal sanctions to the actions abroad of a State's nationals, whereas passive personality jurisdiction permits, at least in some cases, a State to sanction a non-national's conduct abroad that victimizes one of the State's nationals. Protective jurisdiction may be exercised by a State to prosecute conduct abroad that threatens the security of the State or other vital State interests. Universal jurisdiction permits a State to criminalize conduct abroad by non-nationals victimizing non-nationals that does not affect vital State interests if the crime is viewed by the international community as of universal concern (such as piracy or genocide). An understanding of these principles is necessary to follow the proffered general analytical roadmap in Part III as well as the schema in criminal cases in Part IV.

Part II will conclude these introductory materials with an attempt to synthesize, to the extent possible, the Supreme Court's cases to date. I approach this task with trepidation because these decisions are undeniably contradictory. But reference to the Court's historical treatment of extraterritoriality questions is necessary to understand the doctrinal uncertainties that modern courts encounter in transnational cases, as well as to resolve some of the open issues. This Article makes the case that foundational principles of criminal law require that extraterritoriality questions be treated differently in civil and criminal cases. My review of the case law, then, will focus in particular on the Court's criminal precedents.

With this context, this Article will then trace the sequential analytical steps that courts follow in attempting to determine whether a criminal statute ought to apply in a case that involves transnational activity. The analytical roadmap will reveal many open questions. One article cannot effectively resolve all of these questions, but two important issues will be addressed within. Specifically, I argue

4. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (AM. LAW INST. 1987) (identifying bases for prescriptive jurisdiction).

in sections III.D and IV.A that courts are wrong to continue to invoke the *Charming Betsy* canon of construction⁵ and that they would be wise to limit their reliance on *United States v. Bowman*.⁶

The federal courts generally apply two canons of construction to determine the geographic scope of a statute that, on its face, does not address the question (a geoambiguous statute): a presumption against extraterritoriality, which the Supreme Court introduced in its current form in 1991's *EEOC v. Arabian American Oil Co. (Aramco)*,⁷ and the *Charming Betsy* canon, which the Court often relied upon prior to *Aramco*. In the Court's last three extraterritoriality cases—*Morrison v. National Australia Bank Ltd.*,⁸ *Kiobel v. Royal Dutch Petroleum Co.*,⁹ and *RJR Nabisco, Inc. v. European Community*¹⁰—it emphasized the importance of a strong presumption against extraterritoriality. This presumption has become something approaching a clear statement rule (although the Court disclaims this reality¹¹): “When a statute gives no clear indication of an extraterritorial application, it has none.”¹² The presumption applies “regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction.”¹³ The presumption against extraterritoriality means that the Court assumes that Congress intends its statutes to apply only to *conduct* within the *territory of the United States* unless it says otherwise. This exclusive emphasis on conduct within the territory of a State reflects the subjective territorial principle under the international law of prescriptive jurisdiction.

The *Charming Betsy* canon provides that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”¹⁴ Congress has the power to dictate that its statutes apply beyond the bounds of international law's prescriptive principles, but before 1991 the Supreme Court often applied the *Charming Betsy* canon, with reference to *all* of international law's prescriptive principles—not just subjective territoriality—to discern the scope of statutes that were geoambiguous. So, for example, even if a defendant did not act in United States territory, the extraterritorial application of a U.S. statute could be justified by the U.S. citizenship of the defendant under the nationality principle of prescriptive jurisdiction.

These two canons operate from different baselines and thus can provide different answers regarding the scope of a geoambiguous statute. The presumption says “no” to the application of federal statutes to conduct outside of the territorial United States unless affirmative evidence of congressional intent is supplied. By

5. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

6. 260 U.S. 94 (1922).

7. 499 U.S. 244 (1991).

8. 561 U.S. 247 (2010).

9. 569 U.S. 108 (2013).

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

11. *See infra* note 140.

12. *Morrison*, 561 U.S. at 255.

13. *RJR Nabisco*, 136 S. Ct. at 2101.

14. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

contrast, the *Charming Betsy* canon applies only where the Court wishes to say “yes” to a statute’s extraterritorial application based on a statutory analysis unaffected by any presumption, but also seeks to ensure that such an application does not violate international law.

In applying these two canons, courts do not explain the relationship between them or justify their concurrent use. I argue that courts are likely incorrect in continuing to apply the *Charming Betsy* canon to test statutory extraterritoriality. As my historical survey will demonstrate, the modern Court’s presumption is itself a return to early nineteenth century applications of the *Charming Betsy* canon. Because subjective territoriality at that time was the foremost principle upon which congressional enactments were justified, the *Charming Betsy* canon looked a lot like a presumption against extra(subjective)territoriality. That changed over the ensuing century, but in 1991 the *Aramco* Court inexplicably chose to return to this earlier and outmoded analysis. In short, the modern presumption against anything but subjective territoriality is a perversion of the Court’s *Charming Betsy* canon. The Court’s recent cases further demonstrate that the strong presumption against extraterritoriality has rendered *Charming Betsy* irrelevant.

The second open question to be addressed by this Article is the status of *United States v. Bowman*,¹⁵ a 1922 case that is frequently (ab)used by lower courts to justify the extraterritorial application of statutes in criminal cases. Despite the modern Supreme Court’s strong presumption against extraterritoriality, it is relatively rare for courts of appeals to find that a federal criminal statute does not have extraterritorial purchase.¹⁶ The Second Circuit has twice asserted that the presumption against extraterritoriality does not apply in criminal cases, citing *Bowman*,¹⁷ although a subsequent panel of the court attempted to walk back that assertion.¹⁸ My conclusion is that federal courts rely on *Bowman* at their peril because it was decided using the outdated *Charming Betsy* canon and because the Supreme Court’s strong presumption means that it is likely to overrule *Bowman* at its first opportunity.

My conclusions that the *Charming Betsy* canon and *Bowman* are anachronisms are not normative in nature. They are simply the best guesses of an experienced litigator based on history and recent precedents. But the second aim of this Article is normative: To test the wisdom of the modern Court’s strong—and, indeed, usually case-determinative—presumption against extraterritoriality. In Part II, we will discover that the Supreme Court’s current presumption has a questionable precedential pedigree. Further, the rationales advanced for the

15. 260 U.S. 94 (1922).

16. See *infra* notes 277–94 and accompanying text.

17. See *United States v. Siddiqui*, 699 F.3d 690, 700 (2d Cir. 2012) (“The ordinary presumption that laws do not apply extraterritorially has no application to criminal statutes.”); *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011) (“The presumption that ordinary acts of Congress do not apply extraterritorially does not apply to criminal statutes.”) (internal citation omitted).

18. See *United States v. Vilar*, 729 F.3d 62, 72 (2d Cir. 2013) (“[N]o plausible interpretation of *Bowman*” supports the government’s assertion that the presumption does not apply in criminal cases; “fairly read, *Bowman* stands for quite the opposite.”).

application of the presumption against extraterritoriality in civil cases are weak, which I will demonstrate by reference to the justifications asserted in the Court's cases and the scholarly literature in Part V.¹⁹

Part VI offers my contribution to this discussion—a rebuttal to the near-universal conclusion, by courts and commentators, that extraterritoriality analysis should be the same in civil and criminal cases. Fundamental separation of powers considerations and criminal law's foundational legality principle require that Congress, not courts, clearly and prospectively specify the content of criminal prohibitions. The Supreme Court has decreed that the issue of extraterritoriality goes to the merits of a case, not to courts' subject-matter jurisdiction. Where there is ambiguity regarding this element—that is, whether a statute applies extraterritorially and in what circumstances—the operational arms of the legality principle, the rule of lenity, and (perhaps) the vagueness doctrine demand that this ambiguity be resolved in favor of the defendant. In short, where a criminal statute is geo-ambiguous, it should not be construed to apply extraterritorially. The Supreme Court has not had full briefing and argument on the issue of extraterritoriality in a criminal case in the post-*Aramco* period, and thus has not been forced to consider the applicability of the rule of lenity and the vagueness doctrine.²⁰ The lower courts, looking for the most part to *Bowman* for answers in criminal cases, have ignored this seemingly fundamental and obvious issue.

A rule of strict construction or the vagueness doctrine may not be enough, however, to satisfy the imperative that Congress specify in advance the scope of federal criminal statutes. This is because many important statutory schemes are hybrids, meaning that they are also capable of civil and criminal enforcement. Thus, for example, the Supreme Court held in *Morrison* that the securities fraud prohibitions of § 10(b) of the Securities and Exchange Act of 1934²¹ and SEC Rule 10b-5²² do not have extraterritorial application.²³ The Court ruled in *RJR*

19. See sources cited *supra* note 2; see also, e.g., Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1 (1992); Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 LAW & CONTEMP. PROBS. 11, 33–34 (1987); Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. REV. 1 (2014); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121 (2007); William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101 (1998); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110 (2010); Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 HASTINGS INT'L & COMP. L. REV. 323, 338 (2012).

20. Arguably, the Court heard an abbreviated presentation on the extraterritoriality of the wire fraud statute in *Pasquantino v. United States*, 544 U.S. 349 (2005). As I will demonstrate within, however, that decision concerned whether the prosecution at issue was domestic or extraterritorial. Because the Court concluded that all the elements of the crime occurred in the United States, it did not have to reach the extraterritorial application of the statute. See *infra* text accompanying notes 299–308.

21. 15 U.S.C. §§ 78j(b), 78i(a) (2012).

22. 17 C.F.R. § 240 (2017).

23. 561 U.S. 247, 262 (2010).

Nabisco that the Racketeer Influenced and Corrupt Organizations Act (RICO)²⁴ has limited extraterritorial purchase.²⁵ Both *Morrison* and *RJR Nabisco* were civil cases, yet these statutes are also capable of criminal enforcement. The principle of legality and the interpretive tools that operationalize it are not generally consulted in civil cases.²⁶ But the question of extraterritoriality ought not turn on the happenstance of whether a case regarding a hybrid statute's scope arrives before the Court in a civil or criminal context. The presumption against extraterritoriality, then, should be used when examining both criminal and hybrid statutes as a means of honoring the legality principle, and as a proxy for the rule of lenity and the vagueness doctrine, requiring Congress to specify, in advance, the extraterritorial scope of a statute that has criminal applications.

This Article's roadmap will demonstrate the degree of uncertainty that attends extraterritoriality analysis. And it will highlight that courts are applying a presumption of extraterritoriality where they should not—in civil cases—and that they are avoiding the presumption where it should apply—in criminal cases. Scholars and commentators have focused on what the courts have done and should do, ignoring the power and responsibility Congress has to fix this mess. Part VII concludes, then, with a plea that Congress take action. Case-by-case litigation over the geographic scope of the myriad federal criminal prohibitions is an enormous burden on judicial and other resources.²⁷ It is also unnecessary. Congress can, and should, create a general code section that dictates what crimes apply extraterritorially and under what circumstances.

I. INTERNATIONAL LAW OF PRESCRIPTIVE (LEGISLATIVE) JURISDICTION

To begin, readers need an understanding of the international law principles that control prescriptive (legislative) jurisdiction in criminal cases.²⁸ The actual function of these principles is to determine whether the action of a State in prescribing or enforcing its laws gives another State a claim for violation of its rights.²⁹ Congress has the power under our constitutional structure to pass laws that exceed the limits of these principles.³⁰ In short, international law's prescriptive principles do not limit the power of Congress. They simply give other States

24. 18 U.S.C. §§ 1961–68 (2012).

25. 136 S. Ct. 2090, 2102 (2016).

26. Although perhaps they should be. *See infra* notes 415, 427–34 and accompanying text.

27. *See, e.g.,* O'Sullivan, *supra* note 1, at 648–50.

28. Under international law, a State's power is constrained by three types of jurisdictional rules: (1) prescriptive jurisdiction, meaning the power “to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court”; (2) adjudicatory jurisdiction, that is, the power “to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings”; and (3) enforcement jurisdiction, or the power “to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (AM. LAW INST. 1987).

29. *See infra* notes 423–24 and accompanying text.

30. *See infra* note 80.

a basis for objection if Congress exceeds the prescriptive principles. But international law's prescriptive principles are relevant to our present inquiry because, as is explained within, both of the canons of construction applied to test the extraterritoriality of criminal statutes—the presumption against extraterritoriality and the *Charming Betsy* canon—cannot be understood without reference to these principles.

Customary international law (CIL),³¹ as recognized in U.S. courts, presently identifies five bases for prescriptive jurisdiction.

A. TERRITORIAL JURISDICTION

The most traditional basis for prescriptive jurisdiction is territorial. According to the *Restatement (Third) of Foreign Relations Law* (Third Restatement), there are two varieties of territorial jurisdiction. One, “subjective” territorial jurisdiction, is the bedrock. The other, “objective” territorial or “effects” jurisdiction, was at one point controversial, but came to be widely accepted at least by the twentieth century.³²

31. Customary international law (CIL), formerly known as the “law of nations,” is formed through “a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW INST. 1987). Just how much custom reflects a “general and consistent practice” is often in the eye of the beholder. Similarly, whether a State is following that practice as a matter of comity rather than out of a sense of legal obligation can be difficult to divine. Courts around the world can take different views on what constitutes CIL and there is, of course, no Supreme Court of the World to sort it all out. Thus, when talking about prescriptive jurisdiction, which arises out of customary international law, I will rely on the best and most authoritative compilation of the United States' views on the subject, the Third Restatement, to provide the broad outlines. Note, however, that the *Restatement (Fourth) of the Foreign Relations Law of the United States* is currently in the works. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (AM. LAW INST., Tentative Drafts). I will also refer to the highly influential Harvard Research Study that produced a Draft Convention on Jurisdiction with Respect to Crime. See *Codification of International Law: Part II Jurisdiction with Respect to Crime*, 29 SUPP. TO AM. J. INT'L L. 435 (1935) [hereinafter *Draft Convention*]. “Federal and state court decisions in the United States, as well as most course books and treatises on International Law, have adopted the Harvard Research designations.” Christopher L. Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1110 n.5 (1982) (collecting sources).

32. See, e.g., JOHN BASSETT MOORE, REPORT ON EXTRATERRITORIAL CRIME AND THE CUTTING CASE 23 (1887) (conceding the effects principle, stating that “[t]he principle that a man who outside of a country willfully [sic] puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries”); cf. *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (recognizing, in interstate context, that “[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power”). The Permanent Court of International Justice, the precursor to the International Court of Justice, is widely regarded as having recognized the validity of the objective territoriality principle in the famous *Lotus* case from 1927. See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10. After the *Lotus* case was decided, the *First Restatement of Conflict of Laws* recognized this basis as well. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 65 (AM. LAW INST. 1934). The oft-referenced Harvard Research Study recognized it in 1935. See *Draft Convention*, *supra* note 31, at 480. And the Second Circuit, acting for the Supreme Court in a case in which the Court could not gather a quorum, found the effects principle to be “settled law” in 1945. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (“[I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance,

The question whether a case is founded on territorial jurisdiction is critical given our subject matter. As this Article makes clear, an important issue that courts struggle with in cases that have transnational features is: when do federal statutes have extraterritorial application? That question only arises, however, if the violation is deemed to have been committed abroad. If the claim is deemed territorial, there is no need to address the extraterritorial scope of the relevant statute.

1. Subjective Territorial Jurisdiction

The Third Restatement provides that a State has jurisdiction to prescribe law with respect to “conduct that, wholly or in substantial part, takes place within its territory.”³³ This is known as subjective territorial jurisdiction. “It is universally recognized that States are competent, in general, to punish all crimes committed within their territory”³⁴—and this principle has long enjoyed the Supreme Court’s full-throated support.³⁵ The Supreme Court’s modern presumption against extraterritoriality is keyed only to the subjective territoriality principle—that is, to conduct occurring on U.S. soil.³⁶

One difficulty in applying this well-established principle is the question of what, and how much, activity must occur on a State’s territory for a crime to be justified by the subjective territorial principle.³⁷ When all the elements of a crime occur within one State, that crime is “committed” on its territory.³⁸ When elements of the crime occur in different States, however, it is not clear what conduct is necessary or sufficient to ground a State’s assertion of subjective territorial jurisdiction. In *Morrison*, for example, a securities fraud claim was founded on a

for conduct outside its borders that has consequences within its borders which the state rephends; and these liabilities other states will ordinarily recognize.”)

33. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (AM. LAW INST. 1987) (emphasis added).

34. *Draft Convention*, *supra* note 31, at 480.

35. *See, e.g.*, *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812); *Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 234 (1804); *see also The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824).

36. *See Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010) (adopting a focus test to determine what conduct must occur on U.S. soil for a claim to be territorial and rejecting use of effects principle); *see also RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016) (“If the conduct relevant to the statute’s focus occurred in the United States, then the case involves a permissible domestic application . . . but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application . . .”).

37. *See, e.g.*, *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665 (7th Cir. 1998) (“The chronic difficulty with [determining subjective territoriality in securities cases] has been describing, in sufficiently precise terms, the sort of conduct occurring in the United States that ought to be adequate to trigger American regulation of the transaction.”); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30–33 (D.C. Cir. 1987).

38. *See European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 142 (2d Cir. 2014) (“If domestic conduct satisfies every essential element to prove a violation of a United States statute that does not apply extraterritorially, that statute is violated even if some further conduct contributing to the violation occurred outside the United States.”), *rev’d on other grounds*, 136 S. Ct. 2090 (2016); *see also Pasquantino v. United States*, 544 U.S. 349 (2005); *Republic of the Phil. v. Marcos*, 862 F.2d 1355 (9th Cir. 1988).

foreign securities transaction, but the fraud was alleged to have happened, at least in part, in the United States.³⁹ The Court held that subjective territoriality is present only where the securities transaction occurred, and it was irrelevant that the fraud element took place in the United States.⁴⁰ The issue of whether a crime was committed within the territory of a State will be discussed further in section III.A.

2. Objective Territorial or “Effects” Jurisdiction

The second type of territorial jurisdiction gives a State prescriptive jurisdiction over “conduct outside its territory that has or is intended to have *substantial effect* within its territory.”⁴¹ This is known as objective territorial or effects jurisdiction. Many countries use some form of effects jurisdiction, but there is “disagreement over what it means and how the test should be applied.”⁴² The Third Restatement cautions that “[c]ontroversy has arisen as a result of economic regulation by the United States and others, particularly through competition laws, on the basis of economic effect in their territory, when the conduct was lawful where carried out.”⁴³

The Third Restatement clearly identifies the effects principle as a type of *territorial* jurisdiction. The reason for this is best illustrated by a frequently used example.⁴⁴ Assume that, in a duel, Smith, standing in Mexico, shoots with intent to kill Jones, who is on the U.S. side of the border. Jones expires in the United States. In this case, one element of the crime—firing the fatal shot—happened in Mexico, but another element—the death of the victim—occurred in the United States. The “effect” is therefore an element of the crime and suffices to give the United States territorial jurisdiction.

The highly influential *Draft Convention on Jurisdiction with Respect to Crime*, published in 1935, discussed objective territoriality in just such terms: a State has territorial jurisdiction over crimes commenced abroad but completed or consummated within the State’s territory.⁴⁵ The crime, according to the Convention, occurs “in part” in the State claiming objective territorial jurisdiction because an “essential constituent element [was] consummated there.”⁴⁶ The *Restatement*

39. 561 U.S. at 251–53.

40. *See id.* at 266–70.

41. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (AM. LAW INST. 1987) (emphasis added).

42. INT’L BAR ASS’N, REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 12 (2009) [hereinafter TASK FORCE REPORT]; *see also* Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631, 235–36 (2009) (comparing American and German systems for determining territoriality).

43. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. d (AM. LAW INST. 1987); *see also* V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT’L L. 257 (1980) (discussing frictions arising from U.S. application of its economic regulations and laws abroad).

44. *See, e.g.*, *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 987 (2d Cir. 1975) (referring to “the oft-cited case of the shooting of a bullet across a state line where the state of the shooting as well as of the state of the hitting may have an interest in imposing its law”).

45. *Draft Convention, supra* note 31, at 487–88.

46. *Id.* at 495.

(*Second*) of the *Foreign Relations Law of the United States* (Second Restatement) adopted the same elements-based analysis in 1965. It explained:

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory if . . . the conduct and its effect are generally recognized as constituent elements of a crime . . . under the law of states that have reasonably developed legal systems.⁴⁷

As CIL has evolved, modern effects jurisdiction has not required that a “constituent element” of the crime, or that conduct consummating the crime, occur in the prosecuting State.⁴⁸ For many years, federal courts found territorial jurisdiction to be present when conduct abroad had pernicious effects on American markets or American citizens, even if no element of the crime occurred in the United States.⁴⁹ For example, even if all the conduct that satisfied the elements of an anti-trust claim occurred overseas, courts might conclude that the violation was territorial because the wrongful cartel behavior affected prices in the U.S. market for the cartel’s products. Again, this was important because where effects jurisdiction was established and a case was therefore deemed territorial in nature, it was not necessary to test the extraterritorial application of the relevant statute.

The lower courts’ application of the effects principle was criticized as “unpredictable and inconsistent” in part because it was difficult to discern what sorts of effects were sufficient.⁵⁰ Accordingly, the Supreme Court rejected the use of an effects test to discern whether a given case is territorial, meaning that the Court views a case as territorial in nature only if qualifying conduct occurs on U.S. territory.⁵¹ Perhaps for this reason, the tentative draft of the *Restatement (Fourth) of the Foreign Relations Law of the United States* (Tentative Draft of the Fourth Restatement) no longer includes effects as a subset of territorial jurisdiction,

47. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18(a) (AM. LAW INST. 1965); see also *id.* cmt. e. The *Second Restatement* further explained that if the crime at issue is not one that is “generally recognized,” the conduct and effects must be “constituent elements” and the effect must be both substantial and the direct and foreseeable result of the conduct. *Id.* § 18(a) cmt. f.; see also MODEL PENAL CODE § 1.03(1)(a) (AM. LAW INST. 1962) (generally providing for the “[t]erritorial [a]pplicability” of crimes where “either the conduct which is an element of the offense or the result which is such an element occurs within [the U.S. state].”).

48. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 415 (Jurisdiction to Regulate Anti-Competitive Activities), § 416 (Jurisdiction to Regulate Activities Related to Securities) (AM. LAW INST. 1987). For example, courts have upheld jurisdiction to prescribe based on intended effects, even if no effects were actually felt. See, e.g., *United States v. Yousef*, 327 F.3d 56, 96–97 (2d Cir. 2003); *United States v. Wright-Barker*, 784 F.2d 161, 168–69 (3d Cir. 1986); *United States v. Ricardo*, 619 F.2d 1124, 1129 (5th Cir. 1980); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 reporters’ note 6 (AM. LAW INST., Tentative Draft No. 2, March 21, 2016).

49. See, e.g., *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 257–58 (2010).

50. *Id.* at 260.

51. *Id.* at 258–61, 266–70.

delineating it instead as a discrete jurisdictional basis.⁵² As a consequence, unless a case is founded on subjective territoriality—that is, unless the relevant conduct is found to have been committed on U.S. territory—courts must confront the question of the statute’s extraterritorial application.

B. NATIONALITY (OR ACTIVE PERSONALITY) JURISDICTION

A longstanding basis for jurisdiction concerns nationality. Thus, a State has prescriptive jurisdiction over “the activities, interests, status, or relations of its nationals outside as well as within its territory.”⁵³ This ground of jurisdiction legitimated States regulating, and punishing, the conduct of their citizens wherever they acted; the citizens, then, are the *perpetrators*. The rationales for this basis of jurisdiction include “a state’s need to prevent its nationals from engaging in criminal activity, to prevent its nationals ‘from enjoying scandalous impunity,’ difficulty locating the place where an offense was committed, and the need of a state to protect its international reputation.”⁵⁴ “[N]ationality jurisdiction is normally justified by the theory that the national owes allegiance to the home state both while at home and while abroad. According to this view, the state provides its national the benefits of nationality, including protection at home and abroad, in exchange for the national’s obedience.”⁵⁵

C. PASSIVE PERSONALITY JURISDICTION

Another basis for jurisdiction that relates to nationality—the passive personality principle—turns on the nationality of the *victim*. According to the Third Restatement, this principle “asserts that a state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the victim of the act was its national.”⁵⁶ This basis for jurisdiction has been controversial in the United States, although it is commonly used in civil law countries.⁵⁷ Hence, the Third Restatement provides that this principle has not

52. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201(1) (b) cmt. f (AM. LAW INST., Tentative Draft No. 2, March 21, 2016).

53. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (AM. LAW INST. 1987).

54. Stigall, *supra* note 19, at 333 (footnotes omitted); see also *Draft Convention, supra* note 31, 519–20; Gerald L. Neuman, *Extraterritoriality and the Interest of the United States in Regulating Its Own*, 99 CORNELL L. REV. 1441, 1453, 1469 (2014).

55. Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT’L L. 41, 68 (1992).

56. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. g (AM. LAW INST. 1987).

57. See, e.g., CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 113-7 (Fr.) (“French Criminal law is applicable to any felony, as well as to any misdemeanour punished by imprisonment, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time the offence took place.”). The *Second Restatement* rejected this prescriptive basis. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 30(2) & cmt. e (AM. LAW INST. 1987). The Harvard Research Study asserted that this principle is “the most difficult to justify in theory.” *Draft Convention, supra* note 31, at 579 (explaining that the passive personality principle is “more strongly contested than any other type of competence”). To see why, consider a hypothetical case in which France attempts to prosecute an American who, while in the United States,

been accepted for ordinary crimes, but “it is increasingly accepted as applied to terrorist and other organized attacks on a state’s nationals by reason of their nationality, or to assassination[s] of a state’s diplomatic representatives or other officials.”⁵⁸

D. PROTECTIVE JURISDICTION

A State has the prescriptive jurisdiction to address “certain conduct outside its territory by persons [who are] not its nationals that is directed against the security of the state or against a limited class of other state interests.”⁵⁹ This “protective principle” is supposed to be confined to crimes affecting the security of the State or the integrity of governmental functions,⁶⁰ involving crimes such as espionage,⁶¹ using false statements to gain admission to the country,⁶² counterfeiting the State’s currency, and the like. But some U.S. courts have been willing to aggressively expand the bounds of protective jurisdiction to other crimes, such as prohibitions against drug trafficking,⁶³ that do not directly threaten the security of the State or the integrity of its functions.

E. UNIVERSAL JURISDICTION

Finally, “universal jurisdiction” gives a State:

jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the [other] bases of jurisdiction . . . [are] present.⁶⁴

engaged in an employment practice “victimizing” a French employee, even if that labor practice was legal in the United States. Not only would this be seen as an intrusion on U.S. territorial sovereignty, but it would also raise questions of fair notice and legality: How is a U.S. citizen, acting in the United States, supposed to be on notice that his action may be subject to criminal prosecution in Paris? Furthermore, given this lack of notice, individuals could hardly be expected to engage in the kind of risk/benefit analysis that undergirds the deterrence rationale for criminal punishment.

58. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. g (AM. LAW INST. 1987); *see, e.g.*, 18 U.S.C. § 2332(a), (d) (2012) (U.S. may prosecute homicide against a U.S. national while the national is outside the United States where the offense was “intended to coerce, intimidate, or retaliate against a government or a civilian population”). Some courts have applied this principle more broadly. *See, e.g.*, *United States v. Neil*, 312 F.3d 419 (9th Cir. 2002); *United States v. Martinez*, 599 F. Supp. 2d 784 (W.D. Tex. 2009).

59. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3) (AM. LAW INST. 1987).

60. *Id.* § 402 cmt. f.

61. *See, e.g.*, *United States v. Zehe*, 601 F. Supp. 196, 197–98 & n.3 (D. Mass. 1985).

62. *See, e.g.*, *United States v. Rodriguez*, 182 F. Supp. 479, 491 (S.D. Cal. 1960).

63. *See, e.g.*, *United States v. Rojas*, 812 F.3d 382, 392–93 (5th Cir. 2016); *United States v. Lawrence*, 727 F.3d 386, 395 (5th Cir. 2013); *United States v. Tinoco*, 304 F.3d 1088, 1108 (11th Cir. 2002); *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999); *United States v. Romero-Galue*, 757 F.2d 1147, 1154 (11th Cir. 1985). *But see* *United States v. Perlaza*, 439 F.3d 1149, 1161–63 (9th Cir. 2006); *United States v. Wright-Barker*, 784 F.2d 161, 167 n.5 (3d Cir. 1986).

64. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (AM. LAW INST. 1987).

Universal jurisdiction first arose in response to the need to prosecute pirates and was initially restricted to those cases. More recently, States have used their universal jurisdiction statutes to attempt to try those who commit heinous crimes in another State, even where the jurisdictional State's nationals have no involvement, the State's nationals have not been victimized, and the State can claim no protective interests.⁶⁵

F. LIMITATIONS

Even where one of the bases for jurisdiction described above is present, the Third Restatement's section 403 provides that a State "may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."⁶⁶ The Third Restatement views this "reasonableness" inquiry as a legal obligation, not an act of comity.⁶⁷ We need not dwell on section 403 for two reasons. First, it is rarely consulted or employed in criminal cases.⁶⁸ Even when U.S. courts reference the rule of reasonableness, "they are markedly disinclined to limit jurisdiction in transnational criminal matters on such grounds. As such, it may fairly be said that no such rule applies in U.S. law vis-à-vis transnational crime."⁶⁹ This may be because it is doubtful that U.S. courts have the power to dismiss a criminal indictment on the ground that international law deems the prosecution

65. *See id.*; Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 324–25 (2001).

66. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (AM. LAW INST. 1987).

67. *See id.* § 403(2). Another limitation on extraterritorial jurisdiction in international law is exercised by courts through "comity." *See, e.g.,* Stigall, *supra* note 19, at 335–36. Comity is "a traditional diplomatic and international law concept used by States in their dealings with each other. Short of legal obligation, States respect each other's policy choices and interests in a given case, without inquiring into the substance of each other's laws." CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 136–37 (2008) (footnotes omitted). Comity is "widely believed to occupy a place between custom and customary international law." *Id.* at 137 (footnote omitted). Prescriptive comity is defined as "the respect sovereign nations afford each other by limiting the reach of their laws." Stigall, *supra* note 19, at 345 (quoting *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993)). Prescriptive issues are most pronounced in the antitrust area. *See id.* at 341–47, 372–73. Because this limitation is generally not invoked in criminal cases, it will not be further explored here. *See* TASK FORCE REPORT, *supra* note 42, at 168 n.119.

68. Despite reading hundreds of cases assessing the extraterritorial application of U.S. statutes, I have found relatively few cases applying or even referencing section 403 in criminal cases. *See, e.g., In re Hijazi*, 589 F.3d 401, 412 (7th Cir. 2009); *United States v. Clark*, 435 F.3d 1100, 1107 (9th Cir. 2006); *United States v. MacAllister*, 160 F.3d 1304, 1308–09 (11th Cir. 1998); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8 (1st Cir. 1997); *United States v. Vasquez-Velasco*, 15 F.3d 833, 840 (9th Cir. 1994); *United States v. Hijazi*, 845 F. Supp. 2d 874, 884–85 (C.D. Ill. 2011); *cf. United States v. Weingarten*, 632 F.3d 60, 67 (2d Cir. 2011); *United States v. Javino*, 960 F.2d 1137, 1142–43 (2d Cir. 1992). *But see United States v. Martinez*, 599 F. Supp. 2d 784, 800–01 (W.D. Tex. 2009) (declining to apply section 403 in absence of circuit precedent making it part of an extraterritoriality inquiry). Section 403 is infrequently cited by the Supreme Court and, when it has been cited, it has only been in civil cases. *See, e.g., F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818–21 (1993) (Scalia, J., dissenting).

69. Stigall, *supra* note 19, at 338.

“unreasonable.”⁷⁰ Second, the Tentative Draft of the Fourth Restatement has jettisoned section 403. Instead, the Tentative Draft includes a provision stating that, “[a]s a matter of prescriptive comity, U.S. courts may interpret federal statutory provisions to include other limitations on their applicability.”⁷¹ This, then, is a principle of statutory interpretation and does not provide “judicial authority to decline to apply federal law.”⁷²

II. *CHARMING BETSY* AND THE PRESUMPTION AGAINST EXTRATERRITORIALITY: HISTORY

A historical survey of the Court’s extraterritoriality jurisprudence is necessary to understand the promised analytical roadmap within and to resolve some of the uncertainties courts currently encounter in following that map. In particular, this survey provides the foundation for this Article’s conclusion that courts of appeals are likely wrong in continuing to rely on the *Charming Betsy* canon of construction⁷³ and on *United States v. Bowman*⁷⁴ in criminal cases. A review of the Court’s case law is also relevant to our normative consideration of the Court’s strong presumption against extraterritoriality. This review demonstrates that the modern presumption against extraterritorial jurisdiction has a questionable pedigree and it calls into question a central rationalization for the presumption.⁷⁵

As noted in the introduction, where the statute is ambiguous as to its extraterritorial application, lower federal courts generally apply two canons of construction, at least in civil cases. The first is the presumption against extraterritoriality, which the Supreme Court first articulated in its modern form in *EEOC v. Arabian American Oil Co. (Aramco)*.⁷⁶ In *Aramco* and subsequent cases, the Court decreed that unless a statute gives a “clear indication”⁷⁷ that Congress intended it to apply outside the territorial jurisdiction⁷⁸ of the United States, it does not.

70. See, e.g., *United States v. Williams*, 504 U.S. 36 (1992) (district court does not have the power to dismiss an indictment for violation of a court’s procedural rule enacted pursuant to the court’s supervisory power); *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988) (district court can dismiss an indictment for prosecutorial misconduct before the grand jury only if it is established that the violation substantially influenced the grand jury’s decision to indict or there is grave doubt that the decision to indict was free from the substantial influence of the violation); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (customary international law may be referenced where there is no controlling treaty and no controlling executive or legislative act or judicial decision); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 949 (D.C. Cir. 1984) (“An . . . American court cannot refuse to enforce a law its political branches have already determined is desirable and necessary.”); see also Brilmayer, *supra* note 19, at 21–22.

71. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 (AM. LAW INST., Tentative Draft No. 3, March 10, 2017).

72. *Id.* cmt. a.

73. See *infra* notes 263–76 and accompanying text.

74. See *infra* notes 277–95 and accompanying text.

75. See *infra* notes 351–53 and accompanying text.

76. 499 U.S. 244 (1991).

77. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013) (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010)).

78. *Aramco*, 499 U.S. at 248 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

Again, it is important to recognize that the presumption against extraterritoriality assumes that Congress acts only with subjective territoriality in mind and thus means for statutes to apply only to conduct in U.S. territory, unless it affirmatively indicates otherwise.⁷⁹

The second canon of construction lower courts reference is the *Charming Betsy* canon, which developed in reliance upon the Court's pre-*Aramco* case law. Congress has the power to enact extraterritorial legislation even if that legislation exceeds the prescriptive jurisdiction authorized by international law.⁸⁰ Although Congress can act in excess of international law, courts are reluctant to impute this intent to Congress, and so they employ the *Charming Betsy* canon of construction.⁸¹ In short, when faced with congressional silence, many federal courts will test the statute against the prescriptive principles of CIL on the assumption that Congress did not mean to exceed them.⁸²

79. See *supra* note 36.

80. The Supremacy Clause of the U.S. Constitution does not mention CIL, formerly known as the law of nations. By its express terms, only the Constitution, federal statutes, and treaties are the "supreme Law of the Land." U.S. CONST. art. VI, cl. 2. The Supreme Court, however, accepts that CIL is "part of our law." *The Paquete Habana*, 175 U.S. 677, 700 (1900). CIL, the Court instructed in *The Paquete Habana*, may be referenced "where there is no treaty and no controlling executive or legislative act or judicial decision." *Id.* Where a statute authorizes extraterritorial jurisdiction in excess of CIL principles, it controls, whether because of the limited potency of CIL under *The Paquete Habana* or because the statute is last-in-time. See, e.g., Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after Erie*, 66 FORDHAM L. REV. 393, 397–98 (1997); see also *Rainey v. United States*, 232 U.S. 310, 316 (1914); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 135–36 (2d Cir. 2005); *TMR Energy Ltd. v. State Property Fund of Ukr.*, 411 F.3d 296, 302 (D.C. Cir. 2005); *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991).

81. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (AM. LAW INST. 1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

82. See, e.g., *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) ("[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. This rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow.") (internal citations omitted); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) ("Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe."); *United States v. Rojas*, 812 F.3d 382, 392 (5th Cir. 2016); *United States v. Lawrence*, 727 F.3d 386, 394–95 (5th Cir. 2013); *United States v. Ali*, 718 F.3d 929, 935 (D.C. Cir. 2013); *United States v. Ayesh*, 702 F.3d 162, 166–67 (4th Cir. 2012); *United States v. Weingarten*, 632 F.3d 60, 67 (2d Cir. 2011); *United States v. Frank*, 599 F.3d 1221, 1233 (11th Cir. 2010); *United States v. Clark*, 435 F.3d 1100, 1106 (9th Cir. 2006); *United States v. Neil*, 312 F.3d 419, 422 (9th Cir. 2002); *United States v. Plummer*, 221 F.3d 1298, 1307 (11th Cir. 2000); *United States v. MacAllister*, 160 F.3d 1304, 1308 & n.9 (11th Cir. 1998); *United States v. Juda*, 46 F.3d 961, 967 (9th Cir. 1995); *United States v. Vasquez-Velasco*, 15 F.3d 833, 839 (9th Cir. 1994); *United States v. Harvey*, 2 F.3d 1318, 1328–29 (3d Cir. 1993); *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1205 (9th Cir. 1991); *United States v. Thomas*, 893 F.2d 1066, 1069 (9th Cir. 1990); *United States v. Benitez*, 741 F.2d 1312, 1316 (11th Cir. 1984); *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984); *United States v. Columba-Colella*, 604 F.2d 356, 358–59 (5th Cir. 1979); *United States v. King*, 552 F.2d 833, 851 (9th Cir. 1976); *United States v. Cotten*, 471 F.2d 744, 749 (9th Cir. 1973); *Rivard v. United States*, 375 F.2d 882, 885 (5th Cir. 1967); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945); see also Blakesley, *supra* note 31, at 1109 (examining courts' application of the *Charming Betsy* canon in light of prescriptive jurisdiction rules of international law).

The relationship between the *Charming Betsy* canon and the presumption is never explained.⁸³ Courts generally employ both tests without any discussion. The historical reality is that the presumption against extraterritoriality is itself best explained simply as a throwback to the era in which the application of the *Charming Betsy* canon meant that a statute would survive only if justified by the subjective territorial principle. As Professor Knox has argued,

For most of U.S. history, the Supreme Court determined the reach of federal statutes in the light of international law—specifically, the international law of legislative jurisdiction. In effect, it applied a . . . presumption that federal law does not extend beyond the jurisdictional limits set by international law. This presumption was an offshoot of the *Charming Betsy* canon . . .⁸⁴

Professor Knox is correct, then, in identifying the original presumption as one against *extrajurisdictionality* in which, under *Charming Betsy*, the Court assumed that Congress did not intend to extend its laws beyond the limits of the prescriptive jurisdiction recognized under international law. The reason that, in some early cases, the presumption was perceived to relate only to subjective territoriality—and not to all of international law’s prescriptive principles—was that the two were perceived to be congruent in early U.S. history.

In the early nineteenth century, international law limitations on a State’s extra-territorial jurisdiction were more stringent and were tied by prevailing notions of sovereignty largely to subjective territorial jurisdiction.⁸⁵ At that time, strict Westphalian views of sovereignty prevailed. Justice Marshall summarized these views in the *Schooner Exchange v. McFaddon*: “The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.”⁸⁶ From this it followed in *The Apollon* that:

The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction.⁸⁷

83. The draft *Fourth Restatement* currently includes one section that discusses the presumption against extraterritoriality, RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 (AM. LAW INST., Tentative Draft No. 3, March 10 2017), and one that describes the *Charming Betsy* canon, RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 205 (AM. LAW INST., Tentative Draft No. 2, March 21, 2016), but the relationship between the two is not explained.

84. Knox, *supra* note 2, at 352; *see also* Born, *supra* note 19, at 1 (“[T]he earliest U.S. judicial decisions relied on the ‘Law of Nations’ to define the territorial reach of federal law.”).

85. *See* Knox, *supra* note 2, at 365; *see also* Born, *supra* note 19, at 1.

86. 11 U.S. (7 Cranch) 116, 136 (1812).

87. 22 U.S. (9 Wheat.) 362, 370 (1824).

In short, during this period subjective territorial jurisdiction was supreme. Only nationality jurisdiction—at least in some circumstances—and universal jurisdiction—in the case of pirates—could serve as alternative bases for prescriptive jurisdiction.⁸⁸ Accordingly, application of the *Charming Betsy* canon would have looked a lot like a presumption against extraterritoriality restricted to the subjective territorial principle. The case that best illustrates these understandings is *American Banana Co. v. United Fruit Co.*,⁸⁹ a civil antitrust case founded upon actions taken abroad that were alleged to have been in aid of the defendant seeking a monopoly in its industry.

Speaking for the Court, Justice Oliver Wendell Holmes asserted that “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act was done.”⁹⁰ Holmes acknowledged a crabbed version of nationality jurisdiction, noting that “[n]o doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law.”⁹¹ But he concluded that the territorial limitation posited leads “in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.”⁹² In short, according to the *American Banana* Court, “[a]ll legislation is prima facie territorial.”⁹³

So strong was the early nineteenth century tie between sovereignty and the subjective territoriality principle that *American Banana* and a few subsequent cases implied that—consistent with existing notions of sovereign prerogatives—Congress did not have the “power” to extend its legislation beyond territorial limits.⁹⁴ Later cases clarify, however, that the presumption is “a canon of

88. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 reporter’s notes 7 & 10 (AM. LAW INST., Tentative Draft No. 2, March 21, 2016).

89. 213 U.S. 347 (1909).

90. *Id.* at 356.

91. *Id.* at 355–56.

92. *Id.* at 357.

93. *Id.* (citations omitted).

94. See, e.g., *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918) (“Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction.”) (citing *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909)); see also *N.Y. Cent. R. Co. v. Chisholm*, 268 U.S. 29, 31–32 (1925); *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 195–96 (1820) (“[I]n construing [a statute] we should test each case by a reference to the punishing powers of the body that enacted it. The reasonable presumption is, that the legislature intended to legislate only on cases within the scope of that power”); *United States v. Bevans*, 16 U.S. (3 Wheat.) 336, 386–87 (1818) (“[T]he jurisdiction of a [U.S.] state is co-extensive with its territory; co-extensive with its legislative power.”); *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812) (“[F]ull and absolute territorial jurisdiction [is] alike the attribute of every sovereign, and [is] incapable of conferring extra-territorial power”); cf. *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 195 (1856) (Congress’s Article I power to enact patent laws “is domestic in its character, and necessarily confined within the limits of the United States.”).

construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate."⁹⁵

What is important to recognize, however, is that the application of the *Charming Betsy* canon changed over time as subjective territoriality lost its privileged status. For much of the twentieth century, the Court continued to assume, consistent with the *Charming Betsy* canon, that Congress did not mean to exceed the scope of prescriptive jurisdiction under international law. But the Court came to recognize other prescriptive principles that justified the extension of U.S. legislative authority beyond U.S. shores.

For example, the *American Banana* Court's claim that only subjective jurisdiction was legitimate under international law was a stretch even in 1909. Certainly, as the *American Banana* Court was forced to grudgingly acknowledge, nationality jurisdiction was a legitimate basis for extraterritorial jurisdiction even at that time.⁹⁶ Consistent with this principle, the Court later had no difficulty applying federal statutes to U.S. citizens or their property abroad without discussing a presumption against extraterritoriality. Rather than relying on geography, the Court upheld these statutes because they applied to U.S. nationals. It did so in a couple of tax cases,⁹⁷ but for present purposes perhaps the best example is *Kawakita v. United States*,⁹⁸ a criminal case. In that decision, the Court held that the federal criminal treason statute applied extraterritorially to a dual Japanese-American citizen who had abused U.S. prisoners of war in Japan.⁹⁹ In addressing the defendant's extraterritoriality objection, the Court relied on normal principles of interpretation and nowhere referenced any presumption against extraterritoriality.

After its decision in *American Banana*, the Court also moved away from an insistence on subjective territorial jurisdiction and toward recognition that legislation could be applied extraterritorially based on the effects principle. This evolution was seemingly spurred by a series of antitrust cases involving activity that spanned borders but that, in each case, clearly resulted from a unitary objectionable scheme and just as clearly had a detrimental effect on U.S. interests.¹⁰⁰

95. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2015); *see also Blackmer v. United States*, 284 U.S. 421, 437 (1932).

96. *Am. Banana Co.*, 213 U.S. at 358–59.

97. *See, e.g., Cook v. Tait*, 265 U.S. 47 (1924) (holding that Congress has the power to tax income received by a U.S. citizen who was permanently residing in Mexico at the time, and rejecting the claim that this power is inconsistent with international law because of citizenship); *United States v. Bennett*, 232 U.S. 299 (1914) (upholding tax on U.S. citizen's foreign-built yacht which was used entirely outside the limits and territorial jurisdiction of the United States).

98. 343 U.S. 717 (1952).

99. *Id.* at 732–33.

100. *See, e.g., United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *Thomsen v. Cayser*, 243 U.S. 66 (1917); *United States v. Pac. & Arctic Ry. & Navigation Co.*, 228 U.S. 87 (1913); *United States v. Am. Tobacco Co.*, 231 U.S. 106 (1911). In later cases involving international cartels, the Court made no reference to extraterritoriality concerns. *See Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Co.*, 467 U.S. 752 (1984); *United States v. Nat'l Lead Co.*, 332 U.S. 319 (1947), *overruled on other grounds by Con'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

The Court's explanations for holding that the Sherman Act applied to conduct that occurred abroad were often terse and oblique. But in at least two cases decided shortly after *American Banana*, the Court signaled that even when the relevant conduct occurred abroad, the Sherman Act applied if the effects of the forbidden schemes were felt in the United States.¹⁰¹ In neither case did the Court reference a presumption against extraterritoriality.

Many of the Court's cases relating to extraterritoriality concerned the possible application of U.S. laws to activity aboard ships. These cases perhaps demonstrate best that what the Court applied prior to 1991 was a presumption against extrajurisdictionality (measured, under *Charming Betsy*, against all the international law prescriptive principles) rather than a bare presumption against the extension of criminal jurisdiction beyond U.S. territory (measured only against the subjective territorial principle). Exploring these cases is also helpful given our focus on criminal law because most of the Court's extraterritoriality decisions regarding the scope of criminal statutes concerned conduct aboard ships.

When faced with cases concerning whether federal statutes applied on ships, the Court did not rely on a presumption based on the physical location of the crime—that is, whether the ship upon which the offense was committed was on the high seas or within the territorial waters of the United States or another State. Instead, either explicitly or implicitly, the Court relied upon international law principles governing prescriptive jurisdiction as interpreted and applied in the maritime context. Under international law, a ship was considered the constructive territory of the State whose flag it flew¹⁰² and thus was “deemed part of the territory of the country to which she belongs.”¹⁰³ Stateless vessels—those not belonging to any nation—were deemed fair game under international law. The nationality principle also played a lesser—but still important—role in these decisions.

A. PIRACY CASES

In a series of early opinions (1818–1820), the Court was forced to wrestle with Congress's definition of piracy on the high seas. In resolving interpretive questions in these cases, the Court did not apply a presumption against extraterritoriality based on the site of the pirates' conduct—that is, the high seas. Instead, the piracy statute was construed to apply, consistent with international law, to U.S.-

101. See *Sisal Sales Corp.*, 274 U.S. at 269; *Thomsen*, 243 U.S. at 88. The Supreme Court's increasing willingness to apply statutes abroad when doing so would be consistent with the effects principle was not restricted to the antitrust arena. In *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), the Court applied the trademark protections of the Lanham Act to a U.S. citizen's infringing conduct in Mexico. The Court concluded that it was immaterial that the infringing activity happened in Mexico because its effects were felt in the United States, and a U.S. citizen was the offender. See *id.* at 288 (“[P]etitioner by his ‘own deliberate acts, here and elsewhere, . . . brought about forbidden results within the United States.’”) (quoting *Sisal Sales Corp.*, 274 U.S. at 276).

102. See, e.g., *United States v. Flores*, 289 U.S. 137, 155 (1933); *United States v. Rodgers*, 150 U.S. 249, 264 (1893); see also *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 632 (1818).

103. *Rodgers*, 150 U.S. at 264. But see *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123 (1923).

flagged vessels and stateless vessels, regardless of their location or the nationality of their crews.¹⁰⁴

B. HIGH SEAS

The Supreme Court also repeatedly upheld indictments for murder and assault committed by nationals and non-nationals on U.S. vessels on the high seas pursuant to a statute that authorized such prosecutions “upon the high seas or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular [U.S.] state.”¹⁰⁵ Some cases raised definitional questions, such as whether a particular case occurred on the “high seas”¹⁰⁶ or whether a given body of water was outside the jurisdiction of any U.S. state.¹⁰⁷ In none of those cases did the Court reference a presumption against extraterritoriality, much less use it as an interpretive aid. The Court also did not refer to the presumption in upholding an indictment founded on a murder committed on a guano island in the Caribbean.¹⁰⁸

C. CONCURRENT JURISDICTION

A more complicated analysis was necessary when a ship flying the flag of one State was found within the territorial waters of another State. In those cases, two States had concurrent territorial jurisdiction under international law. As noted, ships were treated as the territory of the State whose flag the ship flew. But once the ship was within the territorial waters over which another State was sovereign, those aboard had to comply with that sovereign’s laws “[f]or undoubtedly every person who is found within the limits of a Government, whether for temporary purposes or as a resident, is bound by its laws.”¹⁰⁹

104. In *United States v. Klintock*, the Supreme Court held that the Act of 1790, outlawing piracy, applied to persons, whether or not U.S. nationals, “on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever.” 18 U.S. (5 Wheat.) 144, 152 (1820); *see also* *United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820). In *Palmer*, 16 U.S. at 632, the Court ruled that the crime of robbery committed by a non-U.S. national on a ship belonging exclusively to non-U.S. nationals is not “piracy” within the meaning of the statute. A subsequent case, *United States v. Holmes*, clarified that the nationality of the wrongdoer was irrelevant; all that mattered was that the crime was committed on a U.S. ship. 18 U.S. (5 Wheat.) 412, 417 (1820). Congress reacted to *Palmer* by passing the Act of 1819 “to make clear that it wished to proscribe not only piratical acts that had a nexus to the United States, but also piracy as an international offense subject to universal jurisdiction.” *United States v. Dire*, 680 F.3d 446, 455 (4th Cir. 2012) (quoting *United States v. Hasan*, 747 F. Supp. 2d 599, 612 (E.D. Va. 2010)); *see also* *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 157 (1820) (upholding Congress’s decision to define piracy according to the law of nations).

105. *St. Clair v. United States*, 154 U.S. 134, 136–37 (1894); *see also* *Andersen v. United States*, 170 U.S. 481 (1898); *United States v. Arwo*, 86 U.S. (19 Wall.) 486 (1873).

106. *See* *Rodgers*, 150 U.S. at 253.

107. *See* *United States v. Bevans*, 16 U.S. (3 Wheat.) 336 (1818).

108. *See* *Jones v. United States*, 137 U.S. 202 (1890).

109. *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1856); *see also* *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 124 (1923) (“A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter.”).

In cases of concurrent jurisdiction, no mention was made of any presumption against extraterritoriality. Rather, the Court referenced international law, which viewed the flag State's laws as controlling matters internal to the ship, while the laws of the State in whose waters the ship was found controlled matters that related to the peace and security of the territorial community.¹¹⁰ In *Wildenhus's Case*, for example, the Court upheld the conviction of a Belgian national for the murder of another Belgian aboard a Belgian vessel that was moored at a dock in the United States.¹¹¹ The Court concluded that the case involved public disorder affecting the U.S. community, not solely internal shipboard discipline.¹¹²

1. U.S. Ships in Foreign Waters

The presumption against extraterritoriality would seem to have particular salience in cases in which a U.S. ship is found within the territorial waters of a foreign nation. Yet the Supreme Court did not apply any presumption in affirming an indictment for an assault committed on a U.S. vessel within Canadian territorial waters.¹¹³ Nor did the Court reference the presumption when it upheld the conviction of a foreign national who committed a crime on a U.S. ship in a Japanese harbor.¹¹⁴ Most importantly, the Court expressly found the presumption inapplicable in similar circumstances in *United States v. Flores*.¹¹⁵

The *Flores* Court upheld the indictment of a U.S. citizen who murdered another U.S. citizen on an American vessel while it was docked in the territorial waters of the Belgian Congo. The federal murder statute applied to offenses "committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, on board any vessel belonging in whole or in part to the United States or . . . its nationals."¹¹⁶ Because the crime was committed on board a vessel lying outside the territorial jurisdiction of any U.S. state and within that of a foreign sovereign, the U.S. court had jurisdiction only if the crime was deemed to be within the admiralty and maritime jurisdiction of the United States. The issue, then, was whether jurisdiction over admiralty and maritime cases extended to the punishment of crimes committed on U.S. vessels while in foreign waters. The defendant argued that a presumption against extraterritoriality ought to be applied to determine whether Congress intended the statute's grant of jurisdiction over offenses "within the admiralty and maritime jurisdiction of the United States" to include offenses committed within the territorial waters of another sovereign.¹¹⁷

110. See, e.g., *Rodgers*, 150 U.S. at 260; see also *Lauritzen v. Larsen*, 345 U.S. 571, 585–86 (1953); *Wildenhus's Case*, 120 U.S. 1, 12 (1887).

111. 120 U.S. 1 (1887).

112. See *id.* at 17–18.

113. See *Rodgers*, 150 U.S. at 252.

114. See *In re Ross*, 140 U.S. 453 (1891) (trial before consular court in Japan).

115. 289 U.S. 137, 155 (1933).

116. *Id.* at 145–46.

117. *Id.* at 146–47.

The *Flores* Court acknowledged that “[i]t is true that the criminal jurisdiction of the United States is in general based on the territorial principle, and criminal statutes of the United States are not by implication given an extra-territorial effect.”¹¹⁸ But, citing to international law, it held:

[T]hat principle has never been thought to be applicable to a merchant vessel which, for purposes of the jurisdiction of the courts of the sovereignty whose flag it flies to punish crimes committed upon it, is deemed to be a part of the territory of that sovereignty, and not to lose that character when in navigable waters within the territorial limits of another sovereignty.¹¹⁹

In light of the international law consensus on this principle, the Court was unwilling to say that the language Congress chose “was not intended to give effect to it.”¹²⁰

2. Foreign Ships in U.S. Waters

Perhaps the most interesting cases are those that addressed whether U.S. law would apply to foreign vessels found within U.S. territorial waters. Given the Court’s early emphasis on subjective territoriality, one would assume that U.S. law would automatically apply. But in some circumstances, the law of the United States was held not to apply, either because the Supreme Court reasoned that international law recognized an exception¹²¹ or because the Court concluded that Congress did not intend to govern the actions of foreign ships in U.S. waters.¹²² Notable in the latter regard is a series of cases in which the Court was tasked with determining the applicability of the Labor Management Relations Act of 1947 (LMRA)¹²³ to union activity in U.S. ports. The Court, in construing the jurisdictional provisions of the LMRA, referenced international law principles rather than focusing on subjective territoriality.¹²⁴ Such was the sway of international maritime law in these cases that where the issue was whether a general federal statute that alleged to regulate the internal workings of a foreign ship was applicable in U.S. territorial waters, the Court required Congress to make a clear statement that the statute *applied* to the foreign vessels. In the absence of such a

118. *Id.* at 155.

119. *Id.* at 155–56.

120. *Id.* at 157.

121. *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 145–46 (1812) (ruling that it is “a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction”).

122. *See Brown v. Duchesne*, 60 U.S. (19 How.) 183 (1856).

123. 29 U.S.C. §§ 141–97 (2012).

124. *Windward Shipping (London) Ltd. v. Am. Radio Ass’n*, 415 U.S. 104, 110–11 (1974); *Int’l Longshoremen’s Ass’n, Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 200 (1970); *Inces S.S. Co. v. Int’l Mar. Workers Union*, 372 U.S. 24, 27 (1963); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20–21 (1963); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142 (1957).

statement, the statute was not deemed to apply even in U.S. territorial waters.¹²⁵ In other words, the Court applied a presumption against *territoriality*.

D. U.S. STATES' EXTRATERRITORIAL APPLICATION OF THEIR LAWS

A final category of maritime cases concerned various U.S. states' attempts to apply their laws to their own citizens and ships on the high seas. In deciding these cases, the Court did not apply a presumption against extraterritoriality based on the locus of the activity regulated, which would have precluded jurisdiction. Rather, the Court tested the validity of the statutes against all of the international law prescriptive principles. It determined that the statutes were justified both by the nationality principle and by the territoriality principle because, under international law, ships are floating bits of the territory of the U.S. state from which they hail.¹²⁶

E. SUMMARY OF 1818–1990 CASES

What conclusions can be drawn from over a century of case law? As noted in the Introduction, the Supreme Court's extraterritoriality decisions are far from consistent. For example, the above discussion does not touch on a number of cases that the Court decided by using conflict-of-law principles rather than the *Charming Betsy* canon or a presumption against extraterritoriality.¹²⁷ That said, the Supreme Court referenced a presumption against extraterritoriality in only five cases prior to the 1990s.¹²⁸ In four additional cases, the Court acknowledged that U.S. law was presumptively territorial but concluded that this presumption was overcome¹²⁹ or otherwise inapplicable.¹³⁰ By my count, between 1818 and

125. In *Spector v. Norwegian Cruise Line Ltd.*, a splintered Court ruled that foreign-flagged cruise ships operating in U.S. waters were subject to Title III of the Americans with Disabilities Act (ADA), but ruled that the provision of the ADA requiring barrier removal if "readily achievable" did not apply if the barrier removal would bring the vessel into noncompliance with the International Convention for the Safety of Life at Sea (SOLAS) or any other international legal obligation. 545 U.S. 119, 137 (2005). The *Spector* Court read *Benz* and *McCulloch* to hold that, in some circumstances, "a general statute will not apply to certain aspects of the internal operations of foreign vessels temporarily in United States waters, absent a clear statement." *Id.* at 129 (emphasis added). The Court fragmented in determining when the internal affairs rule ought to control.

126. See *Skiriotes v. Florida*, 313 U.S. 69, 77–78 (1941); *The Hamilton (Old Dominion S.S. Co. v. Gilmore)*, 207 U.S. 398, 405 (1907).

127. See, e.g., *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354 (1959) (concluding that the Court "must apply those principles of choice of law that are consonant" with federal and international maritime law); *Lauritzen v. Larsen*, 345 U.S. 571 (1953) (applying general choice-of-law principles for maritime tort claims).

128. See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440–41 (1989); *United States v. Spelar*, 338 U.S. 217, 222 (1949); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949); *N.Y. Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 31 (1925); *Sandberg v. McDonald*, 248 U.S. 185, 195–96 (1918); see also *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173 (1993) (citing only *Aramco, Foley Bros.*, and *Amerada Hess Shipping*, and Justice Stevens's concurrence in *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992)); *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (citing only *Foley Bros.* for this "longstanding" principle of interpretation).

129. See *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286–87 (1952).

130. See *United States v. Flores*, 289 U.S. 137, 155–56 (1933); *Blackmer v. United States*, 284 U.S. 421 (1932); *United States v. Bowman*, 260 U.S. 94, 97–98 (1922).

1990, the Court could have relied upon or referenced a presumption against extraterritoriality in deciding over twenty-five cases, but it did not.¹³¹ Indeed, in 1965 the Second Restatement referenced a presumption that “[r]ules of United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute.”¹³² Yet in 1987, the Third Restatement omitted reference to any presumption because the Supreme Court had not applied it since 1949.¹³³ As was detailed above, in many cases in which the Court did not apply a presumption against extraterritoriality, it conducted a *Charming Betsy*-type inquiry into whether the statute at issue could be construed to apply extraterritorially, consistent with all international law prescriptive jurisdiction principles.

Most notably for present purposes, in all fifteen criminal cases decided since 1818 in which the criminal conduct did not occur within U.S. territory or territorial waters,¹³⁴ the Court did not apply a presumption against extraterritoriality.¹³⁵ No presumption was applied in an additional five cases that questioned the scope or meaning of federal statutes where the crime occurred in United States waters

131. See, e.g., *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522 (1987); *Pfizer, Inc. v. Gov’t of India*, 434 U.S. 308 (1978); *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354 (1959); *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Kawakita v. United States*, 343 U.S. 717 (1952); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948); *Skiriotes v. Florida*, 313 U.S. 69 (1941); *Ford v. United States*, 273 U.S. 593 (1927); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *Cook v. Tait*, 265 U.S. 47 (1924); *Cunard S.S. Co., Ltd. v. Mellon*, 262 U.S. 100 (1923); *Thomsen v. Cayser*, 243 U.S. 66 (1917); *United States v. Pac. & Arctic Ry. & Navigation Co.*, 228 U.S. 87 (1913); *Andersen v. United States*, 170 U.S. 481 (1898); *St. Clair v. United States*, 154 U.S. 134 (1894); *In re Ross*, 140 U.S. 453 (1891); *Jones v. United States*, 137 U.S. 202 (1890); *United States v. Arwo*, 86 U.S. (19 Wall.) 486 (1873); *United States v. Holmes*, 18 U.S. (5 Wheat.) 412 (1820); *United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); *United States v. Klintock*, 18 U.S. (5 Wheat.) 144 (1820); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818).

132. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (AM. LAW INST. 1965).

133. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 reporter’s note 1 (AM. LAW INST., Tentative Draft No. 3, 2017).

134. *Kawakita*, 343 U.S. at 717; *Skiriotes*, 313 U.S. 69; *United States v. Flores*, 289 U.S. 137, 145 (1933); *United States v. Bowman*, 260 U.S. 94, 96 (1922); *Andersen*, 170 U.S. at 91; *St. Clair*, 154 U.S. at 145; *United States v. Rodgers*, 150 U.S. 249, 250 (1893); *In re Ross*, 140 U.S. at 454; *Jones*, 137 U.S. at 204; *Arwo*, 86 U.S. (19 Wall.) at 487; *Holmes*, 18 U.S. (5 Wheat.) at 413; *Furlong*, 18 U.S. (5 Wheat.) at 185; *Smith*, 18 U.S. (5 Wheat.) at 154; *Klintock*, 18 U.S. (5 Wheat.) 150; *Palmer*, 16 U.S. (3 Wheat.) 632.

135. *Kawakita*, 343 U.S. 717; *Skiriotes*, 313 U.S. 69; *Flores*, 289 U.S. 137 (1933); *Bowman*, 260 U.S. 94; *Andersen*, 170 U.S. 481; *St. Clair*, 154 U.S. 134; *Rodgers*, 150 U.S. 249 (1893); *In re Ross*, 140 U.S. 453; *Jones*, 137 U.S. 202; *Arwo*, 86 U.S. (19 Wall.) 486; *Holmes*, 18 U.S. (5 Wheat.) 412; *Furlong*, 18 U.S. (5 Wheat.) 184; *Smith*, 18 U.S. (5 Wheat.) 153; *Klintock*, 18 U.S. (5 Wheat.) 144; *Palmer*, 16 U.S. (3 Wheat.) 610.

or at least partially in the United States.¹³⁶

F. THE MODERN PRESUMPTION: *ARAMCO* AND *MORRISON*

In the early 1990s, the Rehnquist Court abandoned the Court's prior focus on *Charming Betsy* and the accompanying reference to all the potential bases for prescriptive jurisdiction under international law in favor of a focus only on subjective territorial jurisdiction. Since its decision in *EEOC v. Arabian American Oil Co. (Aramco)*,¹³⁷ the Court has applied this narrowed presumption against extraterritoriality more broadly than ever before¹³⁸ and has given the presumption a greater potency than it formerly claimed.¹³⁹ Indeed, in the Court's most recent cases, the presumption has become something approaching a clear statement rule.¹⁴⁰

The Court's first step in reorienting and reinvigorating its extraterritoriality analysis was taken in *Aramco*, which concerned the extraterritorial application of Title VII of the Civil Rights Act of 1964. *Aramco* involved a claim by a U.S. employee who worked for a U.S. corporation in Saudi Arabia that he had been harassed and eventually dismissed based on his race, religion, and national origin. Recall that the presumption against extraterritoriality and the *Charming Betsy* canon can provide very different answers regarding the scope of a geoambiguous statute. The presumption says "no" to the application of federal statutes to conduct outside of the territorial United States unless affirmative evidence of congressional intent is supplied, whereas the *Charming Betsy* canon applies only

136. *Pasquantino v. United States*, 544 U.S. 349 (2005); *Small v. United States*, 544 U.S. 385 (2005); *Ford v. United States*, 273 U.S. 593 (1927); *Wildenhuis's Case*, 120 U.S. 1 (1887); *United States v. Bevans*, 16 U.S. (3 Wheat.) 336 (1818).

137. 499 U.S. 244 (1991).

138. The presumption originally applied to discern whether statutes regulating conduct applied extraterritorially. But it has more recently been applied also to statutes that grant jurisdiction. *See Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013). The Court applied the presumption to read narrowly a statute that Congress enacted specifically to overrule a narrowing construction the Court had earlier given to the patent laws and to extend the reach of existing laws to cover activity abroad. *See Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007). The Court also has applied the presumption where the question at issue is not whether a given statute applies extraterritorially but rather the meaning of a statutory term in the domestic context. *See Small*, 544 U.S. 385.

139. *See, e.g., Dodge, supra* note 2, at 86 ("What was remarkable about *Aramco* was not just the fact that the Court again applied the presumption, but the apparent strength of the presumption it applied.").

140. It is true that the Court has stated that there need not be "an express statement of extraterritoriality" and that "'context can be consulted as well.'" *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2102 (2016) (quoting *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247, 265 (2010)); *see also Morrison*, 561 U.S. at 265 (claiming that the presumption is not a clear statement rule that requires the statute to say "this law applies abroad"). And the "presumption" is not irrebuttable, as is demonstrated by *RJR Nabisco*, in which the Court held that the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, has extraterritorial application where Congress has made the predicate statutes upon which the RICO case is built extraterritorial. *RJR Nabisco*, 136 S. Ct. at 2103. That said, the *Morrison* Court required that congressional intent to apply a statute extraterritorially be "clearly expressed," 561 U.S. at 255, and the *RJR Nabisco* Court subsequently demanded that Congress "affirmatively and unmistakably instruct[] that the statute" will apply extraterritorially. 136 S. Ct. at 2100. The Court in *RJR Nabisco* further indicated that it will be "rare" for a statute that does not have an express extraterritoriality provision to apply overseas. *Id.* at 2103.

where the Court wishes to say “yes” to extraterritorial application based on a statutory analysis unaffected by any presumption, but also wishes to ensure that such an application does not violate international law. In *Aramco*, nationality jurisdiction (and passive personality jurisdiction) would have, under international law, justified the application of Title VII to a U.S. corporation that allegedly discriminated against a U.S. employee. In at least three prior cases, the Court had held that nationality alone was a sufficient basis to extend U.S. regulations to citizens abroad without any reference to a presumption.¹⁴¹ Had the Court applied the *Charming Betsy* canon, then, the claim should have survived. But the Court, applying a presumption based entirely on the place of the discriminatory conduct rather than the dictates of international law, determined that the statute should be read not to apply in foreign countries.

The Rehnquist Court’s conversion of the presumption’s focus is even more evident in the maritime context. In *Sale v. Haitian Centers Council, Inc.*,¹⁴² the President had directed the Coast Guard to intercept vessels illegally transporting passengers from Haiti to the United States and to return those passengers to Haiti without first determining whether they qualified as refugees. The issue was whether such forced repatriation outside the territorial waters of the United States violated section 243(h)(1) of the Immigration and Naturalization Act of 1952 (INA),¹⁴³ which generally prohibits the Attorney General from deporting or returning aliens to a country where their life or freedom would be threatened due to their race, religion, nationality, or other criteria.

The Court, among other considerations, cited the presumption against extraterritoriality in holding that section 243(h)(1) did not apply to the Coast Guard’s actions on the high seas.¹⁴⁴ In applying the presumption, the *Sale* Court viewed as dispositive the fact that the vessel was on the high seas and outside the territorial waters of the United States despite the fact that the case involving an American ship. In so doing, the Court simply ignored the fact that it had never before applied a presumption against extraterritoriality based solely on the ship’s location. In its many maritime precedents, the Court had instead consulted international law to conclude that vessels on the high seas are the constructive territory of the flag country. In those prior cases, then, the Court had no difficulty concluding that U.S. law applied on U.S. ships on the high seas.¹⁴⁵ Indeed, the *Sale* Court ignored *United States v. Flores*, in which the Court had expressly found a presumption against extraterritoriality inapplicable because Congress would have been aware that U.S. vessels are U.S. territory.¹⁴⁶

141. See *supra* notes 97–98 and accompanying text.

142. 509 U.S. 155 (1993).

143. 8 U.S.C. § 1253(h) (1988 & Supp. IV).

144. See 509 U.S. at 173–74.

145. See *supra* notes 102–08 and accompanying text.

146. See 289 U.S. 137, 155–56, 159 (1933).

Until the last few years, the post-*Aramco*¹⁴⁷ Court's use of the presumption was not consistent. Since 1991, the Court has applied the presumption in six cases.¹⁴⁸ But it did not apply the presumption in four cases in which it could have been relevant¹⁴⁹ and found it inapplicable in another.¹⁵⁰ Notably, the Court has consistently chosen not to apply the presumption against extraterritoriality in the antitrust context.¹⁵¹

Two years after *Aramco*, the Court decided *Hartford Fire Insurance Co. v. California*.¹⁵² The plaintiffs in that case alleged that both domestic and foreign defendants violated the Sherman Act by engaging in various conspiracies to affect the American insurance market.¹⁵³ The Court was tasked, *inter alia*, with deciding whether to dismiss as improper the claims against London reinsurers who allegedly conspired to coerce primary insurers in the United States because the claims were extraterritorial. The Court noted that “[a]lthough the proposition was perhaps not always free from doubt, it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”¹⁵⁴ It determined that “such is the conduct alleged here: that the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect.”¹⁵⁵ The defendants, apparently conceding that the conduct alleged was within the scope of the Sherman Act,¹⁵⁶ argued that the Court should decline to exercise jurisdiction under the principles of international comity. Reading those principles very narrowly, the Court

147. See 499 U.S. 244 (1991).

148. See *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115–17 (2013); *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454–55 (2007); *Smith v. United States*, 507 U.S. 197, 203–04 (1993); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173–74 (1993); cf. *Small v. United States*, 544 U.S. 385, 389 (2005) (although presumption does “not apply directly to this case,” using it to determine the meaning of a statute in a domestic prosecution).

149. See *Kirtsang v. John Wiley & Sons*, 568 U.S. 519 (2013); *Pasquantino v. United States*, 544 U.S. 349 (2005); *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

150. See *Rasul v. Bush*, 542 U.S. 466, 480 (2004).

151. See, e.g., *Hartford Fire Ins. Co.*, 509 U.S. 764. The Court has not applied the presumption in such cases after *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909). See *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), *overruled on other grounds*, *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984); *United States v. Nat’l Lead Co.*, 332 U.S. 319 (1947), *overruled on other grounds by Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *Thomsen v. Caysner*, 243 U.S. 66 (1917); *United States v. Pac. & Arctic Ry. & Navigation Co.*, 228 U.S. 87 (1913); *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911).

152. 509 U.S. 764 (1993).

153. *Id.* at 769.

154. *Id.* at 795–96 (citing *Am. Banana Co.*, 213 U.S. 347); see also *Cont’l Ore Co.*, 370 U.S. at 704 (“A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.”).

155. *Hartford Fire Ins. Co.*, 509 U.S. at 796.

156. See *id.* at 795.

concluded that no conflict, and thus no necessity for a comity analysis, existed where a person subject to regulation by two States could comply with the laws of both.¹⁵⁷

In 1982 Congress had passed the Foreign Trade Antitrust Improvements Act (FTAIA),¹⁵⁸ which excluded from the Sherman Act's reach "conduct involving trade or commerce . . . with foreign nations," other than import trade or import commerce, unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic or import commerce.¹⁵⁹ The "FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy."¹⁶⁰ The *Hartford Fire Insurance Co.* Court noted that it was unclear "whether the Act's 'direct, substantial, and reasonably foreseeable effect' standard amends existing law or merely codifies it."¹⁶¹ The FTAIA was not the basis of the Court's opinion in *Hartford Fire Insurance Co.* because, the Court concluded, its application to the case was unclear and, in any event, the conduct alleged clearly met the FTAIA's requirements.¹⁶²

In a subsequent antitrust case, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*,¹⁶³ the Court was forced to apply the FTAIA. The case involved an international cartel of vitamin sellers that agreed to fix prices, which led to higher vitamin prices in the United States and independently led to higher vitamin prices in foreign States. The Court concluded that a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser in a foreign State could not bring a Sherman Act claim based on foreign harm.¹⁶⁴ Thus, the Court held, foreign persons could not claim relief for foreign injuries that were independent of any adverse domestic impact from the cartel.¹⁶⁵ In so doing, the Court referenced the limits of international prescriptive jurisdiction and applied the *Charming Betsy* canon in interpreting the FTAIA.¹⁶⁶

157. *See id.* at 799.

158. Pub. L. 97-290, § 402, 96 Stat. 1246 (1982) (to be codified at 15 U.S.C. § 6a).

159. 15 U.S.C. § 6a(1)(A) (2012).

160. *Hartford Fire Ins. Co.*, 509 U.S. at 796 n.23 (citing H.R. REP. NO. 97-686, at 2-3, 9-10 (1982) and P. AREEDA & H. HOVENKAMP, ANTITRUST LAW 296-97 (Supp. 1992)).

161. *Id.*; *see also* United States v. LSL Biotechnologies, 379 F.3d 672, 679-80 (9th Cir. 2004) (FTAIA altered the common law "effects" test).

162. *Hartford Fire Ins. Co.*, 509 U.S. at 796-97 n.23.

163. 542 U.S. 155 (2004).

164. *See id.* at 159.

165. *See id.* at 164.

166. *Id.* at ("[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. This rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow. *See Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) ('[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains').") (internal citations omitted). Litigants have argued that the Court's latest extraterritoriality cases, and particularly *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), demonstrate the Court's renewed commitment to a strong presumption against extraterritoriality, and thus that these decisions implicitly overruled *Hartford Fire Insurance Co.* and its application of the conduct-and-effects test in antitrust cases. *See, e.g.*, United States v. Hui Hsiung, 778 F.3d 738, 747 (9th Cir. 2015) (finding argument waived). Although the *Morrison* Court emphatically rejected application of the conduct-and-effects test in the securities area,

In 2010, the Court strongly signaled that these antitrust cases are *sui generis* by insisting on a strong presumption against extraterritoriality in *Morrison v. National Australia Bank*.¹⁶⁷ The case was a blockbuster because the Court overruled decades of courts of appeals case law by dramatically limiting the scope of the securities fraud laws. The respondent, National Australia Bank (National), a non-U.S. bank whose shares were not traded on any U.S. exchange, purchased respondent HomeSide Lending, a company headquartered in Florida.¹⁶⁸ A few years after this purchase, National had to write down the value of Homeside's assets, causing a drop in National's share price.¹⁶⁹ Petitioners, Australians who purchased National's stock before the write-downs, sued National, Homeside, and officers of both companies in federal district court for violating sections 10(b) and 20(a) of the Securities and Exchange Act of 1934¹⁷⁰ and SEC Rule 10b-5.¹⁷¹ Petitioners claimed that HomeSide and its officers, with the knowledge of National and its chief executive, manipulated financial models to make the company appear more valuable than it was.¹⁷² In short, this was a "foreign-cubed"¹⁷³ securities fraud case in that the parties were Australian, the shares were not listed on a U.S. exchange, and the shares were purchased and sold in Australia. The petitioners, however, believed that because the fraudulent conduct took place, at least in part, in the United States, their civil securities fraud suit belonged in a U.S. court.¹⁷⁴

The district court dismissed the case for want of subject-matter jurisdiction, concluding that the fraudulent acts alleged in the United States were, "at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad."¹⁷⁵ The Second Circuit affirmed because the fraudulent acts performed in the United States did not "compris[e] the heart of the alleged fraud."¹⁷⁶ The Supreme Court reversed, making three critical rulings.

First, until *Morrison*,¹⁷⁷ all the circuits treated extraterritoriality as a question going to the courts' subject-matter jurisdiction in securities and other cases. In *Morrison*, however, the Supreme Court made clear for the first time that the extraterritoriality question was not jurisdictional; rather it relates only to whether a case can be made on the merits.¹⁷⁸ It explained:

the FTAIA's codification of an effects test as applied to export activity may preclude the Court from revisiting its precedents, at least in that context.

167. See 561 U.S. 247 (2010).

168. *Id.* at 251.

169. *Id.* at 252.

170. 15 U.S.C. §§ 78j(b), 78t(a) (2012).

171. 561 U.S. at 252–53; 17 C.F.R. § 240.10b–5 (2009).

172. 561 U.S. at 252.

173. *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 175 (2d Cir. 2008).

174. See 561 U.S. at 253.

175. *In re Nat'l Austl. Bank Sec. Litig.*, No. 03 Civ. 6537, 2006 WL 3844465, at *8 (S.D.N.Y. Oct. 25 2006).

176. *Morrison*, 547 F.3d at 175–76.

177. 561 U.S. 247.

178. *Id.* at 253–54 (citations omitted).

[T]o ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, “refers to a tribunal’s ‘power to hear a case.’” It presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief. The District Court here had jurisdiction under 15 U.S.C. § 78aa to adjudicate the question whether § 10(b) applies to National’s conduct.¹⁷⁹

As we shall see in our roadmap discussion in section III.C, this ruling has important procedural implications.¹⁸⁰

Second, the Supreme Court, again overruling decades of lower court precedent, held that section 10(b) does not apply beyond the shores of the United States after applying a strong presumption against extraterritoriality. Until *Morrison*, the circuits had decided whether they had jurisdiction over securities fraud claims that involved transnational elements by applying the so-called “conduct-and-effects” test. This test was derived from international law’s understandings of what constituted a “territorial” application of legislation. It presumed that where subjective territoriality (domestic conduct) or objective territoriality (domestic effects) were present, the case was a territorial suit and no issue of statutory extraterritoriality was raised. The test was pioneered by the Second Circuit and adopted by the other circuits. The Court emphatically rejected the Second Circuit’s conduct-and-effects test as fundamentally inconsistent with the presumption against extraterritoriality.¹⁸¹

The conduct-and-effects test, the Court reasoned, was not based on the text of the statutes or actual legislative intent,¹⁸² but rather on speculation as to what “Congress would have wanted” had it considered the application of the securities laws in a given context¹⁸³ and on “matters of policy.”¹⁸⁴ The Court also rejected the conduct-and-effects test as “complex in formulation and unpredictable in application.”¹⁸⁵ Having rejected the circuit courts’ test, the Court applied its presumption against extraterritoriality. It examined the language and history of section 10(b) and concluded that there was “no affirmative indication in the Exchange Act that section 10(b) applies extraterritorially” and thus nothing to rebut the presumption.¹⁸⁶ Accordingly, the Court ruled that the securities fraud provisions at issue did not apply extraterritorially.

The *Morrison* Court’s third and final holding related to the question of when a given securities fraud case could be deemed extraterritorial, and thus precluded, as opposed to territorial or domestic, in which case it could proceed. Having lost the battle of extraterritoriality, the petitioners attempted to win the war by arguing

179. *Id.* at 254 (citations omitted).

180. *See infra* notes 238–62 and accompanying text.

181. *Morrison*, 561 U.S. at 261.

182. *Id.* at 258, 267 n.9.

183. *Id.* at 257.

184. *Id.* at 259.

185. *Id.* at 256.

186. *Id.* at 265.

that they sought only *domestic* application of section 10(b). Petitioners contended that, given that the fraud was hatched in Florida and false statements were made there, the fraud was committed in the United States.

Acknowledging that “it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States,” the Court applied a “focus” test, which asks what conduct is the “object[] of the statute’s solicitude.”¹⁸⁷ This test looks to “those transactions that the statute seeks to ‘regulate’” and to the “parties to those transactions that the statute seeks to ‘protec[t].’”¹⁸⁸ The Court reasoned that section 10(b) does not “punish deceptive conduct, but only deceptive conduct ‘in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.’”¹⁸⁹ Thus, the Court concluded that section 10(b) applies “only [to] transactions in securities listed on domestic exchanges, and domestic transactions in other securities”¹⁹⁰ and suggested that all other cases constitute improper extraterritorial applications of the statute. In other words, unless there was a domestic securities transaction, the case constitutes a forbidden extraterritorial application of the statute. The site of the fraud is irrelevant to determining whether a claim is territorial or extraterritorial in nature.

It should be noted that after *Morrison* was announced, Congress amended the jurisdictional provisions of a number of securities laws in the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act).¹⁹¹ The amendments left *Morrison*’s holding untouched in private civil securities suits.¹⁹² But with respect to securities fraud cases brought by the SEC and Department of Justice, the Act provides the government jurisdiction to pursue securities violations where the “conduct within the United States . . . constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or . . . conduct occurring outside the United States . . . has a foreseeable substantial effect within the United States.”¹⁹³ The amendment thus purports to reinstate a version of the Second Circuit’s conduct-and-effects test.¹⁹⁴

187. 561 U.S. 255 at 266–67.

188. *Id.* at 267 (citations omitted).

189. *Id.* at 266 (quoting 15 U.S.C. § 78j(b) (2012)).

190. *Id.* at 267.

191. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b) (2)(A), 124 Stat. 1376, 1865–66 (2010) (codified as amended at 15 U.S.C. § 78aa (2010)).

192. *See* Liu Meng-Lin v. Siemens AG, 763 F.3d 175, 180–81 (2d Cir. 2014) (noting that section 929P(b) applies only to government-initiated claims).

193. *Id.* (quoting 15 U.S.C. § 78aa (2010)).

194. I am hedging slightly because some argue that this provision was not effective in overruling *Morrison* in this respect. The question whether this provision was sufficient to overrule *Morrison* arises because Congress included its conduct-and-effects test in the Act’s subject-matter jurisdiction provisions. *Morrison*, however, held that the extraterritorial limitation was a merits question and Congress did not amend the substantive portions of the statutes. *See, e.g.*, SEC v. Chi. Convention Ctr., LLC, 961 F. Supp. 2d 905, 909–17 (N.D. Ill. 2013); Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Needed or Sufficient?*, 1 HARV. BUS. L. REV. 195, 199–205 (2011).

Despite the actual holding in *Morrison* appearing to have been overruled in part by Congress, the Court's analysis has controlled in two subsequent cases. These additional extraterritoriality cases demonstrate the current Court's renewed commitment to a strong presumption against extraterritoriality. In *Kiobel v. Royal Dutch Petroleum Co.*,¹⁹⁵ the Court considered whether the Alien Tort Statute (ATS) confers federal-court jurisdiction over causes of action alleging international-law violations committed overseas. In that case, Nigerian nationals residing in the United States sued Dutch, British, and Nigerian corporations pursuant to the ATS, alleging that the corporations aided and abetted the Nigerian government in committing violations of the law of nations in Nigeria.¹⁹⁶ The Court granted certiorari to decide whether corporations are immune from tort liability under the ATS for violations of the law of nations.¹⁹⁷ The Court itself raised the extraterritoriality question, asking for supplemental briefing on whether courts may recognize a cause of action under the ATS for violations occurring within the sovereign territory of another State.¹⁹⁸

The *Kiobel* Court acknowledged that the presumption against extraterritoriality is "typically" applied to statutes "regulating conduct," but it determined that the principles supporting the presumption should "similarly constrain courts considering causes of action that may be brought under the ATS."¹⁹⁹ Thus, the Court applied the presumption and held that the ATS statute did not apply extraterritorially because the statute lacked any clear indication that it extended to the sorts of foreign violations alleged in that case.²⁰⁰

Finally, in 2016, the Court in *RJR Nabisco, Inc. v. European Community*²⁰¹ addressed the extraterritorial scope of the Racketeer Influenced and Corrupt Organizations Act (RICO).²⁰² RICO is a complex statute, but its most common application involves civil and criminal cases alleging that the defendants conducted an enterprise through a pattern of racketeering activity. Such a pattern is proven by two or more violations of qualifying federal or state statutes.²⁰³ The violations identified are commonly referred to as RICO predicate offenses. The *RJR Nabisco* Court held that RICO has extraterritorial application only where Congress has made the predicate statutes upon which the RICO case is built extraterritorial.²⁰⁴ *RJR Nabisco* demonstrates that the modern presumption is not irrebuttable, but its analysis also underscores how difficult it is to overcome the presumption.

195. 569 U.S. 108 (2013).

196. *Id.* at 111–12.

197. *Id.* at 112–13.

198. *Id.* at 114.

199. *Id.* at 116.

200. *See id.* at 118–24.

201. *See* 136 S. Ct. 2090 (2016).

202. 18 U.S.C. §§ 1961–68 (2012).

203. *See id.* § 1961(1), (5).

204. 136 S. Ct. at 2101–03.

The *Morrison* Court required that congressional intent for a statute's extraterritorially be "clearly expressed."²⁰⁵ The *RJR Nabisco* Court took it up a notch by requiring that Congress "affirmatively and unmistakably instruct[] that the statute" will apply extraterritorially.²⁰⁶ The *RJR Nabisco* Court found an "obvious textual clue" in the fact that some RICO predicates, by their express terms, apply extraterritorially.²⁰⁷ Indeed, "[a]t least one predicate—the prohibition against 'kill[ing] a national of the United States, while such national is outside the United States'—applies *only* to conduct occurring outside the United States."²⁰⁸ Congress's incorporation of extraterritorial predicates into RICO, the Court concluded, "gives a clear, affirmative indication that § 1962 applies to foreign racketeering activity."²⁰⁹ Thus, RICO's unique structure made it "the rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality."²¹⁰

In sum, although the Court's decisions post-*Aramco* have not been entirely consistent, its most recent cases demonstrate that the Court is committed to a muscular presumption against extraterritoriality.

III. ANALYTICAL ROADMAP: GENERAL

Having explored the relevant background principles of international law and summarized the Court's historical treatment of extraterritoriality questions, we now turn to the promised analytical roadmap. These sections discuss the sequential analytical issues that courts must often wrestle with in cases with transnational features.

A. THE "WHERE" QUESTION

The question whether a given statute applies extraterritorially arises only if the crime is deemed to have occurred abroad. Accordingly, the first logical question is whether a given crime was committed within the United States or overseas. Figuring out where a crime was committed for purposes of determining whether it should be deemed territorial (domestic) or extraterritorial turns out to be a complex question.

The easiest case is one in which the elements of the crime are completed in one State: that State will clearly have territorial jurisdiction. But when the elements of the crime occur in two jurisdictions, as in our dueling example,²¹¹ do both States have territorial jurisdiction? In *Morrison*, the Court decreed that the location of only one element of the claim (the securities transaction) was relevant to determine whether a case is territorial or extraterritorial; it ruled that where

205. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010).

206. 136 S. Ct. at 2100.

207. *Id.* at 2101.

208. *Id.* at 2102 (citing 18 U.S.C. § 2332(a) (2012)).

209. *Id.*

210. *Id.* at 2103.

211. *See supra* notes 44-45 and accompanying text.

another element occurred (the fraud) was immaterial. If some elements are more important than others in determining the site of a statutory violation, how does one decide which element ought to be consulted when determining where the violation occurred?

Finally, as we know, modern effects jurisdiction does not require that a constituent element of the crime occur in the prosecuting State. Should the pernicious effects of a crime serve as a ground for territorial jurisdiction even when those effects are not an element of the crime? To give a concrete example, assume for the moment that it could be proved that a foreign power hacked and released a presidential candidate's internal campaign communications. Assume further that it can be proved that this hacking gave the other candidate the victory. (These are just *assumptions* for purposes of making a point.) In this hypothetical, the criminal conduct occurs overseas and has a profound effect on the most important electoral contest in the United States, but proof of damage is not an element of the computer crime. If the computer crime statute does not apply extraterritorially, should courts rule that this effect is sufficient to make this a territorial violation?

The circuit courts responded to the "where" question by formulating their conduct-and-effects test. A more limiting elements-based test was endorsed by the Harvard Research Study and the Second Restatement. The Supreme Court rejected the circuits' test and ignored the elements-based approach in formulating its more stringent "focus" test for subjective territoriality.

1. Conduct-and-Effects Test

For many years, the lower courts, when faced with a case involving transnational elements, used a conduct-and-effects test to examine whether a claim was territorial, and thus was cognizable, or extraterritorial, and therefore subject to dismissal.

To review, the conduct-and-effects test inquired into both conduct and effects under the subjective and objective territorial principles. Subjective territoriality turned on conduct within U.S. territory. Objective territoriality focused on the effects the foreign conduct had within the United States. The effects did not have to be an element of the crime or cause of action to be cognizable.²¹²

This test was pioneered in the Second Circuit during the 1960s in the securities context and was briefly justified as a means of testing the extraterritorial reach of a statute.²¹³ In subsequent transnational cases, however, the Second Circuit determined that the securities laws' applicability depended upon whether substantial fraudulent conduct occurred in the United States or direct harm was suffered by Americans residing in the United States in the apparent belief that such claims

212. See *supra* notes 48–52 and accompanying text.

213. *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968) (discussing the extraterritorial application of the Securities and Exchange Act where fraudulent acts were committed outside the United States based on "effects" jurisdiction).

were *not extraterritorial*.²¹⁴ In so doing, the Second Circuit repeatedly relied on the Second Restatement,²¹⁵ approved in 1965, which noted in a section entitled “*Territorial Interpretation of United States Law*” that “[r]ules of United States statutory law . . . apply only to conduct occurring within, or having effect within, the territory of the United States, unless the contrary is clearly indicated.”²¹⁶ In other words, the Second Circuit was not engaged in determining whether the applicable statutes applied extraterritorially;²¹⁷ it was instead determining whether a suit concerned territorial claims, and thus was unobjectionable, as opposed to extraterritorial claims, which were assumed to be outside the scope of the statute.²¹⁸ If there were sufficient conduct and effects present to warrant a belief that “Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them,” the case was deemed domestic and could proceed.²¹⁹ If, however, sufficient evidence of territoriality (conduct and effects) was not present, the case would be dismissed. In essence, then, the Second Circuit was not only applying the presumption against extraterritoriality, but it was also making that presumption irrebuttable.

In *Morrison*, the Supreme Court took the Second Circuit to task for applying the conduct-and-effects test, which it mistakenly viewed as an alternative to the Court’s presumption against extraterritoriality rather than a test for territoriality. In any case, the *Morrison* Court emphatically rejected the use of the conduct-and-

214. See, e.g., *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 987 (2d Cir. 1975); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1333–34 (2d Cir. 1972).

215. See, e.g., *Vencap*, 519 F.2d at 1016–17 (referencing SECOND RESTATEMENT’S § 30 (nationality jurisdiction) and SECOND RESTATEMENT’S § 18); *Bersch*, 519 F.2d at 987–88 (referencing SECOND RESTATEMENT’S § 18 and § 30 (nationality jurisdiction)); *Leasco*, 468 F.2d at 1333–35, 1339 (referencing SECOND RESTATEMENT’S § 18 and § 30 (nationality jurisdiction)).

216. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (AM. LAW INST. 1965) (emphasis added).

217. Indeed, the word “extraterritorial” is usually not employed in these cases after *Schoenbaum*. Rather, the Second Circuit conceived itself as addressing the “recurring theme of the extent to which the federal securities laws apply to transnational transactions.” *Vencap*, 519 F.2d at 1003–04; see also *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 663 (7th Cir. 1998) (discussing “transnational” securities claims).

218. See, e.g., *United States v. Phillip Morris USA Inc.*, 566 F.3d 1095, 1130 (D.C. Cir. 2009); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984). The Eighth Circuit expressly noted that, when dealing with cases involving transnational securities claims, “courts have employed only the territorial principle,” referencing territoriality’s subjective and objective “variations of this principle.” *Cont’l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 416 (8th Cir. 1979) (quoting Note, Jason Wambold, *The Extraterritorial Application of the Antifraud Provisions of the Securities Acts*, 11 CORNELL INT’L L.J. 137, 139 & nn.12–16 (1978)). And as the D.C. Circuit explained in *United States v. Philip Morris USA Inc.*:

Because conduct with substantial domestic effects implicates a state’s legitimate interest in protecting its citizens within its borders, Congress’s regulation of foreign conduct meeting this “effects” test is “not an extraterritorial assertion of jurisdiction.” Thus, when a statute is applied to conduct meeting the effects test, the presumption against extraterritoriality does not apply.

566 F.3d at 1130 (quoting *Laker Airways*, 731 F.2d at 923).

219. *Bersch*, 519 F.2d at 985.

effects test.²²⁰ It reasoned that the test has no textual support and is difficult to apply in a principled manner.²²¹ The Court made clear that it believes that territoriality turns only on domestic conduct and not on effects. In the above-posed political hacking example, given the magnitude of the domestic effects, the case could be deemed territorial in nature under a conduct-and-effects test. But after *Morrison*, territorial jurisdiction would exist only for the State in which the relevant conduct occurred, and the serious and important effects of the hacking on the U.S. population would be insufficient to make the case territorial.

2. Elements-Based Approach

The Court's rejection of the conduct-and-effects test meant that it had to forge its own test for determining where an offense is committed—that is, what conduct must occur in a State for the crime to be considered domestic as opposed to extraterritorial. One alternative test available to the Court was the elements-based approach adopted by a 1935 Harvard Research Study and the Second Restatement.²²² The elements approach determined that territorial jurisdiction existed based on either conduct or effects if the conduct and effects were elements of the crime. Recall that in *Morrison*, fraudulent conduct occurred in both Australia and the United States; however, the relevant securities transactions were conducted in Australia. Had an elements approach been used, the site of the securities fraud may have justified a conclusion that the case was territorial in the United States as well as Australia.

This elements-based approach was narrower than the circuits' conduct-and-effects test because this approach only recognized effects as a foundation for territorial jurisdiction when those effects were an element of the claim. In our hacking example, the elements-based approach would mandate that a hacking prosecution could only be deemed territorial if the government was required to prove the relevant damage—that is, effects—as an element of the offense. This test not only had the endorsement of the Harvard Research Study and the Second Restatement, but it also reflected the common law approach used in criminal cases.

3. The *Morrison* “Focus” Test

Instead of adopting either of these approaches, the *Morrison* Court chose to create its own “focus” test, which had no precedential support.²²³ Under this focus

220. See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255–61 (2010).

221. See *id.* at 258–60.

222. For a discussion of the elements test, see *supra* notes 45-47 and accompanying text.

223. See *Morrison*, 561 U.S. at 266–67. *EEOC v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244, 255 (1991), the decision the *Morrison* Court cited to support its “focus” test, never addressed the question of what would constitute a domestic, as opposed to an extraterritorial, application of Title VII. The case was argued on the *assumption* that regulation of employment practices overseas, even those of United States employers who employ United States citizens, constituted an extraterritorial application of Title VII. *Aramco*'s discussion of the domestic “focus” of the act, then, simply was used to bolster the presumption against extraterritoriality and rebut textual arguments against its application. *Id.* Similarly, in the other case cited in *Morrison*, *Foley Bros., v. Filardo*, 336 U.S. 281, 282 (1949), the statute at issue required contractors working pursuant to a government contract to limit workers' hours to eight hours

test, courts must evaluate what “territorial event” or “relationship” is the “focus” of the statute to identify the conduct that must occur in the United States for the suit to be deemed domestic, as opposed to extraterritorial.²²⁴ Using its focus test, the *Morrison* Court identified one element of the securities claim to be decisive, ruling that subjective territoriality is only present in civil securities fraud cases involving “transactions in securities listed on domestic exchanges, and domestic transactions in other securities.”²²⁵ Under *Morrison*’s focus test, then, the location of the allegedly fraudulent activity and the place where the harmful effects are felt are irrelevant. This approach is more stringent than the elements-based approach because it privileges the focus element and ignores other elements (including conduct elements) of the offense.

As applied to other statutes, the focus test may well mean, as it did in *Morrison*, that the site of only one element of a multi-element statutory provision will control the determination of whether the relevant offense was committed in the United States or abroad. Combined with the presumption against extraterritoriality, this approach has the potential to drastically limit the scope of federal criminal prohibitions in transnational cases. The Court’s strong presumption is often case determinative, meaning that, if courts apply the presumption, most federal crimes will have no extraterritorial application. And if only one element controls the question of whether a violation is territorial, this may further narrow the scope of the prohibition. For example, under *Morrison* (and before the Dodd–Frank Act), a criminal securities fraud case could only proceed if the securities transaction occurred in the United States, regardless of the location of the fraudulent conduct.

Although *Morrison*’s focus test was designed to promote predictability and clear jurisdictional line-drawing, it is unlikely to serve those ends. The test is difficult to apply because Congress does not normally identify a statutory focus.²²⁶ Commentators are rightly concerned that it is therefore manipulable and subjective.²²⁷ For example, the *Morrison* Court’s decision that the location of the securities transaction is decisive and the site of the fraudulent conduct is irrelevant seems arbitrary given that the statutory prohibition is against securities *fraud*—a

per day. The question presented was whether the statute applied to contracts for work abroad. *Id.* at 284–85. The Court again assumed that this was an extraterritorial application of the statute, notwithstanding the fact that the employee seeking overtime pay in the case was an American citizen. The Court applied the presumption against extraterritoriality and augmented the presumption with a discussion of the language and history of the statute. *Id.* at 285–86. At no point did the Court query what might constitute a domestic versus extraterritorial application of the statute.

224. *Morrison*, 561 U.S. at 266–67.

225. *Id.* at 267.

226. See, e.g., Lea Brilmayer, *The New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. L. REV. 655, 663–64 (2011); John H. Knox, *The Unpredictable Presumption Against Extraterritoriality*, 40 SW. L. REV. 635, 643–45 (2011); Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 NOTRE DAME L. REV. 1673, 1699–1700 (2012).

227. See, e.g., Richard A. Grossman, *The Trouble with Dicta: Morrison v. National Australia Bank and the Securities Act*, 41 SEC. REG. L.J. 349 (2013).

transaction is not covered by the prohibition unless it is accompanied by fraud. And the result of this ruling is disturbing in that it permits U.S.-based fraudsters to engage in deceptive practices in the United States, addressed to U.S. citizens and others, free from civil liability as long as they ensure that the wrongful transactions take place overseas.

Most troubling is that in formulating and applying this focus test, the Court ignored the fact that Congress had, in the securities fraud venue provision, provided its answer to the question of where such a violation is committed. As the Court has explained, “[t]he Constitution makes it clear that determination of proper venue in a criminal case requires determination of where the crime was committed.”²²⁸ Congress had, by statute, expressly provided that a criminal securities fraud is “committed” for venue purposes where “any act or transaction constituting the violation occurred.”²²⁹ Presumably “any act” would include acts of fraud and would not be restricted simply to transactions in securities. This statutory provision provides a much firmer foundation for determining Congress’s intention regarding where actionable domestic conduct was committed than speculation about statutory focus. I believe that in making territoriality decisions in criminal cases, courts should be guided by Congress’s venue directives rather than the Court’s novel focus test.

Finally, I should note that Congress’s post-*Morrison* amendments to the jurisdictional provisions of a number of securities laws in the Dodd–Frank Act²³⁰ may have overruled the Court’s application of the focus test in government-initiated securities suits. Under Dodd–Frank, the SEC and DOJ have jurisdiction to pursue securities violations where the “conduct within the United States . . . constitutes significant steps in furtherance of the violation, *even if the securities transaction occurs outside the United States and involves only foreign investors*; or . . . conduct occurring outside the United States . . . *has a foreseeable substantial effect within the United States.*”²³¹ As noted previously, it is unclear whether courts will find that this amendment supersedes the *Morrison* focus test.²³²

228. *United States v. Cores*, 356 U.S. 405, 407 (1958) (emphasis added); *see also* U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed”); *id.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”).

229. 15 U.S.C. § 78aa(a) (2012).

230. Pub. L. No. 111-203, §§ 929E(b), 929P(b)(2), 124 Stat. 1376, 1853, 1865 (2010) (codified as amended at 15 U.S.C. § 78aa (2010)).

231. *Id.* § 929P(b)(1)–(2) (emphasis added).

232. *See supra* note 194.

B. ARTICLE I CHALLENGES

If a situation is deemed to concern an extraterritorial application of the relevant statute, sometimes (but not often²³³) litigants think to challenge Congress's constitutional power under Article I to reach the targeted overseas conduct. In finding that Congress does have the power to regulate transnationally, courts often rely on the foreign or domestic Commerce Clause;²³⁴ Congress's power to define and punish piracies and felonies committed on the high seas and offenses against the law of nations;²³⁵ and the Necessary and Proper Clause, when employed by Congress to implement a treaty that requires States to enact criminal legislation pursuant to its terms.²³⁶

If Congress has the constitutional power to apply a statute to transnational criminal activities and it has included instructions in the statute regarding its geographic scope, courts will follow those instructions.²³⁷ Much more commonly, however, Congress has provided no such explicit instructions. The inquiry then becomes whether Congress intended to give the statute extraterritorial effect.

C. THE GEOGRAPHICAL APPROPRIATENESS OF A PROSECUTION IS AN ELEMENT OF THE OFFENSE

If a case is deemed extraterritorial and Congress has the constitutional power to regulate the relevant overseas activity but the statute is geoambiguous, courts will attempt to discern whether Congress intended the statute to apply to extraterritorial conduct. One threshold question that must be considered is what procedural consequences flow from an extraterritoriality determination. For decades, the courts of appeals treated the issue whether a statute had extraterritorial application as a question going to the courts' subject-matter jurisdiction. If the claim was deemed extraterritorial, and the relevant statute did not apply extraterritorially, courts would dismiss the case on jurisdictional grounds. In *Morrison*, however, the Court ruled that, unless Congress specifies otherwise, the question whether a statute applies extraterritorially does not go to subject-matter jurisdiction but is, instead, a "merits" question.²³⁸

This change in approach has significant implications for criminal defendants. First, questions of jurisdiction are non-waivable and can be raised at any time. "Merits" determinations, by contrast, are waivable, especially when a defendant pleads guilty because such pleas waive all non-jurisdictional objections.²³⁹ Thus,

233. See, e.g., *United States v. Clark*, 435 F.3d 1100, 1106 n.7 (9th Cir. 2006) ("the more common scenario" is that a party will "challenge[] only the extraterritorial reach of a statute without contesting congressional authority to enact the statute.").

234. U.S. CONST. art. I, § 8, cl. 3.

235. *Id.* art. I, § 8, cl. 10.

236. *Id.* art. I, § 8, cl. 18; see also *Missouri v. Holland*, 252 U.S. 416 (1920).

237. See, e.g., CHARLES DOYLE, CONG. RESEARCH SERV., RL 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 40-63 (2012) (listing federal criminal laws that enjoy express extraterritorial application).

238. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 253-54 (2010).

239. See, e.g., *United States v. Miranda*, 780 F.3d 1185, 1191 (D.C. Cir. 2015).

the Court's decision that extraterritoriality is normally a merits question means that persons who plead guilty or fail to timely object to the extraterritorial application of a statute will waive that objection. Second, questions of jurisdiction are decided by judges. Merits questions, however, may be deemed elements of an offense that must be charged in the indictment and proved beyond a reasonable doubt to the satisfaction of a jury. The important question of whether the geographical appropriateness of a prosecution is now such an element of federal crimes has not yet been raised by courts or commentators. I believe it is.

The Constitution requires that the government bear the burden of proving each element of a crime beyond a reasonable doubt to a jury.²⁴⁰ Historically, “[m]ost American jurisdictions have declined to apply that requirement to the proof of every issue of fact in a criminal case.”²⁴¹ But there is, unfortunately, no generally applicable test for what factual questions constitute elements of a crime, such that the prosecution bears the burden of proving to a jury, beyond a reasonable doubt, those elements. In the 1970s, the Court rendered two decisions, *Mullaney v. Wilbur*²⁴² and *Patterson v. New York*,²⁴³ in which it addressed the question of when U.S. state statutes could shift the burden of persuasion on an issue to the defendant. These opinions, however, are famously and infuriatingly unhelpful in answering the question of what constitutes an element of an offense such that burden shifting is inappropriate.

Other more recent cases concern not burden shifting, but rather the Court's emphatic reaffirmation that elements of crimes must be decided by juries, not judges. In the sentencing context, the Court launched a revolution when, beginning with *Apprendi v. New Jersey*,²⁴⁴ it insisted that what were formerly considered sentencing factors that could be determined by a judge under a preponderance standard must in fact be treated as elements of the crime and proven to a jury's satisfaction. The Court also restricted the extent to which Congress may dodge the dictates of the Sixth Amendment's jury trial right by reclassifying elements of a crime into non-elements. As the Court cautioned in *Harris v. United States*, “Congress may not manipulate the definition of a crime in a way that relieves the Government of its constitutional obligations to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt.”²⁴⁵ The Court also demonstrated its insistence on safeguarding defendants' Sixth Amendment jury trial rights in *United States v. Gaudin*, ruling

240. See, e.g., *United States v. Gaudin*, 515 U.S. 506, 522–23 (1995).

241. Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1302–03 (1977).

242. See 421 U.S. 684 (1975) (invalidating a state statute requiring the defendant to prove provocation as a defense to murder to reduce the crime to manslaughter).

243. See 432 U.S. 197 (1977) (without overruling *Mullaney*, upholding a statute requiring the defendant to prove “extreme emotional disturbance” as a defense to murder to reduce the crime to manslaughter).

244. See 530 U.S. 466, 476 (2000).

245. See 536 U.S. 545, 557 (2002).

that even the issue of materiality, which had long been viewed as a mixed question of law and fact that judges could resolve, must go to the jury.²⁴⁶

The *Apprendi* line of cases establishes that “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”²⁴⁷ This test, which was crafted for evaluating what ought to be considered elements in the sentencing context, may seem inapposite, but it is the best test available at present. After *Morrison*, no penalty—let alone an enhanced one—may be lodged against a defendant absent proof that the prosecution is geographically appropriate. It may follow that the facts underlying the geographic scope of the crime should be deemed elements.²⁴⁸

Two other lines of cases are instructive in determining whether the geographical appropriateness of a criminal prosecution is an element of the crime. Cases concerning the status of venue determinations are superficially the most relevant because they also concern whether a prosecution is geographically appropriate. The circuits are split on whether proper venue—which is required by Article III of the Constitution and the Sixth Amendment²⁴⁹—is an element of a crime.²⁵⁰ But the predominant position appears to be that venue *is* an element of a crime, albeit a lesser “jurisdictional” element rather than a “substantive” element going to

246. See 515 U.S. 506, 511 (1995).

247. *United States v. Booker*, 543 U.S. 220, 244 (2005).

248. See MODEL PENAL CODE § 1.13(9)(e), (10) (AM. LAW INST. 1962).

249. U.S. CONST. art. III, § 2, cl. 3 (“Trial shall be held in the State where the said Crimes shall have been committed . . .”); *id.* amend. VI (providing right to speedy and public trial “by an impartial jury of the State and district wherein the crime shall have been committed”).

250. Compare *United States v. Engle*, 676 F.3d 405, 412 (4th Cir. 2012) (“Venue ‘is not a substantive element of a crime,’ but instead ‘is similar in nature to a jurisdictional element.’” (citations omitted)); *United States v. Acosta-Gallardo*, 656 F.3d 1109, 1118 (10th Cir. 2011) (“[V]enue . . . has been characterized as ‘an element of every crime.’” (quoting *United States v. Miller*, 111 F.3d 747, 749 (10th Cir. 1997))); *United States v. Miller*, 111 F.3d 747, 749 (10th Cir. 1997) (“Although venue is a right of constitutional dimension, and has been characterized as ‘an element of every crime,’ this court and others have consistently treated venue differently from other, ‘substantive’ elements of a charged offense.” (internal citation omitted)); *United States v. Winship*, 724 F.2d 1116, 1124 (5th Cir. 1984) (“Venue is an element of any offense . . .”); *United States v. Massa*, 686 F.2d 526, 527, 530 (7th Cir. 1982) (“Proof of venue is an essential element of the Government’s case. . . . Although venue is an essential element which the Government must prove, it is an element more akin to jurisdiction than to the substantive elements of the crime.”), with *United States v. Coplan*, 703 F.3d 46, 77 (2d Cir. 2012) (“[T]he venue requirement, despite its constitutional pedigree, is not an element of a crime so as to require proof beyond a reasonable doubt . . .” (internal quotations and citation omitted)); *United States v. Smith*, 198 F.3d 377, 382 (2d Cir. 1999) (“Because it is not an element of the crime, the government bears the burden of proving venue by a preponderance of the evidence”). Cf. *United States v. Kaytso*, 868 F.2d 1020, 1021 (9th Cir. 1988) (“While venue presents a question of fact and must be proved by the government, it is not an *essential* element of the offense.” (emphasis added)); *United States v. Griley*, 814 F.2d 967, 973 (4th Cir. 1987) (“A criminal defendant has a constitutional right to be tried in the district in which the crime was committed; the burden of proving that a crime occurred in a particular district is on the prosecution. The prosecution, however, does not have to prove where the crime occurred beyond a reasonable doubt, since venue is not a *substantive* element of a crime. The prosecution need only show by a preponderance of the evidence that the trial is in the same district as a part of the criminal offense.” (emphasis added) (citation omitted)).

culpability.²⁵¹ (In the language of the *Model Penal Code*, venue is an element but not a “material” element.²⁵²) By this, the circuits do not mean that venue goes to subject-matter jurisdiction.²⁵³ Rather, they are referencing another line of cases involving what are labeled as “jurisdictional” elements in federal criminal statutes. These often establish Congress’s Article I power to intrude into what otherwise might be the domain of the U.S. states. For example, mail fraud requires proof of a mailing because that statute was passed pursuant to Congress’s postal power;²⁵⁴ by contrast, wire fraud requires proof of an interstate wiring because that statute was passed pursuant to Congress’s Commerce Clause power.²⁵⁵ Although courts recognize that these jurisdictional “hooks,” like venue, do not go to the defendant’s culpability,²⁵⁶ the hooks are attendant circumstances that are universally considered to be elements of the crime.²⁵⁷ In a jury trial, a conviction cannot be successfully secured unless these jurisdictional hooks are proven beyond a reasonable doubt.

By analogy to venue questions and these jurisdictional hooks, it seems likely that at least the factual questions underlying extraterritoriality will be deemed an element of the crime. As such, the geographical appropriateness of the prosecution must be pleaded in the indictment and proved to the satisfaction of a jury. The only question is the applicable burden of proof. Venue is treated like an element—even in those circuits that refuse to so label it—in that the government

251. As the Third Circuit explained in *United States v. Perez*:

When courts describe venue as an element, they often distinguish it from “substantive” or “essential” elements. The Fifth Circuit has explained that while venue is an element, it will be protected less vigorously than other elements. Likewise, the Seventh Circuit has recognized that while one may call venue an element, “it is an element more akin to jurisdiction than to the substantive elements of the crime.” Put another way, “[v]enue is wholly neutral; it is a question of procedure, more than anything else, and it does not either prove or disprove the guilt of the accused.”

280 F.3d 318, 330 (3d Cir. 2002) (citations omitted).

252. MODEL PENAL CODE § 1.13(10) (AM. LAW INST. 1962).

253. *See, e.g.*, *United States v. Calderon*, 243 F.3d 587, 590 (2d Cir. 2001) (“Venue is not jurisdictional . . .”).

254. *See* 18 U.S.C. § 1342 (2012).

255. *See, e.g.*, *United States v. Bryant*, 766 F.2d 370, 375 (8th Cir. 1985).

256. *See, e.g., id.* (the wire fraud statute’s requirement of an interstate wiring “seems clearly to be only jurisdictional. The interstate nature of the communication does not make the fraud more culpable. Thus, whether or not a defendant knows or can foresee that a communication is interstate, the offense is still every bit as grave in the moral sense.”); *see also* *United States v. Lindemann*, 85 F.3d 1232, 1241 (7th Cir. 1996) (noting that the individual does not need to know that there was an “interstate nexus” to be liable for a wire fraud transfer).

257. *See, e.g.*, *Taylor v. United States*, 136 S. Ct. 2074, 2080 (2016) (“There is no question that the Government in a Hobbs Act prosecution must prove beyond a reasonable doubt that the defendant engaged in conduct that satisfies the Act’s commerce element . . .”); *United States v. Bass*, 404 U.S. 336, 339 (1971) (in a prosecution for possessing firearms in violation of 18 U.S.C. App. § 1202(a)(1), “the Government must prove as an essential element of the offense that a possession, receipt, or transportation was ‘in commerce or affecting commerce’”); *see also* *United States v. McRary*, 665 F.2d 674, 679 (5th Cir. 1982) (“In cases where the issue is directly addressed it has been uniformly held that the basis for federal jurisdiction is an essential element of the offense.”) (collecting court of appeals cases).

bears the burden of proving appropriate venue.²⁵⁸ And venue is uniformly denominated a question of fact that should be decided by the jury,²⁵⁹ although it may easily be waived if it is not “in issue.”²⁶⁰ But the circuits concur in holding that venue, unlike the hooks described above, is subject only to a preponderance standard²⁶¹ even in those circuits that describe venue as an element of a crime.²⁶²

The geographical application of a statute is better treated like the hooks discussed above rather than venue for purposes of determining the applicable standard of proof. Venue is an odd duck because it is an overarching constitutional requirement and any statutes dealing with venue are simply responsive to that constitutional decree. The extraterritorial scope of a statute, however, is, like the applicable jurisdictional hooks, a discrete statutory imperative. It is a statutorily mandated attendant circumstance that is critical to a successful prosecution; a conviction, and criminal penalty, should not be possible without the requisite proof. For example, under *Morrison* (and before the Dodd-Frank Act complicated the matter), a securities fraud conviction could not be obtained under the applicable statutes absent proof that the relevant transaction occurred in the United States. By analogy to these other statutory attendant circumstances, it seems likely that a beyond-a-reasonable-doubt standard will be applied to the question of whether a given application of the statute is geographically appropriate.

It is unlikely that courts will ask juries to answer the legal question whether, applying the presumption against extraterritoriality, a given geoambiguous criminal statute has extraterritorial application. But, in light of the above, at least the factual issues underlying extraterritoriality ought to be considered an element to be charged in the indictment and proven to a jury. In cases where the statute is held to have no extraterritorial application, juries should be tasked with determining whether the relevant conduct (identified by the focus test) occurred on U.S. territory. And in cases in which the statute does apply extraterritorially, juries should be charged with determining whether the statutory requisites are satisfied. For example, if a statute states that it applies extraterritorially when the defendant is a U.S. national or the criminal conduct occurred in whole or in part in the United States, the jury should be required to make the findings of fact relevant to that requirement.

258. See, e.g., *United States v. Auernheimer*, 748 F.3d 525, 533 (3d Cir. 2014); *United States v. Coplan*, 703 F.3d 46, 77 (2d Cir. 2012); *United States v. Cameron*, 699 F.3d 621, 636 (1st Cir. 2012); *United States v. Lukashov*, 694 F.3d 1107, 1120 (9th Cir. 2012); *United States v. Engle*, 676 F.3d 405, 412 (4th Cir. 2012); *United States v. Sitzmann*, 74 F. Supp. 3d 96, 102–03 (D.D.C. 2014).

259. See, e.g., *Lukashov*, 694 F.3d at 1120; *Engle*, 676 F.3d at 412–13; *United States v. Acosta-Gallardo*, 656 F.3d 1109, 1118 (10th Cir. 2011).

260. See, e.g., *United States v. Perez*, 280 F.3d 318, 330–35 (3d Cir. 2002).

261. *Coplan*, 703 F.3d at 77; *Cameron*, 699 F.3d at 636; *Lukashov*, 694 F.3d at 1120; *Engle*, 676 F.3d at 412.

262. See, e.g., *Acosta-Gallardo*, 656 F.3d at 1118; *United States v. Miller*, 111 F.3d 747, 749–50 (10th Cir. 1997); *United States v. Winship*, 724 F.2d 1116, 1124 (5th Cir. 1984); *United States v. Massa*, 686 F.2d 526, 527–28 (7th Cir. 1982).

D. CONGRESSIONAL INTENT AND THE QUESTIONABLE CONTINUING RELEVANCE OF CHARMING BETSY

Having resolved this threshold procedural question, we can now turn to the ultimate question: where a federal statute is geoambiguous (as they usually are) how should courts determine whether Congress intended the statute to apply extraterritorially? The lower courts employ, without explanation, both the presumption against extraterritoriality and a *Charming Betsy* inquiry. Thirteen years after deciding *Aramco*²⁶³ and introducing the strong presumption against extra(subjective)territoriality, the Court in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*,²⁶⁴ applied the *Charming Betsy* canon instead of the presumption. Does this mean that the *Charming Betsy* canon remains relevant? If so, what role does it play?

My view is that the Court's most recent decisions render the *Charming Betsy* canon—and its reference to all of the CIL prescriptive principles—unnecessary and anachronistic, at least outside the antitrust area. In antitrust, an abbreviated *Charming Betsy* canon—which looks only to subjective and objective territoriality—appears to be too entrenched in Supreme Court precedent and in export cases—the FTAIA—to be displaced.

In the Court's most recent cases, *Microsoft Corp. v. AT&T Corp.*,²⁶⁵ *Morrison v. National Australia Bank*,²⁶⁶ *Kiobel v. Royal Dutch Petroleum Co.*,²⁶⁷ and *RJR Nabisco, Inc. v. European Community*,²⁶⁸ it nowhere referenced the *Charming Betsy* canon. What these precedents tell us is that, for the most part, the modern Court has determined that the only relevant prescriptive principle is subjective territorial jurisdiction and that the other principles do not matter.

The Court demonstrated this most clearly in its most recent extraterritoriality decision, *RJR Nabisco*.²⁶⁹ In that case, the Court set forth its preferred order of analysis. Courts should first determine whether a statute has any extraterritorial application and, in doing so, must apply a strong presumption against extraterritoriality.²⁷⁰ Second, if the statute does *not* apply extraterritorially, courts must “determine whether the case involves a domestic application of the statute,” which it does “by looking to the statute’s ‘focus.’”²⁷¹ The Court continued:

If the conduct relevant to the statute’s focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign

263. See 499 U.S. 244 (1991).

264. See 542 U.S. 155 (2004).

265. See 550 U.S. 437 (2007).

266. See 561 U.S. 247 (2010).

267. See 569 U.S. 108 (2013).

268. See 136 S. Ct. 2090 (2016).

269. See *id.*

270. See *id.* at 2101.

271. *Id.*

country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.²⁷²

If the statute *does* have extraterritorial effect, the *RJR Nabisco* Court instructed that “[t]he scope of an extraterritorial statute . . . turns on the limits Congress has (or has not) imposed on the statute’s foreign application, and not on the statute’s ‘focus.’”²⁷³ According to the Court, the lower courts need not answer the question of where the crime took place when dealing with statutes with extraterritorial effect because the statutory directions regarding extraterritoriality will control.²⁷⁴ For our purposes, the important point is that the Court, in explicitly laying out these analytical steps, nowhere mentioned that the *Charming Betsy* canon, and prescriptive principles other than subjective territoriality, might also be applicable.

The logic of the *RJR Nabisco* analysis also renders the *Charming Betsy* canon irrelevant. If a statute is deemed *not* to permit extraterritorial application, the *Charming Betsy* canon has no work to do. Whether the extraterritorial application of the statute could be justified, for example, by the protective or nationality principles is irrelevant because the Court has decided that the statute only applies to conduct within the territory of the United States. If the *Charming Betsy* canon is to have any continuing relevance, then, it would only be in further restricting the scope of statutes that are found to be extraterritorial. But the *RJR Nabisco* Court instructed that if a statute *does* have extraterritorial applications, no further judicial analysis is required—the statute applies extraterritorially by reference to its own terms.²⁷⁵ In light of the strength of the presumption, any ambiguity in a statute will be grounds for a finding that it only applies within U.S. territory. Only if Congress provides express instruction regarding extraterritorial applications can the presumption be overcome. And where Congress has spoken, it is not material what the CIL prescriptive principles provide; a statutory instruction will always control, even if it constitutes a violation of CIL.²⁷⁶

In sum, the language and logic of the Supreme Court’s recent cases dictate that courts apply only the presumption against extraterritoriality in discerning congressional intent. The Court’s presumption presupposes that Congress does not intend its legislation to have purchase outside the territorial United States unless it affirmatively says so. Whether the extraterritorial application of a statute can be justified by the effects, nationality, protective, or universal prescriptive principles is irrelevant under the Court’s recent case law. Accordingly, courts need not continue to consult the *Charming Betsy* canon of construction.

272. *Id.*

273. *Id.*

274. The Court appears to be unaware, unfortunately, that some statutes’ extraterritorial application turns on whether the crime occurred in whole or in part in the United States, thus necessitating a “focus” analysis. *See, e.g.*, 18 U.S.C. §§ 1956(f) (money laundering), 2339B(d)(1)(D) (material support to terrorist organizations), 2442(c)(4) (2012) (recruitment or use of child soldiers).

275. *See RJR Nabisco*, 136 S. Ct. at 2101.

276. *See supra* note 80.

IV. ANALYTICAL ROADMAP: CRIMINAL CASES

Having outlined the generally applicable analytical questions courts face when determining whether federal statutes apply in transnational cases, we now turn to two other issues that arise only in criminal cases.

A. THE QUESTIONABLE CONTINUING RELEVANCE OF *UNITED STATES V. BOWMAN*

The Supreme Court has not recently decided an extraterritoriality challenge in a criminal case but the lower federal courts have been very willing to find that federal criminal statutes do apply extraterritorially. In fact, it has been relatively rare for courts of appeals to apply the presumption and find that a criminal statute does *not* apply extraterritorially.²⁷⁷

Most courts have avoided applying the presumption against extraterritoriality by relying on the Supreme Court's 1922 opinion in *United States v. Bowman*.²⁷⁸ In *Bowman*, the defendants schemed on the high seas and in Rio de Janeiro to defraud a U.S. government-owned corporation. The Court recognized that punishment of crimes against private individuals or their property "must of course be committed within the territorial jurisdiction of the government where it may properly exercise it."²⁷⁹ But, the Court explained,

[t]he same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are

277. For a few of the rare cases in which courts of appeals do apply the presumption, *see, e.g.*, *United States v. Chao Fan Xu*, 706 F.3d 965, 974–75 (9th Cir. 2013) (RICO does not apply extraterritorially); *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010) (same); *United States v. Yakou*, 428 F.3d 241, 253–54 (D.C. Cir. 2005) (International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 129.3(a), and the Arms Export Control Act (AECA), 22 U.S.C. § 2778(b)(1)(A)(ii)(I), do not apply extraterritorially to non-U.S. persons); *United States v. Gatlin*, 216 F.3d 207, 210 (2d Cir. 2000) (statute outlawing sexual abuse of a minor while within special maritime and territorial jurisdiction of the United States, 18 U.S.C. § 2243(a), did not apply to offense committed on property leased by the military in Germany); *United States v. Javino*, 960 F.2d 1137, 1143 (2d Cir. 1992) (holding that crime of receipt and possession of a destructive device made in violation of the National Firearms Act, 26 U.S.C. §§ 5822, 5861(c), applied only to devices made in the United States); *see also* *United States v. Reeves*, 62 M.J. 88, 92–93 (Child Pornography Prevention Act, 18 U.S.C. § 2252A, did not apply extraterritorially to American soldier's conduct in Germany); *cf.* *United States v. Columba-Colella*, 604 F.2d 356, 360 (5th Cir. 1979) (finding no jurisdiction over the offense based on lack of prescriptive jurisdiction under international law); *United States v. Mitchell*, 553 F.2d 996, 1001–03 (5th Cir. 1977) (Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. § 1361, and related regulations did not apply to an American citizen taking dolphins within the territorial waters of a foreign sovereign state); *Yenkichi Ito v. United States*, 64 F.2d 73, 75 (9th Cir. 1933) (crime of attempting to bring into the United States persons not lawfully entitled to enter, 8 U.S.C. § 144, does not apply outside the territorial waters of the United States).

278. 260 U.S. 94 (1922).

279. *Id.* at 98.

such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.²⁸⁰

The defendants on trial were Americans. With respect to the defendant who was a national of Great Britain, the Court acknowledged that he had not yet been apprehended and concluded that “it will be time enough to consider what, if any, jurisdiction the District Court below has to punish him when he is brought to trial.”²⁸¹

The Court referenced the *Charming Betsy* canon when it stated that the scope of the statute must be determined by the “jurisdiction of a government to punish crime under the law of nations.”²⁸² Although the *Bowman* Court did not explicitly cite the protective principle of prescriptive jurisdiction, it justified the extraterritorial application of the statute by the “right of the Government to defend itself.”²⁸³ The Court, then, appeared to have concluded that the protective principle justified this extraterritorial prosecution. The Harvard Research Study so understood the case, discussing *Bowman* in its examination of that principle.²⁸⁴ It is also relevant that the Court discussed the citizenship of the defendants, hinting that the nationality principle was in play.

The *Bowman* decision has never been overruled and is still frequently employed by courts to justify the extraterritorial application of criminal statutes without reference to, or despite, the presumption.²⁸⁵ *Bowman*’s permission to

280. *Id.*

281. *Id.* at 102–03.

282. *Id.* at 97–98.

283. *Id.* at 98.

284. *Draft Convention*, *supra* note 31, at 544–45.

285. *See, e.g.*, *United States v. Lawrence*, 727 F.3d 386, 394 (5th Cir. 2013); *United States v. Ayesh*, 702 F.3d 162, 166 (4th Cir. 2012); *United States v. Siddiqui*, 699 F.3d 690, 701–02 (2d Cir. 2012); *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011); *United States v. Weingarten*, 632 F.3d 60, 66 (2d Cir. 2011); *United States v. Belfast*, 611 F.3d 783, 813–14 (11th Cir. 2010); *United States v. Leija-Sanchez*, 602 F.3d 797, 799 (7th Cir. 2010); *United States v. Frank*, 599 F.3d 1221, 1230 (11th Cir. 2010); *United States v. Villanueva*, 408 F.3d 193, 197–98 (5th Cir. 2005); *United States v. Delgado-Garcia*, 374 F.3d 1337, 1345–46 (D.C. Cir. 2004); *United States v. Liang*, 224 F.3d 1057, 1060 (9th Cir. 2000); *United States v. Plummer*, 221 F.3d 1298, 1304–06 (11th Cir. 2000); *United States v. MacAllister*, 160 F.3d 1304, 1307–08 (11th Cir. 1998); *United States v. Vasquez-Velasco*, 15 F.3d 833, 839 (9th Cir. 1994); *United States v. Harvey*, 2 F.3d 1318, 1327 (3d Cir. 1993); *United States v. Larsen*, 952 F.2d 1099, 1100–01 (9th Cir. 1991); *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204–05 & n.3 (9th Cir. 1991); *United States v. Layton*, 855 F.2d 1388, 1395 (9th Cir. 1988); *United States v. Walczak*, 783 F.2d 852, 854 (9th Cir. 1986); *United States v. Wright-Barker*, 784 F.2d 161, 167 (3d Cir. 1986); *United States v. Benitez*, 741 F.2d 1312, 1317 n.1 (11th Cir. 1984); *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984); *United States v. Perez-Herrera*, 610 F.2d 289, 290–92 (5th Cir. 1980); *United States v. Baker*, 609 F.2d 134, 137–38 (5th Cir. 1980); *United States v. Cotten*, 471 F.2d 744, 750 (9th Cir. 1973); *United States v. Birch*, 470 F.2d 808, 811 & n.2 (4th Cir. 1972); *Stegman v. United States*, 425 F.2d 984, 986 (9th Cir. 1970); *Brulay v. United States*, 383 F.2d 345, 350 (9th Cir.

courts to disregard the presumption against extraterritoriality and focus instead on whether the nature of the offense is such that extraterritoriality may be inferred contains important limitations. It seems to apply, by its terms, only to geoambiguous criminal statutes. And it applies only to a subset of criminal prohibitions that are not logically dependent on their locality and are enacted to protect the government “against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents.”²⁸⁶ Given the *Bowman* Court’s caveat regarding the status of the British defendant, the rule may be limited to U.S. citizens or agents of the U.S. government. As the Supreme Court summarized its *Bowman* holding in *Skiriotes v. Florida*, “a criminal statute dealing with acts that are directly injurious to the government, and are capable of perpetration without regard to particular locality is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect.”²⁸⁷

The lower courts have often ignored these limitations. First, they apply *Bowman* to many cases not involving fraud or obstruction.²⁸⁸ Some decisions, such as those dealing with the murder of federal agents or corruption in connection with federal programs and perhaps immigration-related cases, may be justified to some extent under the protective principle.²⁸⁹ Other cases, concerning offenses involving drug trafficking, violent crimes, and sexual offenses, do not

1967); *United States v. Abu Khatallah*, 151 F. Supp. 3d 116, 125–27 (D.D.C. 2015); *United States v. Carson*, 2011 WL 7416975 at *6 (C.D. Cal. 2011); *United States v. Singhal*, 876 F. Supp. 2d 82, 97 (D. D.C. 2012); *United States v. Campbell*, 798 F. Supp. 2d 293, 300–01 (D.D.C. 2011); *United States v. Hijazi*, 845 F. Supp. 2d 874, 887 (C.D. Ill. 2011); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 193–97 (S.D.N.Y. 2000); see generally Zachary D. Clopton, *Bowman Lives: The Extraterritorial Application of U.S. Criminal Law After Morrison v. National Australia Bank*, 67 N.Y.U. ANN. SURV. AM. L. 137 (2011); Ellen S. Podgor & Daniel M. Filler, *International Criminal Jurisdiction in the Twenty-First Century: Rediscovering United States v. Bowman*, 44 SAN DIEGO L. REV. 585 (2007).

286. *United States v. Bowman*, 260 U.S. 94, 98 (1922).

287. 313 U.S. 69, 73–74 (1941) (emphasis added).

288. *But see United States v. Martinelli*, 62 M.J. 52, 57–58 (C.A.A.F. 2005) (in court martial, proscriptions on possessing, downloading, and emailing child pornography did not apply extraterritorially; refusing to apply *Bowman* in cases that do not involve “statutes punishing fraud or obstructions against the United States Government”); *United States v. Abu Khatallah*, 151 F. Supp. 3d 116, 129 (D.D.C. 2015) (reading *Bowman* as satisfied when “(1) a federal criminal offense directly harms the U.S. Government, and (2) enough foreseeable overseas applications existed at the time of a statute’s enactment (or most recent amendment) to warrant the inference that Congress both contemplated and authorized prosecutions for extraterritorial acts”); *United States v. Sidorenko*, 102 F. Supp. 3d 1124, 1332 (N.D. Cal. 2015) (holding that *Bowman* did not apply to honest services wire fraud, 18 U.S.C. § 1343, or federal statute outlawing bribes in connection with a federal program, 18 U.S.C. § 666).

289. See, e.g., *Ayesh*, 702 F.3d at 166 (relying *Bowman*, statute proscribing theft of public money, 18 U.S.C. § 641, and committing acts affecting a personal financial interest, 18 U.S.C. § 208(a), applied extraterritorially); *Siddiqui*, 699 F.3d at 700–01 (relying on *Bowman*, statutes outlawing attempted murder of, and assault on, U.S. agents, 18 U.S.C. §§ 1114, 111, applied extraterritorially and statute prohibiting use of a firearm during a violent crime, 18 U.S.C. § 924(c), applied extraterritorially to the extent that the violent crime does); *Al Kassar*, 660 F.3d at 118 (relying on *Bowman* analysis, statutes prohibiting killing or attempting to kill an officer or employee of the United States, 18 U.S.C. §§ 1114, 1117, applied extraterritorially); *Villanueva*, 408 F.3d at 197–199 (relying on *Bowman*, statute prohibiting smuggling aliens into the country, 18 U.S.C. § 1324(a), applied extraterritorially); *Delgado*

target the government as such, but rather are addressed to victimization of private persons or the public at large.²⁹⁰ They would seem to be outside the scope of the

Garcia, 374 F.3d at 1343–44 (relying on *Bowman*, statute prohibiting conspiracies to induce aliens to illegally enter the United States, 8 U.S.C. § 1324(a), applied extraterritorially); *Liang*, 224 F.3d at 1060 (relying on *Bowman*, statute against attempted alien smuggling, 8 U.S.C. § 1324(a)(2)(B)(ii), applied extraterritorially); *Plummer*, 221 F.3d at 1302–07 (applying *Bowman*, statute against attempted smuggling, 18 U.S.C. § 545, in violation of the Trading With the Enemy Act, applied extraterritorially); *Felix-Gutierrez*, 940 F.2d at 1204–05 (applying *Bowman*, accessory-after-the-fact statute, 18 U.S.C. § 3, applied extraterritorially to case involving the murder of DEA agents abroad); *Layton*, 855 F.2d at 1395 (applying *Bowman*, statute outlawing conspiracy to kill a member of Congress, 18 U.S.C. § 351(d), applied extraterritorially); *Walczak*, 783 F.2d at 854 (using *Bowman*, false statement statute, 18 U.S.C. § 1001, in the context of false statements made to customs officials, applied extraterritorially); *Benitez*, 741 F.2d at 1316–17 (using *Bowman*, statutes proscribing assault upon, and attempted murder of, DEA agents, 18 U.S.C. §§ 111, 1114, 1117, and stealing their passports, 18 U.S.C. § 2112, applied extraterritorially); *Cotten*, 471 F.2d at 749–51 (relying on *Bowman*, statute outlawing theft of government property, 18 U.S.C. § 641, applied extraterritorially); *Birch*, 470 F.2d at 811 (applying *Bowman*, statute proscribing forgery and false use of government documents, 18 U.S.C. § 499, applied extraterritorially); *Abu Khatallah*, 151 F. Supp. 3d at 130–38 (relying on *Bowman*, statutes outlawing murder and attempted murder of government agents, 18 U.S.C. § 1114, killing a person in the course of an armed attack on a federal facility, 18 U.S.C. § 930(c), and the malicious damage of U.S. property causing death, 18 U.S.C. § 844(f)(1), (3), applied extraterritorially; 18 U.S.C. § 924(c) (use of a firearm in the course of a violent crime) and § 2339A (material support) are ancillary crimes that apply extraterritorially to the extent the underlying offenses do); *Campbell*, 798 F. Supp. 2d at 299–304 (applying *Bowman*, crime outlawing corruption in federal programs, 18 U.S.C. § 666, applied extraterritorially); *Bin Laden*, 92 F. Supp. 2d at 192–98 (relying in part on *Bowman*, crimes of using an explosive to damage government property, killing in the course of an attack on a federal facility, and destruction of national defense materials, 18 U.S.C. §§ 844(f), (h), (n), 930(c), and 2155, applied extraterritorially).

290. See, e.g., *Lawrence*, 727 F.3d at 395 (relying in part on *Bowman*, statute outlawing conspiracy to possess illicit substance on aircraft, 21 U.S.C. § 963, applied extraterritorially); *Weingarten*, 632 F.3d at 64–67 (relying on *Bowman*, crime of travel with intent to engage in illicit sexual conduct, 18 U.S.C. § 2423(b), applied extraterritorially); *Belfast*, 611 F.3d at 810–13 (relying on *Bowman*, torture statute, 18 U.S.C. § 2340A, applied extraterritorially); *Leija-Sanchez*, 602 F.3d at 799–800, 802 (relying on *Bowman*, statute outlawing violent crimes in aid of racketeering, 18 U.S.C. § 1959, applied extraterritorially); *Frank*, 599 F.3d at 1229–34 (relying on *Bowman*, statute outlawing traveling in foreign commerce and promoting sexual conduct by a minor for purposes of visual depiction, 18 U.S.C. § 2251A, applied extraterritorially); *MacAllister*, 160 F.3d at 1306–09 (relying on *Bowman*, conspiracy to export cocaine, 21 U.S.C. § 963, applied extraterritorially); *Vasquez-Velasco*, 15 F.3d at 839 & n.4 (relying on *Bowman*, statute penalizing violent racketeering crimes, 18 U.S.C. § 1959, applied extraterritorially); *Harvey*, 2 F.3d at 1329–30 (applying *Bowman*, crime of possession of child pornography, 18 U.S.C. § 2252, applied extraterritorially); *Larsen*, 952 F.2d at 1100–01 (relying on *Bowman*, statute prohibiting possession of controlled substances with intent to distribute, 21 U.S.C. § 841(a)(1), applied extraterritorially); *Wright-Barker*, 784 F.2d at 167 (citing *Bowman*, drug statute, 21 U.S.C. § 955a(d)(1), applied extraterritorially); *Chua Han Mow*, 730 F.2d at 1311 (applying *Bowman*, statute barring conspiracy to import drugs, 21 U.S.C. § 959, applied extraterritorially); *Perez-Herrera*, 610 F.2d at 290–92 (relying on *Bowman*, crime of attempt to import drugs into the United States, 21 U.S.C. § 963, applied extraterritorially); *Baker*, 609 F.2d at 137–39 (using *Bowman*, possession and conspiracy to possess marijuana statutes, 21 U.S.C. §§ 841(a), 846, applied extraterritorially); *Stegman*, 425 F.2d at 986 (using *Bowman* to apply bankruptcy fraud statute, 18 U.S.C. § 152, extraterritorially); *Brulay*, 383 F.2d at 350 (using *Bowman*, statutes governing conspiracy to smuggle drugs into the United States, 18 U.S.C. §§ 371, 545, applied extraterritorially, even in absence of evidence that conspiracy was formed in the United States or that an overt act was committed in the country); *Carson*, 2011 WL 7416975 at *6–8 (relying on *Bowman*, the Travel Act, 18 U.S.C. § 1952(a)(3), applied extraterritorially); *Hijazi*, 845 F. Supp. 2d at 887–88 (applying *Bowman*, Major Fraud Act, 18 U.S.C. § 1031(a) and wire fraud statute, 18 U.S.C. § 1343, applied extraterritorially).

Bowman ruling, but courts have nonetheless applied *Bowman* in many such cases. Courts have also determined that application of the *Bowman* analysis is appropriate regardless of whether the defendant is a U.S. national.²⁹¹

Despite the Court's emphatic embrace of the presumption in its latest cases, the lower courts have resisted applying it in criminal cases by taking the position that *Bowman* applies until it is expressly overruled.²⁹² In 2016, for example, the Seventh Circuit refused, despite *Morrison*, to reverse a decision that relied upon *Bowman* to hold that a federal criminal statute applied extraterritorially.²⁹³ Judge Easterbrook explained that "[a] decision such as *Bowman*, holding that criminal and civil laws differ with respect to extraterritorial application, is not affected by yet another decision showing how things work on the civil side."²⁹⁴ Are these courts correct?

I believe the Supreme Court, should it have an opportunity to do so, will overrule *Bowman* and demand federal courts vigorously apply the presumption against extraterritoriality in criminal cases. (As is discussed in Part VI, I believe that this is the correct course, but not because of *Bowman*.) In its most recent cases the Court has demonstrated a clear and unequivocal commitment to the presumption.²⁹⁵ *Bowman* is obviously inconsistent with the modern Court's insistence on a strong presumption against the application of statutes in any circumstances other than where justified by the subjective territorial principle. The protective and (perhaps) nationality principles upon which *Bowman* appeared to turn were relevant under the *Charming Betsy* canon, but not under the Court's narrowed presumption against extraterritoriality.

B. THE QUESTIONABLE RELEVANCE OF *PASQUANTINO V. UNITED STATES*

Those resisting the application of the presumption against extraterritoriality in criminal cases may argue, as is true, that the Court has never applied the presumption in such cases. As the above historical survey proves, however, the Court has abandoned its pre-1991 approach, and thus those precedents hold far less sway. Those seeking to avoid the presumption may also cite the only criminal case in which extraterritoriality arguably has been discussed by the Court post-*Aramco*:

291. See, e.g., *Delgado-Garcia*, 374 F.3d at 1345–46; *United States v. Pizzarusso*, 388 F.2d 8, 11 (2d Cir. 1968); *Bin Laden*, 92 F. Supp. 2d at 194.

292. See, e.g., *Weingarten*, 632 F.3d at 66 (acknowledging *Morrison*, but noting that under *Bowman* "Congress is presumed to intend extraterritorial application of criminal statutes where the nature of the crime does not depend on the locality of the defendants' acts and where restricting the statute to United States territory would severely diminish the statute's effectiveness") (internal quotation marks and citation omitted); *Leija-Sanchez*, 602 F.3d at 799 ("Whether or not *Aramco* and other post-1922 decisions are in tension with *Bowman*, we must apply *Bowman* until the Justices themselves overrule it."); *Campbell*, 798 F. Supp. 2d at 303 ("Despite the emphasis of *Morrison* that the presumption against extraterritoriality applies 'in all cases,' recent Supreme Court jurisprudence has developed with nary a mention of *Bowman* and has predominately involved civil statutes.") (internal citation omitted); *Carson*, 2011 WL 7416975 at *7 ("*Morrison* does not mention *Bowman*, nor does it expressly overrule it.").

293. See *United States v. Leija-Sanchez*, 820 F.3d 899, 900–01 (7th Cir. 2016).

294. *Id.* at 901.

295. See *supra* notes 167–210 and accompanying text.

Pasquantino v. United States.²⁹⁶ In that case, the Court did not apply a presumption against extraterritoriality. But a careful consideration of the case will demonstrate that the Court did not actually decide the question of whether the statute applied extraterritoriality and thus presumption was irrelevant.

The defendants were indicted for wire fraud for carrying out a scheme to smuggle large quantities of liquor from the United States into Canada, thereby depriving the Canadian government of the required excise taxes.²⁹⁷ The Court took the case to decide whether the Canadian excise taxes could be considered “property” under the wire fraud statute as charged in the indictment (they could), and whether the common law revenue rule—which precludes enforcement of tax liabilities of one sovereign in the courts of another—applied to bar the prosecution (it did not).²⁹⁸ The question whether this was an extraterritorial application of the wire fraud statute “was not pressed or passed upon below and was raised only as an afterthought in petitioners’ reply brief.”²⁹⁹

The best reading of *Pasquantino* is that the Court rejected the petitioner’s argument by determining that this was a domestic, not an extraterritorial, application of the wire fraud statute. The statute has only two elements: a scheme to defraud and an interstate wiring in furtherance of that scheme.³⁰⁰ It does not require that the scheme be consummated, that a discrete false statement be proven, or that damage to the defendant ensue.³⁰¹ The scheme was apparently hatched in the United States. And the Court held that the offense “was complete the moment [the defendants] executed the scheme inside the United States” through their domestic, interstate use of the wires—that is, their use of a telephone in New York to place orders with liquor stores in Maryland.³⁰² The Court referred to the defendants’ use of U.S. interstate wires as the “domestic element of [their] conduct . . . [that] the Government is punishing in this prosecution.”³⁰³

Granted, the case had significant transnational circumstances: The victim was a foreign sovereign, the object of the fraud was the Canadian tax revenues due, and the actual fraud concerned misrepresentations made to Canadian officials. But none of these circumstances are elements of the crime. The Court focused on where the elements of the crime occurred, determining that all of them (that is the formation of a scheme to defraud and wirings in furtherance of that scheme) were satisfied in the United States. When all elements of an offense take place in the

296. 544 U.S. 349 (2005). I do not consider *Small v. United States*, 544 U.S. 385 (2005) to qualify as a criminal extraterritoriality precedent because the Court applied the presumption to the question of the meaning of a statutory term in the domestic context, not to whether a statute applies to conduct abroad.

297. *Pasquantino*, 544 U.S. at 353.

298. *Id.* at 354–55, 359.

299. *Id.* at 371 n.12.

300. *See, e.g.*, *Pereira v. United States*, 347 U.S. 1, 8 (1954).

301. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 25 (1999) (fraud statutes do not require proof of reliance or damages and a completed fraud need not be shown); *Carpenter v. United States*, 484 U.S. 19, 27 (1987) (fraud exists where there is concealment in the face of a duty to disclose).

302. *Pasquantino*, 544 U.S. at 371.

303. *Id.*

United States, the statute will be deemed to apply domestically, requiring no inquiry into the extraterritorial reach of the statute.³⁰⁴

The only difficulty with this characterization of *Pasquantino* is the Court's cryptic concluding sentence: "In any event, the wire fraud statute punishes frauds executed 'in interstate and foreign commerce,' so this is surely not a statute in which Congress had only 'domestic concerns in mind.'"³⁰⁵ The modern Court justifies its presumption against extraterritoriality in part by contending that Congress "is primarily concerned with domestic conditions."³⁰⁶ This, then, can be read as a coded statement that extraterritorial applications of the statute are appropriate. It is difficult to believe, however, that this one sentence represented a holding that the wire fraud statute applies extraterritorially, although at least one court has so read it.³⁰⁷

The wire fraud statute is among the most frequently invoked statutes in the federal criminal code, so its scope is of more than passing interest. The issue of the wire fraud statute's extraterritorial reach was not even fully briefed, much less the subject of a decision below. And the Court has made clear in the past that "even statutes that contain broad language in their definitions of 'commerce' . . . do not apply abroad."³⁰⁸ Thus, the premise of this critical sentence—that the foreign commerce element was itself conclusive evidence of a congressional intent that the statute apply extraterritorially—cannot be reconciled with precedent. Finally, the presumption, which is so prominent in the Court's recent cases, was not even mentioned, much less distinguished. My own view is that this throw away was dicta. *Pasquantino* is best understood as a case in which the Court determined that because all the elements of the crime occurred in the United States, the prosecution was domestic—not extraterritorial—in nature.

304. *See supra* note 38.

305. 544 U.S. at 371–72 (quoting *Small v. United States*, 544 U.S. 385, 388 (2005)) (citation omitted).

306. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)); *see also* *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (basing presumption against extraterritoriality on notion that "Congress generally legislates with domestic concerns in mind"); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454–55 (2007); *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

307. *See* *United States v. Georgiou*, 777 F.3d 125, 137–38 (3d Cir. 2015); *cf.* *United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014) (the Wire Act, 18 U.S.C. § 1084, applies extraterritorially). Other courts, including the Second Circuit, have held to the contrary. *See* *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 140–41 (2d Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 2090 (2016); *United States v. All Assets Held at Bank Julius*, 251 F. Supp. 3d 82, 101–02 (D.D.C. 2017) (wire fraud not extraterritorial); *Elsevier, Inc. v. Grossman*, 199 F. Supp. 3d 768, 783 (S.D.N.Y. 2016); *United States v. Sidorenko*, 102 F. Supp. 3d 1124, 1132 (N.D. Cal. 2015); *United States v. Hayes*, 99 F. Supp. 3d 409, 420 (S.D.N.Y. 2015); *United States v. Hijazi*, 845 F. Supp. 2d 874, 906 (C.D. Ill. 2011).

308. *Morrison*, 561 U.S. at 262–63 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 251 (1991)).

C. DUE PROCESS CHALLENGES

Criminal defendants often raise due process objections to extraterritorial prosecutions.³⁰⁹ It is not uncommon, for example, for the United States to bring narcotics prosecutions against foreign nationals seized from foreign-registered or stateless vessels on the high seas,³¹⁰ even when there is no evidence that the drugs seized from the ships were intended for sale in the United States.³¹¹ Such persons commonly object that prosecuting them under such circumstances violates due process guarantees.

The Supreme Court has not yet addressed whether Fifth Amendment due process limitations apply to extraterritorial applications of federal criminal law. We know, however, that in civil cases, the Supreme Court has recognized that U.S. states' extraterritorial application of their laws is subject to Fourteenth Amendment due process scrutiny. With respect to such applications of U.S. state law, the Fourteenth Amendment requires "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."³¹² Foreign defendants in civil cases can also claim due process rights with respect to exercises of personal jurisdiction by U.S. courts pursuant to state long-arm statutes.³¹³ That said, criminal cases, rightly or wrongly,³¹⁴ have their own rules. For example, a criminal defendant who is forcibly abducted while abroad and brought to trial in the United States has no due process right to redress.³¹⁵

The courts of appeals have found that Fifth Amendment due process limitations on the exercise of extraterritorial criminal jurisdiction exist but they are split on what the applicable test is: whether due process only requires that the extraterritorial prosecution not be arbitrary and unfair,³¹⁶ or whether the Due Process

309. See U.S. CONST. amend V. See generally, e.g., Colangelo, *supra* note 2, at 1103–09; Colangelo, *supra* note 19; Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992); A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379 (1997). Note that "[i]n regulatory matters, the United States will base limitations on extraterritorial jurisdiction on notions of comity while, for transnational criminal matters, courts will apply limitations most commonly associated with the Due Process Clause of the U.S. Constitution, though suffused with international legal considerations." Stigall, *supra* note 19, at 372.

310. See, e.g., *United States v. Davis*, 905 F.2d 245, 247 (9th Cir. 1990); *United States v. Gonzalez*, 776 F.2d 931, 933 (11th Cir. 1985).

311. See, e.g., *United States v. Cardales-Luna*, 632 F.3d 731, 740 (1st Cir. 2011); *United States v. Bustos-Useche*, 273 F.3d 622, 624 (5th Cir. 2001); *United States v. Robinson*, 843 F.2d 1, 3–4 (1st Cir. 1988); *United States v. Marino-Garcia*, 679 F.2d 1373, 1379 (11th Cir. 1982).

312. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)); see also *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930).

313. See, e.g., *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 113 (1987); *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 413–15 (1984).

314. See, e.g., Michael Farbiarz, *Accuracy and Adjudication: The Promise of Extraterritorial Due Process*, 116 COLUM. L. REV. 625 (2016).

315. See *Ker v. Illinois*, 119 U.S. 436, 444 (1886); see also *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

316. See, e.g., *United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1378–79 (11th Cir. 2011) (using "arbitrary and unfair" test); *United States v. Cardales*, 168 F.3d 548, 552–53 (1st Cir. 1999) (adopting

Clause also requires proof of a sufficient “nexus” between the defendant and the United States.³¹⁷ They also disagree about what the focus of the due process analysis should be and what sources should be consulted to resolve defendants’ objections. The only apparent consensus lies in holdings that persons on stateless ships have no due process rights, although it is not obvious why that is the case.³¹⁸

Some courts have applied a nexus test that “serves the same purpose as the ‘minimum contacts’ test in personal jurisdiction. It ensures that a United States court will assert jurisdiction only over a defendant who ‘should reasonably anticipate being haled into court’ in this country.”³¹⁹ This test appears to concern whether a defendant could have contemplated that the United States has the *power* to exert jurisdiction over the defendant. Other circuits appear to look for real effects or consequences accruing in the United States before they find a nexus.³²⁰ These two approaches may explain why some courts rely on international law’s prescriptive principles in addressing due process objections.³²¹ Courts may believe these principles to be relevant in determining whether a defendant had sufficient notice of the possibility of extraterritorial jurisdiction and as a guide to what conduct or effects provide a sufficient nexus to the United States.

Still other circuits reject the analogy to minimum contacts standards, asserting that “the law of personal jurisdiction is simply inapposite.”³²² “Fair warning does not require that the defendants understand that they could be subject to criminal

“arbitrary and unfair” test and rejecting “nexus” test); *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 202 cmt. c (AM. LAW INST., Tentative Draft No. 3, 2017) (“To satisfy the Due Process Clauses of the Fifth and Fourteenth Amendments, the application of federal and State statutes must be neither arbitrary nor fundamentally unfair.”).

317. *See, e.g.*, *United States v. Epskamp*, 832 F.3d 154, 168–69 (2d Cir. 2016); *United States v. Mohammad-Omar*, 323 F. App’x. 259, 261–62 (4th Cir. 2009); *United States v. Yousef*, 327 F.3d 56, 111–12 (2d Cir. 2003); *United States v. Davis*, 905 F.2d 245, 248–49 & n.2 (9th Cir. 1990).

318. *See, e.g.*, *Ibarguen-Mosquera*, 634 F.3d at 1379; *United States v. Shi*, 525 F.3d 709, 722 (9th Cir. 2008); *United States v. Caicedo*, 47 F.3d 370, 371–73 (9th Cir. 1995).

319. *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)); *see also Mohammad-Omar*, 323 F. App’x. at 261–62; *United States v. Zakharov*, 468 F.3d 1171, 1177 (9th Cir. 2006); *United States v. Shahani-Jahromi*, 286 F. Supp. 2d 723, 727–29 & n.13 (E.D. Va. 2003); *Brilmayer & Norchi*, *supra* note 309 (arguing that the extraterritorial Fifth Amendment due process test should mirror the minimum contacts analysis used in civil cases, thus requiring a nexus between a criminal defendant and the United States).

320. *See, e.g.*, *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011) (“For non-citizens acting entirely abroad, a jurisdictional nexus exists when the aim of that activity is to cause harm inside the United States or to U.S. citizens or interests.”); *Zakharov*, 468 F.3d at 1177–78; *United States v. Medjuck*, 156 F.3d 916, 918–19 (9th Cir. 1998); *Klimavicius-Viloria*, 144 F.3d at 1257.

321. *See, e.g.*, *Ibarguen-Mosquera*, 634 F.3d at 1378–79 (referencing prescriptive principles to determine whether prosecution would be arbitrary or fundamentally unfair); *Shi*, 525 F.3d at 722–23 (referencing prescriptive principles to determine whether “nexus” exists); *Cardales*, 168 F.3d at 553 (referencing prescriptive principles to determine whether the prosecution is arbitrary or unfair); *Davis*, 905 F.2d at 248–49 & n.2 (applying nexus test and finding that international law prescriptive jurisdiction principles provide a rough guide but do not control).

322. *United States v. Ali*, 718 F.3d 929, 944 (D.C. Cir. 2013); *see also United States v. Perez Oviedo*, 281 F.3d 400, 403 (3d Cir. 2002) (discussing other circuits’ rejection of nexus requirement for jurisdiction).

prosecution *in the United States* so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere.³²³ These courts focus on whether the defendant had notice of the *substantive law* rather than of the power of the United States to impose that law on a particular defendant.³²⁴ Courts that look to international treaties regulating certain types of criminal activities (for example, against terrorist acts or trafficking in persons) may believe that the treaties are relevant to this notice concern—that is, whether defendants have sufficient notice that their conduct is subject to “universal condemnation.”³²⁵

There is further uncertainty over whether defendants who are non-U.S. citizens (as they often are, given the extraterritorial nature of these cases) can claim a U.S. constitutional due process right to object to their prosecution.³²⁶ Aliens within U.S. territory are generally entitled to Fifth and Sixth Amendment protections.³²⁷ Thus, “even aliens [in U.S. territory] shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law.”³²⁸ But the Supreme Court has ruled that the Fifth Amendment’s due process guarantee cannot be claimed by enemy aliens tried abroad by U.S. authorities.³²⁹ The Court has also ruled that the Fourth Amendment is not violated by a warrantless search of the foreign property of a non-U.S. national who has no substantial and voluntary relationship to the United States.³³⁰ The Court’s precedents in this area are not tidy; the applicable analysis appears to turn to some extent on the nature of the

323. *Al Kassar*, 660 F.3d at 119.

324. *See, e.g., Ali*, 718 F.3d at 944 (“What appears to be the animating principle governing the due process limits of extraterritorial jurisdiction is the idea that ‘no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.’”) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964)).

325. *Ali*, 718 F.3d at 945; *see also Shi*, 525 F.3d at 723; *Perez Oviedo*, 281 F.3d at 358; *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993).

326. *See, e.g., Brillmayer*, *supra* note 19; Colangelo, *supra* note 19, at 158–76; Jennifer K. Elsea, *Substantive Due Process and U.S. Jurisdiction over Foreign Nationals*, 82 *FORDHAM L. REV.* 2077 (2014); Chimene I. Keitner, *Rights Beyond Borders*, 36 *YALE J. INT’L L.* 55 (2011); Hon. Karen Nelson Moore, *Aliens and the Constitution*, 88 *N.Y.U. L. REV.* 801, 845–77 (2013).

327. *See, e.g., Wong Wing v. United States*, 163 U.S. 228, 239 (1896).

328. *Id.* at 238. Aliens within U.S. territory—whether or not they are lawfully present—can also claim equal protection rights. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 210–15 (1982); *Yick Wo v. Hopkins*, 118 U.S. 356, 368–69 (1886); *see also Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (resident aliens have First Amendment rights); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 492 (1931) (aliens in the United States can claim rights under Just Compensation Clause of Fifth Amendment).

329. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 290–91 (1990); *see also Johnson v. Eisentrager*, 339 U.S. 763, 782–85 (1950) (Fifth Amendment does not apply to enemy aliens tried abroad by U.S. authorities); *United States v. Belmont*, 301 U.S. 324, 332 (1937) (aliens cannot claim a Fifth Amendment right against takings without just compensation for properties taken abroad by their State).

330. *See Verdugo-Urquidez*, 494 U.S. at 269–73.

constitutional privilege at issue.³³¹ It is fair to say, however, that two primary determinants of defendants' rights to claim U.S. constitutional protections are the nationality of the individual involved³³² and the perceived site of the alleged constitutional violation.³³³

The relevance of citizenship may be obvious, but the location of the violation may take some explaining. "The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials [abroad] prior to trial may ultimately impair that right, a constitutional violation occurs only at trial" when the compelled testimony is introduced into evidence in a U.S. courtroom.³³⁴ Although the Supreme Court has not yet explicitly so held, lower courts have ruled that the Fifth Amendment right against compelled self-incrimination, being a trial right, should be claimable by alien defendants who made compelled statements abroad but are on trial in the United States.³³⁵ By contrast, the Court has held that the Fourth Amendment "prohibits 'unreasonable searches and seizures' whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is 'fully accomplished' at the time of an unreasonable governmental intrusion."³³⁶ Accordingly, when government agents conduct a search overseas, the Fourth Amendment does not apply—at least if the person involved is an alien with no substantial connection to the United States.

United States citizens can likely claim that the extraterritorial application of a U.S. statute violates their due process rights but, given their obvious nexus to the country and presumed knowledge of its law, they are unlikely to prevail. Aliens raising the same claim can argue that the violation occurs when the criminal sanction is sought to be imposed on them in a U.S. court and may further claim that

331. *Compare Verdugo-Urquidez*, 494 U.S. 259, 264–66 (stressing text of the Fourth Amendment, fact that search was conducted in Mexico, and fact that the defendant was a non-national) *with* *Boumediene v. Bush*, 553 U.S. 723, 766–71 (2008) (applying a multi-factor test).

332. *See, e.g., Verdugo-Urquidez*, 494 U.S. at 269–73; *id.* at 275–76 (Kennedy, J., concurring); *Reid v. Covert*, 354 U.S. 1 (1957); *Eisentrager*, 339 U.S. 763.

333. In *Boumediene*, 553 U.S. 723, the Supreme Court held that aliens detained in a U.S. facility in Guantanamo Bay, Cuba could claim a constitutional habeas corpus right. But in the *Insular Cases*, the Court held that not every constitutional provision applies to governmental activity in U.S. territories, even though the United States exercises sovereign power over them. *See, e.g., Balzac v. Porto Rico*, 258 U.S. 298, 304–05 (1922) (Sixth Amendment right to jury trial inapplicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (Fifth Amendment grand jury provision inapplicable in Philippines); *Dorr v. United States*, 195 U.S. 138, 143–44 (1904) (jury trial provision inapplicable in Philippines); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (provisions on indictment by grand jury and jury trial inapplicable in Hawaii); *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (Revenue Clauses of Constitution inapplicable to Puerto Rico). In *Eisentrager*, the Court held that enemy aliens arrested in China and imprisoned in Germany after World War II could not obtain writs of habeas corpus in U.S. federal court on the ground that their convictions for war crimes had violated the Fifth Amendment and other constitutional provisions. 339 U.S. at 781–85.

334. *Verdugo-Urquidez*, 494 U.S. at 264 (internal citations omitted).

335. *See In re Terrorist Bombings of U.S. Embassies in East Afr.*, 552 F.3d 177, 199 (2d Cir. 2008).

336. *Verdugo-Urquidez*, 494 U.S. at 264 (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974)).

their alien status exacerbates their injury rather than vitiating their rights.³³⁷ In any case, U.S. citizens' and aliens' odds of succeeding on a due process claim are vanishingly small: out of the hundreds of extraterritoriality cases I have read, I have found only one case in which a due process challenge succeeded.³³⁸

V. A PRESUMPTION AGAINST EXTRATERRITORIALITY DOES NOT MAKE SENSE IN CIVIL CASES

Our roadmap reveals the extensive areas of confusion and uncertainty attending extraterritoriality analysis: How does one determine a statute's focus? If Congress has provided a venue instruction for criminal cases, must a statutory focus be identified? Is extraterritoriality an element of the crime that must be proved beyond a reasonable doubt to the jury? Should courts continue to apply the *Charming Betsy* canon of construction? Does the presumption apply in criminal cases? What is the status of *Bowman*? Is there a due process limit on extraterritorial prosecutions, can it be invoked by non-U.S. nationals and, if so, what is the applicable due process standard? All that is clear is that the Court wishes for the lower courts to apply a strong—indeed case-determinative—presumption against extraterritoriality, at least in civil cases. But does this presumption make sense?

The Court's creation of a presumption founded only on subjective territoriality in *Aramco* was a departure from the weight of precedent and a curious and unexplained throwback to early nineteenth century conceptions equating sovereignty with subjective territoriality—conceptions that have been otherwise abandoned as unworkable or undesirable in areas ranging from conflicts of laws³³⁹ to civil procedure.³⁴⁰ The international community has long recognized that a State may legitimately extend its jurisdiction beyond its borders where effects, nationality, passive personality, protective, and universal jurisdictional principles permit.³⁴¹ The United States has been famously aggressive in its extension of U.S. laws abroad, employing one or more of these principles.³⁴² The Court's insistence, then, that congressional intent be measured only against subjective territorial jurisdiction, to the extent that it is grounded in antique notions of territorial sovereignty, is outmoded.

337. *But see* United States v. Ali, 71 M.J. 256, 267–68 (C.A.A.F. 2012) (alien defendant who committed crime overseas has no Fifth or Sixth Amendment rights in U.S. court martial).

338. *See* United States v. Perlaza, 439 F.3d 1149, 1168–69 (9th Cir. 2006); *see also* United States v. Ali, 885 F. Supp. 2d 55 (D.D.C. 2012) (dismissing on due process grounds), *rev'd*, 718 F.3d 929 (D.C. Cir. 2013) (reversing due process determination).

339. *See* Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 189–98 (1991).

340. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

341. *See* Born, *supra* note 19, at 61 (“This century’s profound international political, economic, technological, and legal transformations have significantly undermined the strict territoriality presumption that prevailed in the nineteenth century conceptions of public international law.”).

342. *See, e.g., supra* note 43.

What then justifies the presumption against extra(subjective)territoriality upon which the modern Court is so insistent? Instead of adopting a default presumption, why not use ordinary tools of construction—including reference to the policies the law was enacted to achieve—to answer extraterritoriality contests?³⁴³ The Court’s explanation for why the presumption against extraterritoriality is necessary has changed over time and includes three distinct rationales.

A. CONFLICT WITH FOREIGN LAW

Historically, the presumption, as well as the *Charming Betsy* canon,³⁴⁴ was justified as necessary “to protect against unintended clashes between our laws and those of other nations which could result in international discord.”³⁴⁵ Where one State seeks to enforce its laws on non-nationals who acted on another sovereign’s territory, there is potential for conflict and political repercussions.³⁴⁶ Overzealous application of U.S. statutes overseas may provoke retaliation and impose other costs.³⁴⁷ But I join most commentators in concluding that the conflict-avoidance rationale is ultimately unpersuasive.

If the object is to create a presumption that mirrors Congress’s intentions, it is notable that Congress has not demonstrated a great concern about conflicts. Conflict with other States is most likely when the United States is exercising effects jurisdiction with respect to economic regulation.³⁴⁸ Yet Congress has responded to the courts’ reading of statutes regulating economic matters in important regulatory areas—including areas, such as antitrust and securities law enforcement, most likely to generate international consternation—by expressly endorsing the conduct-and-effects test. For example, Congress codified lower courts’ application of the conduct-and-effects test in antitrust cases relating to export activity in the FTAIA.³⁴⁹ Congress responded to *Morrison* by amending the jurisdictional provisions in various securities statutes with the evident intention of reinstating the conduct-and-effects test in government-initiated securities fraud actions.³⁵⁰

This may well be because avoiding potential conflicts with other States is not at the top of most politicians’ list of priorities. As Professor Born has argued, the presumption against extraterritoriality “unduly elevates Congress’s presumed desire to avoid conflicts with foreign laws over other important legislative goals. Much more important, in the real world, are legislators’ desires to assist local

343. See Kramer, *supra* note 339, at 213.

344. See generally Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998) (discussing Court’s decision not to construe a congressional Act to violate the law of nations if an alternative exists).

345. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); see also *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957).

346. See, e.g., Stigall, *supra* note 19, at 325–30.

347. See Parrish, *supra* note 2, at 1459 (discussing retaliation); *id.* at 1489–93 (discussing costs).

348. See, e.g., Kramer, *supra* note 2, at 756.

349. 15 U.S.C. § 6a (2000).

350. See *supra* notes 191–94 and accompanying text.

constituencies, to further domestic legislative programs and interests, and to make statements of political or moral principle.”³⁵¹

The modern Court’s insistence on a presumption wedded only to subjective territoriality is also patently overprotective if the aim is to avoid unnecessary jurisdictional conflicts. As discussion of the Court’s pre-1991 caselaw demonstrates, the Court long thought that conflicts could be avoided if *any* of international law’s prescriptive principles justified extraterritorial applications of the statute. It is only after 1991 that the Court determined that only subjective territoriality could effectively prevent unnecessary clashes with foreign jurisdictions. Where the United States is acting within the parameters of international law’s prescriptive principles in pursuing a prosecution, other States do not have much basis for complaint, given that they, too, regularly employ these principles.

Indeed, the Court’s exclusive focus on subjective territoriality ignores that conflict may eventuate even if U.S. statutes have no extraterritorial purchase. Many States employ all the prescriptive principles, including effects jurisdiction and expansive nationality and passive personality jurisdiction.³⁵² Because other States may, consistent with international law norms, apply their laws extraterritorially—for example, to their own nationals even if those nationals are acting on U.S. territory—the presumption may well be ineffective in preventing conflicts.³⁵³

The modern presumption also overstates the degree to which the extraterritorial application of U.S. laws creates conflict. Most other States, for example, do not seem to object to the U.S. enforcement priority that produces the greatest number of extraterritorial convictions: prosecutions under U.S. anti-drug trafficking laws.³⁵⁴ And although many States submitted amicus briefs in *Morrison* arguing against allowing extraterritorial application of the civil securities fraud provisions, one must recall that in *RJR Nabisco* it was the European Community that sought damages in a civil RICO case based on U.S. companies’ alleged activities abroad. In that case, the European Community aggressively fought to have U.S. law apply overseas.

351. Born, *supra* note 19, at 76; *see also* Dodge, *supra* note 2, at 116–17.

352. *See, e.g.*, TASK FORCE REPORT, *supra* note 42, at 142.

353. *See* Clopton, *supra* note 19, at 12.

354. The Maritime Drug Law Enforcement Act (MDLEA) makes it a crime for persons, while on U.S. vessels or “vessels subject to the jurisdiction of the United States,” to manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance. 46 U.S.C.A. § 70503 (West 2016) (formerly 46 U.S.C. app. § 1903(a) (2000)). The MDLEA states that a “‘vessel subject to the jurisdiction of the United States’ includes . . . a vessel in the territorial waters of a foreign nation if the nation consents to the enforcement of United States law by the United States.” *Id.* § 70502(c)(1)(E) (2012). States regularly consent to U.S. jurisdiction under the MDLEA. *See, e.g.*, *United States v. Angulo-Hernandez*, 565 F.3d 2, 11 (1st Cir. 2009) (Bolivia consented); *United States v. Greer*, 285 F.3d 158, 175 (2d Cir. 2002) (Canada consented); *United States v. Perez-Oviedo*, 281 F.3d 400, 403 (3d Cir. 2002) (Panama consented); *United States v. Bustos-Useche*, 273 F.3d 622, 627 (5th Cir. 2001) (Panama consented); *United States v. Cardales*, 168 F.3d 548, 552 (1st Cir. 1999) (Venezuela consented); *United States v. Davis*, 905 F.2d 245, 250 (9th Cir. 1990) (United Kingdom consented); *United States v. Robinson*, 843 F.2d 1, 4 (1st Cir. 1988) (Panama consented).

It is also notable that the Court draws no distinction in its application of the presumption between cases in which the U.S. law would be applied to U.S. nationals abroad as opposed to non-nationals. It is clear that there is far greater potential for conflict in the latter cases than the former. And, although Congress traditionally has been relatively reluctant to invoke nationality jurisdiction, it does not seem reasonable to apply a global presumption that Congress is generally unconcerned with the conduct of its citizens—and government personnel—overseas.³⁵⁵ If U.S. citizens' criminal actions abroad are presumptively immune from the reach of federal criminal statutes, this can create the same political difficulties and conflicts that the Supreme Court says it wishes to avoid, particularly if the perpetrator returns to the United States and cannot—as is not uncommon—be extradited.

Finally, the conflict-avoidance rationale carries with it a whiff of the disingenuous. The Court does not actually inquire into the potential for international conflict in every case. Indeed, the Court has recognized that this concern does not arise in all cases in which it chooses to apply the presumption.³⁵⁶ The Court has applied the presumption in cases where it knew that no conflict was possible.³⁵⁷ And it has failed to apply the presumption where conflicts might well eventuate.³⁵⁸ This imprecision is not costless. Where there is no potential for conflict, application of the strong presumption may result in cases where no State's law will apply to objectionable conduct (for example, in Antarctica³⁵⁹ and on U.S. ships on the high seas³⁶⁰). And the Court's failure to apply U.S. law to situations where other States' laws would not apply may actually create conflicts. For example, in *Sale v. Haitian Centers Council, Inc.*, the Court refused to apply restrictions that Congress adopted to comply with U.S. treaty obligations to U.S. personnel on a U.S. vessel on the high seas.³⁶¹ This result disappointed, rather than satisfied, some members of the international community.³⁶²

B. DOMESTIC CONCERNS

Most recently, the Court has relied on a different rationale, that “Congress ordinarily legislates with respect to domestic, not foreign, matters.”³⁶³ This rationale fails for two reasons.

355. See, e.g., *Knox*, *supra* note 2, at 383–84.

356. See, e.g., *RJR Nabisco, Inc. v. European Cmty*, 136 S. Ct. 2090, 2100 (2016); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993); *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993).

357. See *Sale*, 509 U.S. 155, 173–74; *Smith*, 507 U.S. 197, 203–05.

358. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 794–99 (1993); see also *supra* notes 152–57.

359. *Smith*, 507 U.S. at 203–05.

360. *Sale*, 509 U.S. 173–74.

361. *Id.* at 159.

362. See *Knox*, *supra* note 2, at 382 & n.200.

363. *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247, 255 (2010); see also *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454–55

First, one must, in light of current conditions, question the fundamental assumption here—that is, that Congress ordinarily is concerned only with U.S. domestic matters. This may have been true in 1991 when the modern presumption was created. But, especially in the criminal sphere, it is doubtful that Congress is concerned only with conduct occurring on U.S. soil given the explosion in cross-border criminality.³⁶⁴

Second, and more fundamentally, the Supreme Court's limitation of its definition of "domestic matters" solely to conduct in U.S. territory does not reflect reality.³⁶⁵ Even if one assumes that Congress is only concerned with circumstances affecting the territory of the United States, "[f]oreign actions can and often do affect conditions within U.S. borders so that, at least under certain conditions, legislation must address foreign conduct in order to regulate domestic concerns."³⁶⁶ Congress knows conduct that occurs abroad may often have concrete and seriously pernicious effects in U.S. territory and on the voting public. Its concern in this regard is demonstrated by Congress's repeated overruling of judicial efforts to limit the geographic reach of statutes to conduct occurring within U.S. territory and its endorsement of the conduct-and-effects test.³⁶⁷ Indeed, Professor Dodge makes a persuasive case that Congress is primarily concerned with domestic effects and thus the presumption should not apply at all when such effects are present.³⁶⁸

C. LEGISLATIVE EFFICIENCY

The third modern rationale for the Court's strong presumption is the belief that Congress knows the Court will employ the presumption where a statute is geoambiguous: Congress "legislates against the backdrop of the presumption against extraterritoriality."³⁶⁹ This, the Court asserts, "preserv[es] a stable background against which Congress can legislate with predictable effects."³⁷⁰ This rationale is questionable first because it is factually inaccurate. As discussed above, the strong presumption against extraterritoriality tied only to subjective territorial jurisdiction has been the "stable background" against which the Court assumes Congress has acted for only the last twenty-five years. Many of the statutes whose geographical scope is being tested were enacted before 1990.

(2007); *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

364. *See, e.g.*, *Turley*, *supra* note 2, at 657–59.

365. *See, e.g.*, *Clopton*, *supra* note 19, at 15.

366. *Knox*, *supra* note 2, at 384.

367. *See supra* notes 191–94 and accompanying text (Dodd–Frank and *Morrison*). Congress also overruled *Aramco*, 499 U.S. 244, by amending Title VII to extend protection to U.S. citizens employed abroad. *See Civil Rights Act of 1991*, Pub. L. No. 102-166, § 109(a), 105 Stat. 1071, 1077 (codified as amended at 42 U.S.C. § 2000e(f) (2012)) ("With respect to employment in a foreign country," the term "employee" includes "an individual who is a citizen of the United States.").

368. *See Dodge*, *supra* note 2, at 118–19.

369. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *see also Smith v. United States*, 507 U.S. 197, 204 (1993).

370. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 261 (2010).

Second, the implicit assumption underlying this rationale is that the presumption is value neutral and that, like “driving a car on the right-hand side of the road,” it “is not so important to choose the best convention as it is to choose one convention and stick to it.”³⁷¹ Professor Eskridge has demonstrated that this rationale cannot withstand scrutiny. To justify the presumption against extraterritoriality on this basis, three conditions must be satisfied: (1) Congress must be “institutionally capable of knowing and working from an interpretive regime that the Court is institutionally capable of devising and transmitting in coherent form,” (2) the application of the interpretive regime must be “transparent” to Congress, and (3) the interpretive regime “should not change in unpredictable ways.”³⁷² Professor Eskridge rightly concludes that although the presumption established in *Aramco*³⁷³ could perhaps be said to satisfy the first condition, it failed the second, and “dramatically flunk[ed]” the third.³⁷⁴ And Professor Eskridge is not alone; many question whether the presumption is sufficiently transparent, coherent, and consistently applied to be a useful guide to Congress.³⁷⁵

Finally, no one is obviously advantaged by a decision to drive on the right side of the road as opposed to the left side. The presumption against extraterritoriality, however, is not similarly value neutral.³⁷⁶ The presumption advantages those, like transnational companies, who prefer that regulations be as limited in geographic scope as possible. The presumption works to their advantage because it puts the heavy burden of persuading Congress to overrule the Court’s geographic limitation on advocates of regulation.³⁷⁷ Many commentators believe that, in view of these allocational effects, the presumption simply reflects the Court’s normative commitment to traditional territorial sovereignty or its distaste for certain types of regulation.³⁷⁸ Contemporary evidence of such distaste may be found in *Morrison* in which Justice Scalia asserted that one should be “repulsed” by the potential adverse consequences of a contrary ruling.³⁷⁹

D. SEPARATION OF POWERS

A fourth rationale for the presumption comes from academia. Professor Bradley asserts that “the determination of whether and how to apply federal legislation to conduct abroad raises difficult and sensitive policy questions that tend to fall outside both the institutional competence and constitutional prerogatives of

371. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 277 (1994).

372. *Id.* at 278.

373. 499 U.S. 244 (1991).

374. ESKRIDGE, *supra* note 371, at 278.

375. *See, e.g.*, KNOX, *supra* note 2, at 388–96.

376. ESKRIDGE, *supra* note 371, at 279.

377. Dodge, *supra* note 2, at 122–23; *see also* Turley, *supra* note 2, at 661–62.

378. *See, e.g.*, ESKRIDGE, *supra* note 371, at 283; Brillmayer, *supra* note 19, at 17.

379. 561 U.S. 247, 270 (2010).

the judiciary.”³⁸⁰ One difficulty with this argument is that it assumes its conclusion—that is, that Congress actually has a default intention with respect to geo-ambiguous statutes, that the intention is to limit their application to U.S. soil, and that the Court must honor this intention. But “in the vast majority of cases, legislatures have no actual intent on [extra]territorial reach.”³⁸¹ Given that the presumption is supposed to apply when actual congressional intent is absent—or ambiguous—“by definition it is ambiguous whether applying the statute territorially or extraterritorially would be the ‘activist’ position.”³⁸² And one may legitimately question whether the presumption, which “always sacrific[es] legislative aims in order to avoid conflicts with foreign law,” is truly the best way to limit judicial intrusion.³⁸³ In sum, as Professor Dodge has argued,

[A] court attempting to carry out congressional intent should apply a statute extraterritorially whenever doing so would advance the domestic purposes that Congress sought to achieve with the statute. To constrain the extraterritorial application of a statute on the basis of a court’s intuition that conflict with foreign law is undesirable is—to borrow a phrase—judicial activism.³⁸⁴

Congress can “correct” the Court’s mistaken limitation of the scope of a geo-ambiguous statute, but the reverse is true as well. Professor Dodge queries whether the Court should apply a presumption designed to “force Congress to

380. Bradley, *supra* note 2, at 516; *see also* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115–16 (2013); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455 (2007); *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004). Arguably this rationale encompasses two concerns: judicial interference with the executive’s conduct of foreign policy, and judicial meddling with congressional prerogatives in determining the scope of federal statutes. *See, e.g.*, *Sale v. Haitian Cents. Council, Inc.*, 509 U.S. 155, 188 (1993). In criminal cases, there is no legitimate concern over interference with executive prerogatives because it is, of course, the executive who determines whether to launch a given case. The Department of Justice’s own policies reflect that it recognizes the sensitivity of transnational prosecutions and applies increased scrutiny to their appropriateness. For example, only money laundering prosecutions that involve extraterritorial application of the relevant statutes require Main Justice approval. *See* U.S. Dep’t of Justice, *Offices of the United States Attorneys, U.S. Attorney’s Manual* § 9-105.300(1) (2007).

381. Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 393 (1980). As Judge Friendly acknowledged in the securities context in *Bersch v. Drexel Firestone, Inc.*, “[t]he Congress that passed these extraordinary pieces of legislation in the midst of the depression could hardly have been expected to foresee the development of offshore funds thirty years later . . . Our conclusions rest on . . . our best judgment as to what Congress would have wished if these problems had occurred to it.” 519 F.2d 974, 993 (2d Cir. 1975); *see also* *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 663–64 (7th Cir. 1998); *Robinson v. TCI/US W. Cable Comms., Inc.*, 117 F.3d 900, 904–05 (5th Cir. 1997) (describing the court’s task of determining jurisdiction as “‘fill[ing] the void’ created by a combination of congressional silence and the growth of international commerce since the Exchange Act was passed”) (quoting *MCG, Inc. v. Great W. Energy Corp.*, 896 F.2d 170, 173 (5th Cir. 1990)); *Cont’l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 415–16 (8th Cir. 1979) (recognizing that its decision “in favor of finding subject matter jurisdiction is largely based upon policy considerations”); *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977) (stating that “it should be recognized that this case in a large measure calls for a policy decision”).

382. Clopton, *supra* note 19, at 16.

383. Dodge, *supra* note 2, at 120.

384. *Id.*

reveal its preferences by adopting a rule that Congress would not want,” noting that this argument seems strongly counter-majoritarian and contrary to separation of powers.³⁸⁵ Finally, “if the presumption is intended to respect the decisions of the political branches—legislative and executive—it needs work.”³⁸⁶ The strength of the modern presumption is such that courts have rejected the views of the executive branch departments or agencies that interpret and apply the statutes at issue.³⁸⁷ Similarly, the Court’s insistence that congressional intent to apply federal law overseas must be clear means that it consistently finds less crystalline indicators to be insufficient, thus arguably foiling Congress’s actual intention.³⁸⁸

* * *

The above survey demonstrates that none of the rationales for the modern presumption convincingly justify its use, at least in civil cases. In particular, the primary justification for the presumption rests on the assumption that Congress always wishes to avoid potential jurisdictional conflicts with other States. We know, based on history, that this is incorrect. If this were truly the goal, it would make more sense to employ the *Charming Betsy* canon and test statutes against all the prescriptive principles. Only when a given geographical expansion of a statute’s scope cannot be justified by the international law principles to which all States adhere could another sovereign have a legitimate objection to a jurisdictional conflict.

The exclusive focus on territorial conduct is neither necessary nor particularly sensible in a world in which much of modern communication and commerce is conducted digitally, “in the air,” so to speak, rather than in a specific geographic location.³⁸⁹ The pernicious effects of the conduct may well be the primary evil that a cause of action or criminal prohibition seeks to address, and it therefore makes sense that a “territorial” analysis identifying the location of effects is just as relevant as conduct.³⁹⁰ Returning to the hypothetical with which this Article began, the site of the computer hackers’ keyboard or the relevant server farm seems to be less important than the fact that the cybercrime was intended to affect, and did affect, the functioning of vital networks, such as the British Health Service. In many circumstances, the site of the conduct ought not trump the place of the effects in sorting out appropriate criminal jurisdiction.

My own view is that it makes sense to revert to the Court’s historical practice of (1) determining, with reference to normal canons of statutory interpretation, the appropriate geographical scope of a statute in light of the statute’s policy

385. *Id.*

386. Clopton, *supra* note 19, at 17.

387. *See, e.g.*, *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 272 (2010); *EEOC v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244, 260 (1991); *Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 846 (9th Cir. 2012).

388. *See, e.g.*, *ESKRIDGE*, *supra* note 372, at 282.

389. *See* Buxbaum, *supra* note 42, at 631–36, 673–74.

390. *See, e.g.*, *Dodge*, *supra* note 2, at 118; Donald T. Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation*, 22 OHIO ST. L.J. 586, 594 (1961) (“Often the evil is more the consequence of the activity than the activity itself.”).

objectives and (2) applying the *Charming Betsy* canon as a means of determining whether the extraterritorial reach of a statute would offend international law and thereby give other States a real reason for grievance. One advantage of this approach is that it can be justified as consistent with congressional expectations. Much of geoambiguous legislation was enacted prior to 1991 and, in most cases, Congress probably had no intention at all with respect to the geographical scope of the statute. Prior to 1991, the Court often adopted the interpretative approach I have suggested. Granted, the Court did not invariably do so and thus its precedents may not pass Professor Eskridge's test with flying colors. But it certainly makes more sense than applying the post-1991 presumption against anything other than subjective territoriality to discern Congress's intention in passing legislation from 1818 through 1990.

VI. THE PRESUMPTION OF EXTRATERRITORIALITY OUGHT TO APPLY TO CRIMINAL AND HYBRID STATUTES TO OPERATIONALIZE THE LEGALITY PRINCIPLE AND SEPARATION OF POWERS REQUIREMENTS

In the Third Restatement, the American Law Institute appeared to recognize that, in criminal cases, an elevated standard should be applied to test whether a given statute applies extraterritorially.³⁹¹ And some courts have questioned whether the same interpretive rules ought to apply in civil and criminal cases in reliance on *United States v. Bowman*.³⁹² The majority view, however, is that the same interpretive rules apply for purposes of both public and private enforcement.³⁹³ The scholarly literature on the presumption also assumes that there is no distinction between its wisdom in criminal and civil cases other than that in criminal cases separation of powers concerns relating to judicial intrusion on executive prerogatives are not as great, given that the executive launches prosecutions.³⁹⁴ The tentative draft of the Fourth Restatement disclaims any difference between civil and criminal cases.³⁹⁵ However, I believe that there are fundamental differences between civil and criminal enforcement such that criminal (and hybrid)

391. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. f (AM. LAW INST., 1987) (“[I]n the case of regulatory statutes that may give rise to both civil and criminal liability, such as United States antitrust and securities laws, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject conduct outside the state’s territory to its criminal law should be found only on the basis of express statement or clear implication.”).

392. See *supra* notes 17, 292–95 and accompanying text.

393. See, e.g., *United States v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1, 6–7 (1st Cir. 1997); see also RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 reporters’ note 4 (AM. LAW INST., Tentative Draft No. 3, 2017).

394. *But see* Clopton, *supra* note 19 (arguing that civil, criminal, and administrative law statutes should be treated differently).

395. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 cmt. d (AM. LAW INST., Tentative Draft No. 2, March 21, 2016); *id.* § 203 reporters’ note 4 (Tentative Draft No. 3 2017) (“Unless a contrary congressional intent appears, the geographic scope of a statute is the same for the purposes of both public and private enforcement.”).

statutes demand application of the presumption, whereas—as argued above—civil cases do not.

It is inarguable that a number of doctrines employed regularly in transnational civil litigation do not apply in the criminal sphere:

Neither civil nor common law systems appear to apply the doctrine of *forum non conveniens* or *lis alibi pendens* to criminal cases, and there is no clear authority that the doctrine of “comity,” which “counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law,” applies generally in the criminal context.³⁹⁶

Conflicts principles are inapplicable because U.S. courts may not apply foreign criminal statutes in domestic courts or enforce foreign criminal judgments.³⁹⁷ In response to constitutional imperatives surrounding venue, Congress and the courts have decreed where criminal violations are “committed” so the *Morrison* “focus” test is (in my view) irrelevant in criminal cases.

Perhaps these differences are not pertinent to assessments of whether a presumption should apply. What are relevant, however, are foundational separation of powers and legality principles that are central in criminal adjudication but that are not applicable in civil cases. These principles dictate that the applicable canons of construction in civil and criminal cases must be different. In criminal but not civil cases, the rule of lenity and the void-for-vagueness doctrines apply. The *Chevron* doctrine also arguably does not apply in criminal cases, although this has not been authoritatively settled.³⁹⁸

Our constitutional scheme mandates that the power to define criminal offenses and prescribe criminal punishment “resides wholly with the Congress.”³⁹⁹ According to the Supreme Court, federal crimes “are solely creatures of statute”⁴⁰⁰; there are no federal common law crimes.⁴⁰¹ The prohibition on common law making in the criminal realm is founded in a number of basic principles—separation of powers being one. “Enlightenment theoreticians decreed that liberty is most secure where political power is fractured and separated.”⁴⁰² It would be a dangerous concentration of power for life tenured judges to both propound the

396. See TASK FORCE REPORT, *supra* note 42, at 168 n.119 (quoting *Nippon*, 190 F.3d at 8–9).

397. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 422(1), 483, & reporters’ note 3 (AM. LAW INST. 1987).

398. See, e.g., *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., dissenting from denial of certiorari); *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027 (6th Cir. 2016) (Sutton, J., dissenting), *rev’d on other grounds*, 137 S. Ct. 1562 (2017).

399. *Whalen v. United States*, 445 U.S. 684, 689 (1980).

400. *Liparota v. United States*, 471 U.S. 419, 424 (1985).

401. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

402. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 202 (1985) (criticizing rule of strict construction because it does not serve stated goals); see also Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345 (1994). *But see generally* Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57 (1998).

law and to preside over its interpretation and administration. More fundamentally, “[a]s the branch most directly accountable to the people, only the legislature could validate the surrender of individual freedom necessary to formation of the social contract.”⁴⁰³

The bar on judicial crime-creation is also founded on the first principle of criminal law—the principle of legality—which outlaws the retroactive definition of criminal offenses.⁴⁰⁴

It is condemned because it is retroactive and also because it is judicial—that is, accomplished by an institution not recognized as politically competent to define crime. Thus, a fuller statement of the legality ideal would be that it stands for the desirability in principle of advance legislative specification of criminal misconduct.⁴⁰⁵

One of the ways the legality principle is operationalized is through the rule of strict construction, often referred to as the rule of lenity. The rule of lenity requires that “when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before [the Court chooses] the harsher alternative, to require that Congress should have spoken in language that is clear and definite.”⁴⁰⁶ The rule is founded first on notice concerns: “a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.”⁴⁰⁷ Second, legitimacy concerns reflected in separation of powers principles justify lenity. “[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.”⁴⁰⁸ “Lenity promotes th[e] conception of legislative supremacy not just by preventing courts from covertly undermining legislative decisions, but also by forcing Congress to shoulder the entire burden of criminal lawmaking even when it prefers to cede some part of that task to courts.”⁴⁰⁹

The other arm of the legality principle is the due process vagueness doctrine, which “requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”⁴¹⁰ “[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning

403. Jeffries, *supra* note 402, at 202.

404. See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 79–80 (1968).

405. Jeffries, *supra* note 402, at 190.

406. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952).

407. *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

408. *United States v. Bass*, 404 U.S. 336, 348 (1971).

409. Kahan, *supra* note 402, at 350.

410. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

and differ as to its application, violates the first essential of due process of law.”⁴¹¹ The vagueness doctrine’s “connection to legality is obvious: a law whose meaning can only be guessed at remits the actual task of defining criminal misconduct to retroactive judicial decision making.”⁴¹²

The legality principle and its foot soldier, the rule of lenity, should be applicable to geoambiguous statutes. As discussed above, I believe that at least the factual circumstances underlying extraterritoriality, as a “merits” question, must now be considered an element of the crime charged. Where there is ambiguity regarding this element, the rule of lenity requires that it be resolved in the defendant’s favor—that is, the statute should not be applied extraterritorially.

Some might argue that the vagueness doctrine may also be applicable. Courts have not been explicit in distinguishing vagueness from ambiguity in criminal cases, but the distinction is important in terms of remedy. The Supreme Court sometimes undertakes, under the rubric of the rule of lenity, to fix ambiguous statutes rather than to strike them as violations of due process and send them back for legislative definition, as it would vague statutes. A rule is vague when the statute defines “not a neatly bounded class but a distribution about a central norm.”⁴¹³ Ambiguity presents a more limited problem and is present when a term or phrase has two competing applications or connotations, and the Court is tasked with selecting the most defense-favorable application under the rule of lenity.⁴¹⁴ In my view, the issue of the extraterritorial application of a statute implicates ambiguity because it can generally be resolved with a yes or no answer, but courts may conclude that vagueness is also implicated.

This analysis is complicated by the fact that a number of important statutes that have abundant potential transborder applications are hybrids—that is, they can be enforced both civilly and criminally. The rule of lenity and the vagueness doctrine generally are not employed in construing civil statutes where concerns about notice and legislative supremacy do not have the same sway. The Court has occasionally held that where a statute is capable of both civil and criminal enforcement, lenity ought to be applied,⁴¹⁵ but it has not done so in extraterritoriality cases concerning hybrid statutes. “Absent a clear indication to the contrary, U.S. courts have construed the geographic scope of such statutes to be the same in each context.”⁴¹⁶

411. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

412. Jeffries, *supra* note 402, at 196.

413. See E. ALLAN FARNSWORTH, *CONTRACTS* 441 (Aspen Publishers 4th ed. 2004).

414. *Id.*

415. See, e.g., *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 408–09 (2003); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517–18 (1992) (plurality opinion); *Crandon v. United States*, 494 U.S. 152, 158 (1990); *FCC v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954). But see *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687, 704 n.18 (1995). See generally Jonathan Marx, *How to Construe a Hybrid Statute*, 93 VA. L. REV. 235 (2007); Margaret V. Sachs, *Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934*, 2001 U. ILL. L. REV. 1025.

416. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 cmt. d (AM. LAW INST., Tentative Draft No. 2, March 21, 2016).

Where hybrid statutes are at issue, the extraterritoriality question should not hinge on the happenstance of whether the first case to raise the issue before the Supreme Court involved a civil or criminal application of the statute. In the absence of another means of ensuring that Congress defines the relevant criminal prohibition in a way that provides advance notice to defendants, the presumption against extraterritoriality serves much the same function: it requires Congress to specify, in advance, the extraterritorial application of a statute. The presumption, then, should be applied to test the extraterritoriality of both criminal and hybrid statutes as a means of respecting the legality principle and as a proxy for the rule of lenity.

Some courts have responded to “notice” concerns through a due process analysis, which normally comes at the conclusion of the analytical roadmap traced above. My view is that relegating this issue to due process analysis is a mistake for at least three reasons.

The first is, in part, unabashedly instrumental. Many aliens are the subjects of transnational criminal prosecutions and there is a real question of whether they can claim due process rights. I, for one, do not understand why foreign corporations can claim due process rights in civil cases—and thus are able to contest a U.S. state court’s choice of law⁴¹⁷ or demand that minimum contacts with the United States sufficient to satisfy constitutional requirements be demonstrated⁴¹⁸—but individual (alien) criminal defendants whose liberty is at stake may not.⁴¹⁹

Some contend that “it may be logically awkward for a defendant to rely on what could be characterized as an extraterritorial application of the U.S. Constitution in an effort to block the extraterritorial application of U.S. law.”⁴²⁰ But I believe that it is far more awkward to assert jurisdiction to put a foreign national in a U.S. jail for conduct committed wholly outside the United States, while not affording that defendant even minimal constitutional protections. In this, I am with Justice Brennan in believing that an alien should be entitled to due process protection:

[O]ur Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for purposes of enforcing our laws. He has become, quite literally, one of the governed. Fundamental fairness and the ideals underlying our Bill

417. See, e.g., *Home Ins. Co. v. Dick*, 281 U.S. 397, 411 (1930) (Fourteenth Amendment protections “extend[] to aliens” in choice of law dispute).

418. See, e.g., *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal.*, 480 U.S. 102, 113 (1987); *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 413 (1984).

419. See *GSS Group Ltd. v. Nat’l Port Auth.*, 774 F. Supp. 2d 134, 139 (D.D.C. 2011) (“It is not clear why foreign defendants, other than foreign sovereigns, should be able to avoid the jurisdiction of United States courts by invoking the Due Process Clause when it is established in other contexts that nonresident aliens without connections to the United States typically do not have rights under the United States Constitution.”), *aff’d*, 680 F.3d 805, 815–16 (D.C. Cir. 2012).

420. Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 338; see also *United States v. Ali*, 718 F.3d 929, 943 (D.C. Cir. 2013) (quoting Bradley).

of Rights compel the conclusion that when we impose “societal obligations,” such as the obligation to comply with our criminal laws, on foreign nationals, we in turn are obliged to respect certain correlative rights If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them.⁴²¹

In any case, notice concerns in this context should not be considered “only” individual due process rights. Rather, they are based on structural constitutional considerations and foundational principles of criminal law and thus should be met without regard to the individual at issue.

Second, when courts answer the notice question in the due process context, they consult the wrong sources. Instead of focusing on whether defendants had notice of the content and applicability of U.S. law, they instead reference international law sources.⁴²² I do not think it appropriate to task individual defendants with effective notice of the international law governing prescriptive principles or the content of treaties that require State parties to criminalize defined conduct. The Second Restatement explained that prescriptive jurisdiction principles determine “whether the action of a state in prescribing or enforcing its laws gives to another state a claim for violation of its rights.”⁴²³ The Third Restatement also noted that “[i]nternational law deals with the propriety of the exercises of jurisdiction by a state, and the resolution of conflicts of jurisdiction between states.”⁴²⁴ These principles are not designed, then, to control the actions of individuals. And, at least in the United States, it is generally recognized that international law does not create rights for, or impose obligations on, individuals. Treaties, in particular, are covenants that concern only the States party to them and do not generally create rights enforceable by “third-party” individuals.⁴²⁵ As a matter of equity, it seems questionable to hold that individuals are largely irrelevant to treaties and most norms of international law but that those same individuals are somehow on notice that they may be haled into criminal court by virtue of the content of international law. Unless these dictates are embodied in domestically-binding law, they do not serve to give effective notice.

Third, and most important, these notice related doctrines do not respond to lenity’s imperative that only Congress has the legitimacy to dictate the content of criminal norms. Justice Scalia made this point in a dissent from denial of

421. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 284 (1990) (Brennan, J., dissenting) (internal citation omitted).

422. *See supra* notes 321–25.

423. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES Part I, Intro. Note (AM. LAW INST. 1965); *see also id.* § 8 (“Action by a state in prescribing or enforcing a rule that it does not have jurisdiction to prescribe or jurisdiction to enforce, is a violation of international law, giving rise to a claim . . .”).

424. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 cmt. b (AM. LAW INST. 1987); *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 cmt. a (AM. LAW INST., Tentative Draft No. 3, 2017).

425. *See, e.g., Medellín v. Texas*, 552 U.S. 491, 506 n.3 (2008).

certiorari in *Whitman v. United States*.⁴²⁶ *Whitman* concerned a related issue—whether the *Chevron* doctrine’s deference to administrative agencies ought to apply to statutes that have criminal application. The question presented, in Justice Scalia’s view, was: “Does a court owe deference to an executive agency’s interpretation of a law that contemplates both criminal and administrative enforcement?”⁴²⁷ His emphatic view was that it does not.

Justice Scalia cited a number of cases in which the Court had held that, where a hybrid statute is at issue, the rule of lenity ought to be applied even in civil cases.⁴²⁸ He then sought to distinguish a footnote in the one case that rejected his view, *Babbitt v. Sweet Home Chapter of Communities for Greater Oregon*.⁴²⁹ That footnote stated that the regulation at issue was clear enough to fulfill the rule of lenity’s purpose of providing “fair warning” to would-be-violators.⁴³⁰ Justice Scalia, however, correctly argued that even if the rule of lenity’s purpose of providing fair warning to would-be-violators were satisfied, “that is not the only function performed by the rule of lenity; equally important, it vindicates the principle that only the *legislature* may define crimes and fix punishments. Congress cannot, through ambiguity, effectively leave that function to the courts—much less to the administrative bureaucracy.”⁴³¹

VII. A PLEA TO CONGRESS

As detailed above, there is no convincing reason for a general presumption against extraterritoriality in civil cases. It is appropriate to apply such a presumption in cases implicating criminal and hybrid statutes in service of the legality principle and as a surrogate for the rule of lenity. The status quo in the courts, then, makes no sense: the presumption is applied where it should not be and is ignored where it is required. Add to that the additional uncertainties and questions arising out of existing case law detailed above, and what we have is an increasingly vital area of the law that requires immediate attention. Most of the relevant scholarship exhorts the courts to attend to this mess. My belief is that attempting to sort out all these issues through statute-by-statute litigation is both patently inefficient and unfair to the litigants who cannot know whether their conduct was actually illegal until the Supreme Court decides their cases.

This wasteful and unfair litigation is also unnecessary because Congress can resolve so many of these issues through comprehensive legislation. Congress need not revise each statute to make its wishes clear regarding what circumstances, if any, warrant its extraterritorial application. Instead, Congress can create a general code section that instructs courts about the geographic scope of particular

426. 135 S. Ct. 352 (2014).

427. *Id.* at 353.

428. *See supra* note 415.

429. 515 U.S. 687 (1995).

430. *Id.* at 704 n.18.

431. *Whitman*, 135 S. Ct. at 354 (citing *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)).

statutes or particular types of statutes. This is not pie-in-the-sky: other States have such a code provision.⁴³² The work can begin by referencing the extraterritoriality provision drafted as part of a (failed) effort to revise the entire criminal code.⁴³³ This draft requires updating, but much can be learned from a comprehensive analysis of the statutes in which Congress has expressly indicated its intentions with respect to extraterritoriality. Such an analysis may yield a taxonomy of the types of prohibitions that Congress believes warrant expansive geographical application.

Congress should also comprehensively address the “where” question—that is, what it deems a territorial or domestic application of a statute as opposed to an extraterritorial one. In criminal cases in which Congress has provided directions regarding venue—evidencing where it thinks the crime was “committed”—courts ought to ignore the Court’s focus test and instead rely on the venue provision. Many statutes, however, do not expressly address venue. With respect to such statutes, Congress should consider creating a generally applicable provision that makes known its wishes in this respect. Again, this is not an impossible dream. The Model Penal Code has just such a provision.⁴³⁴ And the relevant language included in the Dodd–Frank Act may provide a start.

CONCLUSION

The lower courts are daily faced with the task of determining where a crime that has transnational elements was committed, and whether federal criminal statutes apply to extraterritorial conduct. The Supreme Court relatively recently articulated a focus test for determining where a crime was committed for these purposes. Although it may be too soon to tell, this test appears to be subjective and manipulable and thus may require revisiting. The Court has provided clearer direction with respect to the extraterritorial application of federal statutes in the last decade. It mandates that unless a statute clearly provides that it applies to conduct outside the territory of the United States, it does not. The Court’s recent cases demonstrate that the Court has abandoned its traditional reliance on the *Charming Betsy* canon. This change has important implications in criminal cases because it likely means that the lower courts are wrong to rely so heavily on *United States v. Bowman*⁴³⁵ to escape the presumption against extraterritoriality in criminal cases.

432. See, e.g., Strafgesetzbuch [StGB] [Penal Code], §§ 5–7, translation at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [<https://perma.cc/Y7UF-8AQ6>] (Ger.); Schweizerisches Zivilgesetzbuch [StGB] [Criminal Code] Dec. 21, 1937, SR 311, arts. 4–7, translation at <https://www.admin.ch/opc/en/classified-compilation/19370083/201701010000/311.0.pdf> [<https://perma.cc/7WGM-EGCE>] (Switz.).

433. See generally, e.g., Kenneth R. Feinberg, *Extraterritorial Jurisdiction and the Proposed Federal Criminal Code*, 72 J. CRIM. L. & CRIMINOLOGY 385 (1981); William A. Gillon, Note, *Extraterritorial Jurisdiction Under the Proposed Federal Criminal Codes: Senate Bill 1630 and House Bill 1647*, 12 GA. J. INT’L & COMP. L. 305 (1982).

434. MODEL PENAL CODE § 1.03 (AM. LAW INST. 1962).

435. 260 U.S. 94 (1922).

From a normative point of view, although there is no convincing case for applying a strong presumption against extraterritoriality in civil cases, foundational principles of criminal law require a different result in the criminal sphere. Because the geographic appropriateness of criminal prosecution should be treated as an element of the offense, ambiguity with respect to this element should be resolved in the defendant's favor. A strong presumption against extraterritoriality ought to apply where criminal or hybrid statutes' extraterritorial reach is at issue as a surrogate for the principle of legality and the rule of lenity. The current state of affairs—in which courts apply a strong presumption against extraterritoriality in civil cases but largely decline to do so in criminal cases based on *Bowman*—is obviously wrongheaded. Congress ought to act promptly to enact a general provision that provides uniform guidance on these questions in criminal matters.