

2011

# Bowman Lives: The Extraterritorial Application of U.S. Criminal Law after Morrison v. National Australia Bank

Zachary D. Clopton  
*Cornell Law School*, [zdc6@cornell.edu](mailto:zdc6@cornell.edu)

Follow this and additional works at: <http://scholarship.law.cornell.edu/facpub>

 Part of the [Criminal Law Commons](#), and the [Jurisdiction Commons](#)

---

## Recommended Citation

Zachary D. Clopton, "Bowman Lives: The Extraterritorial Application of U.S. Criminal Law after Morrison v. National Australia Bank," 67 *New York University Annual Survey of American Law* (2011)

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Publications by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

**BOWMAN LIVES: THE EXTRATERRITORIAL  
APPLICATION OF U.S. CRIMINAL LAW  
AFTER *MORRISON V. NATIONAL  
AUSTRALIA BANK***

*ZACHARY D. CLOPTON\**

Julio Leija-Sanchez, the kingpin of a document-forgery ring in Illinois, arranged for the murder of his rival in Mexico by Mexican assassins.<sup>1</sup> Floridian Kent Frank paid minor girls in Cambodia to engage in sexual conduct and took their photographs.<sup>2</sup> Pablo Aguilar impersonated an INS agent in Mexico, reconnoitered a prospective visa-applicant, and accepted cash and jewelry in exchange for the promise of visas for her children, a job for her son, and INS-confiscated property.<sup>3</sup> A group of Japanese companies conspired in Japan to fix the price of facsimile paper in North America.<sup>4</sup> Three men conspired to transport 140 aliens into the United States from Central America, getting only as far north as the outskirts of Monterrey, Mexico, before being apprehended by Mexican authorities.<sup>5</sup> Members of the Guadalajara Narcotics Cartel tortured and killed an American novelist and his friend in Mexico, mistaking them for American DEA agents.<sup>6</sup> Members of Jim Jones's Peoples Temple

---

\* Assistant United States Attorney, Civil Division, Northern District of Illinois. The views expressed in this Article are those of the author alone. They do not represent the views of the United States government or the United States Attorney. I am grateful for the assistance of the Honorable Diane P. Wood, Christopher J. Borgen, Victor D. Quintanilla, and Katherine D. Kinzler.

1. *United States v. Leija-Sanchez*, 602 F.3d 797, 798 (7th Cir. 2010) (violent crimes in aid of racketeering activity, 18 U.S.C. § 1959).

2. *United States v. Frank*, 599 F.3d 1221, 1227 (11th Cir. 2010) (obtaining custody of a minor with the intent to produce child pornography, 18 U.S.C. § 2251A(b)(2)(A)).

3. *United States v. Aguilar*, 756 F.2d 1418, 1420 (9th Cir. 1985) (impersonation of government official, 18 U.S.C. § 912).

4. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 1 (1st Cir. 1997) (price-fixing, 15 U.S.C. §§ 1-7).

5. *United States v. Villanueva*, 408 F.3d 193, 196 (5th Cir. 2005) (conspiracy to bring undocumented aliens into the United States, 8 U.S.C. § 1324(a)(2)(B)(ii)).

6. *United States v. Vasquez-Velasco*, 15 F.3d 833, 838 (9th Cir. 1994) (violent crimes in aid of racketeering activity, 18 U.S.C. § 1959).

ambushed U.S. Representative Leo Ryan and his party in Guyana, resulting in the death of Congressman Ryan and others.<sup>7</sup>

Each of these descriptions corresponds to the allegations of the U.S. government in criminal prosecutions in U.S. courts for violations of U.S. laws. In each case, the defendants were charged based on conduct that occurred outside the territorial borders of the United States, even though none of the statutes at issue specify an extraterritorial application. And in each case, attorneys for the United States convinced a court of appeals that the ambiguous statute should be read to apply to extraterritorial conduct based on a broad reading of the Supreme Court's 1922 decision in *United States v. Bowman*.<sup>8</sup>

The Supreme Court has not placed any constitutional restraints on Congress's ability to enact statutes regulating conduct outside of U.S. borders.<sup>9</sup> Nevertheless, U.S. courts still must determine when Congress has intended to exercise this power. For some statutes, the answer is clear from the text; the law prohibiting war crimes, for example, criminalizes "[w]hoever, whether inside or outside the United States, commits a war crime."<sup>10</sup> But Congress tends to legislate without reference to geographic limitations.<sup>11</sup> This question of statutory interpretation—whether Congress intended an ambiguous criminal statute to apply extraterritorially—is the subject of the Article.

The Supreme Court has resolutely defended a canon of interpretation by which courts presume that ambiguous statutes do not apply extraterritorially unless Congress indicated an extraterritorial intent. Over the last two decades, the Supreme Court's decisions on this "presumption against extraterritoriality" have seemed to limit the situations in which ambiguous civil statutes apply outside of the United States. The Rehnquist Court made it more difficult for litigants to show that Congress intended a law to apply extraterritorially in *EEOC v. Arabian American Oil Co. (Aramco)* and other decisions in the 1990s,<sup>12</sup> and the Roberts Court made it more difficult to establish territorial connections necessary to avoid the pre-

---

7. *United States v. Layton*, 855 F.2d 1388, 1394 (9th Cir. 1988) (conspiracy to kill a member of Congress and aiding and abetting that killing, 18 U.S.C. § 351).

8. 260 U.S. 94 (1922).

9. *See infra* note 16.

10. 18 U.S.C. § 2441(a) (2006); *see infra* note 17.

11. *See, e.g.*, *Lauritzen v. Larsen*, 345 U.S. 571, 576–77 (1953) (discussing the "literal catholicity" (universality) of the scope of the Jones Act).

12. 499 U.S. 244 (1991); *see Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *Smith v. United States*, 507 U.S. 197 (1993); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

sumption against extraterritoriality in *Morrison v. National Australia Bank* in 2010.<sup>13</sup>

On the criminal side, the Supreme Court has not spoken to the issue since *Bowman* in 1922.<sup>14</sup> In that case, the Court opened the door a crack, seemingly creating an exception to the presumption for prosecutions based on fraud against the U.S. government. In criminal cases since *Bowman*, like those described above, courts of appeals routinely use *Bowman* to support the extraterritorial application of criminal laws. Yet the reasoning and types of laws applied extraterritorially in these decisions tend to go beyond *Bowman*'s express holding. Moreover, while these courts of appeals have not expressly forsaken the civil precedents or their relevance to criminal law—and in fact frequently cite the civil precedents in their criminal decisions—the *outcomes* of these cases suggest that criminal law is treated differently: these courts have tended to expand the extraterritorial application of U.S. criminal law, in contrast to the trend of Supreme Court decisions in civil cases. However, the Supreme Court's recent decision in *Morrison*, which seemingly narrowed the situations to which U.S. law applies, actually permits a new approach that the Supreme Court could follow in affirming much of the criminal law trend. If adopted, this approach could be justified by the same factors that the Supreme Court invokes to justify its criminal and civil law pronouncements on the presumption.

Part I of this Article discusses the twin canons of statutory interpretation that are relevant to the extraterritoriality inquiry: the *Charming Betsy* canon and the presumption against extraterritoriality. These canons are most fully developed in the civil context, although the relevant case law arises from both civil and criminal cases. Part II looks specifically at the presumption against extraterritoriality in criminal law in *Bowman*, the leading Supreme Court decision on the topic. Part II also includes a comprehensive survey of decisions by courts of appeals applying *Bowman*, which reveals that the courts of appeals have stretched *Bowman* to shoehorn extraterritorial applications of criminal laws into the stream of Supreme Court jurisprudence. Part III turns to the Court's 2010 decision in *Morrison* (a civil case). Although *Morrison* purports to be a straightforward application of the presumption against extraterritoriality, the "real motor" of the decision is a rule that explains when the

---

13. 130 S. Ct. 2869 (2010).

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

presumption applies—and when it does not.<sup>15</sup> Part IV then asks what *Morrison* suggests about how the Supreme Court could handle an extraterritorial criminal case. *Morrison*'s rule appeared to limit the extraterritorial reach of U.S. law—keeping with the Supreme Court's trend in civil cases but running counter to the criminal law trend in the courts of appeals. This Article suggests that the new “focus” rule announced in *Morrison* may help to reconcile those seemingly contradictory trends, while still maintaining an allegiance to the Supreme Court's stated justifications of the presumption. Part V concludes with some brief remarks about extraterritorial criminal law.

## I. BACKGROUND

Does a particular law apply to a set of facts that include elements outside the territory of the United States? Putting aside constitutional constraints<sup>16</sup> and those statutes that are expressly

---

15. The appellation “real motor” comes from Justice Stevens's opinion concurring in the judgment in *Morrison*. 130 S. Ct. at 2894 (Stevens, J., concurring in the judgment).

16. Congress has the constitutional authority to enact extraterritorial legislation. *See, e.g., Aramco*, 499 U.S. at 248; *Lauritzen*, 345 U.S. at 579 n.7. According to a leading textbook, “no reported federal court decision has held an extraterritorial application of substantive U.S. law unconstitutional.” GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 579 (4th ed. 2007); *see also* Charles Doyle, *Extraterritorial Application of American Criminal Law*, Congressional Research Service Report, Mar. 26, 2010, available at <http://opencrs.com/document/94-16/2010-03-26/>; 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); A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379 (1997); Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992). That said, various courts have discussed potential substantive due process constraints on the extraterritorial application of U.S. law. *See, e.g., United States v. Davis*, 905 F.2d 245, 248 (9th Cir. 1990) (“[A]s a matter of constitutional law, we require that application of the statute to the acts in question not violate the due process clause of the fifth amendment.”); *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103, 1107 n.11 (7th Cir. 1984) (“Were Congress to enact a rule beyond the scope of [foreign relations law] principles, the statute could be challenged as violating the due process clause on the ground that Congress lacked the power to prescribe the rule.”); *see also Blackmer v. United States*, 284 U.S. 421, 438 (1932) (discussing the personal jurisdictional limits set by the Due Process Clause). The scope of the Foreign Commerce Clause, U.S. CONST. art. I, §8, cl. 3, may constrain congressional action in this area as well. *See, e.g., Anthony J. Colangelo, The Foreign Commerce Clause*, 96 VA. L. REV. 949 (2010). The states also have at least some authority to regulate conduct outside of the United States. *See Skiriotes v. Florida*, 313 U.S. 69, 77 (1941) (“If the United States may

extraterritorial<sup>17</sup> (or expressly not<sup>18</sup>), courts are left to apply traditional tools of statutory interpretation. Two canons of interpretation are relevant to this inquiry. First, U.S. courts have incorporated the international law concept of legislative jurisdiction into U.S. law through the *Charming Betsy* canon, which calls on courts to avoid unnecessary conflict with the law of nations.<sup>19</sup> Second, U.S. courts have developed a presumption that ambiguous statutes do not ap-

---

control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress.”); *see also* Daniel L. Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 TEX. L. REV. 763 (1960).

17. *See, e.g.*, 18 U.S.C. § 1119 (2006) (providing for the punishment of “[a] person who, being a national of the United States, kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country”); 18 U.S.C. § 2332 (2006) (criminalizing homicide, attempted homicide, conspiracy to commit homicide, or certain assaults of “a national of the United States, while such national is outside the United States,” upon certification of the Attorney General); 18 U.S.C. § 2339B(d) (2006) (defining the constraints on extraterritorial jurisdiction for the statute criminalizing material support to designated foreign terrorist organizations); 18 U.S.C. § 3261 (2006) (punishing individuals for commission of certain felonies “while employed by or accompanying the Armed Forces outside the United States”); Alien Tort Statute, 28 U.S.C. § 1350 (2006) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”); *cf.* 18 U.S.C. § 1111 (2006) (providing for the punishment for murder only “[w]ithin the special maritime and territorial jurisdiction of the United States,” defined in 18 U.S.C. § 7 (2006)); *see also* Doyle, *supra* note 16, at 37–60 (cataloging U.S. laws).

For example, Viktor Bout, the so-called “Merchant of Death,” has been charged with violations of 18 U.S.C. § 2339B, providing material support or resources to designated foreign terrorist organizations, based on extraterritorial conduct. *See* Complaint, United States v. Bout, No. 08 MAG 0386 (S.D.N.Y. Feb. 27, 2008), *available at* <http://www.justice.gov/opa/pr/2008/March/bout-complaint.pdf>. *See also* STEPHEN BRAUN & DOUGLAS FARAH, *MERCHANT OF DEATH: MONEY, GUNS, PLANES, AND THE MAN WHO MAKES WAR* (2007). Section 2339B, however, explicitly applies to certain extraterritorial activities. 18 U.S.C. § 2339B(d) (2006). In late 2010, Thailand agreed to extradite Bout to the United States. Seth Mydans, *Thailand Extradites Russian Arms Suspect to U.S. to Face Arms Charges*, N.Y. TIMES, Nov. 17, 2010, at A6. Pursuant to 18 U.S.C. § 3238, Bout will be arrested and tried in the Southern District of New York—the district where the offender is first brought.

18. *See, e.g.*, 28 U.S.C. § 2680(k) (2006) (excepting “any claim arising in a foreign country” from the Federal Tort Claims Act).

19. *See infra* Part I.A. As discussed in greater detail below, legislative jurisdiction is not, as its name suggests, a true jurisdictional issue. That said, this Article will use the term legislative jurisdiction in keeping with the literature on the subject.

ply extraterritorially.<sup>20</sup> The twin canons are tools of statutory interpretation and thus are tools to determine the intent of Congress.<sup>21</sup>

Although both canons help answer the question whether a statute applies extraterritorially, the Supreme Court has said that these two presumptions are distinct and not always coextensive.<sup>22</sup> With respect to the concept of “extraterritoriality,” the *Charming Betsy* canon invokes the international law of legislative jurisdiction, in which the concept of territoriality merely plays a role and is not always dispositive of the outcome. In contrast, the presumption against extraterritoriality treats extraterritoriality as the *only* relevant factor, and it does not rely upon the distillation of any other body of law. While both canons can help courts answer questions about the extraterritorial reach of U.S. law, for clarity, this Article will reserve the term “extraterritoriality” for the presumption against extraterritoriality.<sup>23</sup>

#### A. *Legislative Jurisdiction and the Charming Betsy Canon*

Under international law, the legal power of a state is constrained by three types of jurisdiction: (1) legislative jurisdiction: “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,

---

20. See *infra* Parts I.B, I.C.

21. See *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (“[Canons] are designed to help judges determine the Legislature’s intent as embodied in particular statutory language.”).

22. See *infra* note 83 (discussing the Supreme Court’s distinction between the two canons and presenting scenarios in which the two canons would support different outcomes).

23. To differentiate between the subjects of the twin canons, at least one scholar has applied the term “extrajurisdictionality” to the former and “extraterritoriality” to the latter. See John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AMER. J. INT’L L. 351, 351–52 (2010). This term exacerbates the naming problem—i.e. that legislative jurisdiction is not a jurisdictional issue. For that reason, this Article will not adopt this nomenclature. Similarly, Erez Reuveni rightly notes that “jurisdiction” is an improper term for the issues addressed by the presumption against extraterritoriality, but he stumbles into an analogous problem by calling the issue “statutory standing.” Erez Reuveni, *Extraterritoriality as Standing: A Standing Theory of the Extraterritorial Application of the Securities Laws*, 43 U.C. DAVIS L. REV. 1071 (2010). Although this term may be technically accurate, the reference to “standing” also may lead courts down the wrong path. See, e.g., *Arreola v. Godinez*, 546 F.3d 788, 794–95 (7th Cir. 2008) (“Although the two concepts unfortunately are blurred at times, standing and entitlement to relief are not the same thing. Standing is a prerequisite to *filing suit*, while the underlying merits of a claim (and the laws governing its resolution) determine whether the plaintiff is *entitled to relief*.”). For this reason, this Article will eschew the term “statutory standing” as well.

or by determination of a court"; (2) adjudicatory jurisdiction: "to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings"; and (3) enforcement jurisdiction: "to induce or compel compliance or to punish non-compliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action."<sup>24</sup> Self-evidently, legislative jurisdiction is the power to legislate, adjudicatory jurisdiction is the power to subject people to the judicial process, and enforcement jurisdiction is the power to enforce the laws.

The reach of a civil or criminal statute is a question of legislative jurisdiction. Under accepted principles of international law, there are five bases of legislative jurisdiction.<sup>25</sup> The first and most straightforward is territoriality. There is little dispute that states have the authority to apply their laws to persons and conduct within their borders.<sup>26</sup> The second basis is similarly easy to comprehend—

---

24. 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1986) [hereinafter RESTATEMENT (THIRD) FOREIGN RELATIONS LAW].

25. *Id.* §§ 402 & 404; see MALCOLM N. SHAW, INTERNATIONAL LAW 572–622 (5th ed. 2003); ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW TO USE IT 56–77 (1994); Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978); Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 37–38 (1992). Legislative-jurisdictional limits also appear in the text of international treaty law. See, e.g., SHAW, *supra* note 25, at 597–604; Roger Alford, *Extraterritorial Regulation of Human Rights and the Environment Under the WTO General Exceptions*, OPINIO JURIS (Nov. 2, 2010, 10:42 AM), <http://opiniojuris.org/2010/11/02/extraterritorial-regulation-of-human-rights-and-the-environment-under-the-wto-general-exceptions> (discussing the bases for extraterritorial legislation under the General Agreement on Tariffs and Trade).

26. See, e.g., RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 402(1) (“[A] state has jurisdiction to prescribe law with respect to (1) (a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory . . . .”); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19 (Boston, Hilliard, Gray & Co. 1834) (“[E]very nation possesses an exclusive sovereignty and jurisdiction with its own territory.”); *The Apollon*, 22 U.S. (9 Wheat.) 362 (1824) (“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.”); SHAW, *supra* note 25, at 579–84.

Indeed, some scholars have suggested that, prior to the Twentieth Century, the territoriality principle provided the exclusive basis. Not so. For example, Joseph Story's canonical COMMENTARIES ON THE CONFLICT OF LAWS and the oft-cited United States Supreme Court decision in *The Apollon* case articulate the impor-



jurisdiction based on nationality. Under this basis, a state may regulate the conduct of its nationals, even if they are outside of the state's territorial borders.<sup>27</sup>

The third basis of jurisdiction is of a more modern vintage. Gaining strength around the turn of the Twentieth Century was the notion that a state should be able to regulate conduct outside its borders that has effects inside its borders.<sup>28</sup> This principle, often referred to as objective territoriality or passive personality, greatly expands a state's legal reach beyond the bounds countenanced by the principles of territoriality and nationality.<sup>29</sup>

---

tance of territorial jurisdiction, but also remark on the propriety of nationality jurisdiction. See STORX, *supra* note 26, at 22 (“[A]lthough the laws of a nation have no direct, binding force, or effect, except upon persons within its territories; yet every nation has a right to bind its own subjects by its own laws in every other place . . . .”); *The Apollon*, 22 U.S. (9 Wheat.) at 370 (“The laws of no nation can justly extend beyond its own territories, *except so far as regards its own citizens.*”) (emphasis added).

27. See, e.g., RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 402(2) (“[A] state has jurisdiction to prescribe law with respect to . . . (2) the activities, interests, status, or relations of its nationals outside as well as within its territory . . . .”); SHAW, *supra* note 25, at 584–89.

28. See, e.g., RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 402(1) (“[A] state has jurisdiction to prescribe law with respect to . . . (c) conduct outside its territory that has or is intended to have substantial effect within its territory . . . .”); *Cutting's Case*, 2 MOORE DIGEST § 201, at 228; SHAW, *supra* note 25, at 589–91.

29. The Permanent Court of International Justice, the precursor to the International Court of Justice, gave voice to the objective territoriality principle in the famed *Lotus Case*. *Case of the SS Lotus (Fr. v. Turk.)*, 1927 P.C.I.J., (ser. A) No. 10 (Sept. 7). In that decision, the PCIJ held that Turkey was not forbidden from applying its criminal laws to a French officer's conduct on a French vessel that collided with a Turkish ship on the high seas. Since flagged ships were understood to be extensions of national territory, the Turkish government argued that its laws should reach the conduct of the French officer because that conduct had a direct effect within the scope of Turkey's sovereignty, i.e. the Turkish ship. The PCIJ agreed. “[O]nce it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting [the French officer] because of the fact that the author of the offence was on board the French ship.” *Id.* at 23. Summarizing this approach, the court observed that “the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if . . . its effects, have taken place there.” *Id.* Following the *Lotus Case*, the First Restatement of the Conflict of Laws recognized this basis of jurisdiction as well. See RESTATEMENT (FIRST) OF THE CONFLICT OF LAWS § 65 (1934) (“If consequences of an act done in one state occur in another state, each state in which any event in the series of act and consequences occurs may exercise legislative jurisdiction to create rights or

The fourth basis of jurisdiction is the protective principle, under which a state can regulate conduct directed against the state or its vital interests.<sup>30</sup> This basis would pull in laws aimed at conduct such as espionage and counterfeiting, even if it occurs overseas and was not intended to have a direct effect on the territory of the state. Finally, states have long recognized universal jurisdiction for certain conduct considered to be of “universal concern,” such as piracy and genocide.<sup>31</sup>

For our purposes, the inquiry into legislative jurisdiction is relevant to statutory interpretation. The case of *Hartford Fire Insurance Co. v. California* illustrates two different approaches to legislative jurisdiction in U.S. law: one in Justice Souter’s majority opinion, and one in Justice Scalia’s dissent.<sup>32</sup> Although Souter’s view won the battle for judgment in the case, Scalia’s view seems to have won the war, as later Supreme Court decisions confirm.<sup>33</sup>

*Hartford Fire* asked the Court to determine whether the Sherman Antitrust Act could apply to a London-based reinsurance company, even though the United Kingdom had an extensive regulatory scheme for the insurance industry. Treating the case as

---

other interests as a result thereof.”); see also *Draft Convention on Jurisdiction With Respect to Crime*, 29 AM. J. INT’L L. 435, 480 (Supp. 1935) (Harvard Research in International Law study); *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (“Acts 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.”); *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 443 (2d Cir. 1945) (citing the Restatement).

30. See, e.g., RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 402(2) (“[A] state has jurisdiction to prescribe law with respect to . . . (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.”); SHAW, *supra* note 25, at 591–92.

31. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 404 (“A state has 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 bases of jurisdiction indicated in § 402 is present.”); see SHAW, *supra* note 25, at 592–97. The hotly contested debate about the extent of universal jurisdiction is beyond the scope of this Article.

32. 509 U.S. 764 (1993).

33. See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004); see also Phillip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT’L L. 53 (1995); John A. Trenor, *Jurisdiction and the Extraterritorial Application of Antitrust Laws after Hartford Fire*, 62 U. CHI. L. REV. 1583 (1995).

raising an issue of “prescriptive comity,”<sup>34</sup> the ephemeral majority held that U.S. courts have no jurisdiction over extraterritorial conduct if there is a “true conflict” between U.S. and foreign law; a true conflict, the Court held, occurred when a party could not possibly comply with both sets of requirements.<sup>35</sup>

Justice Scalia’s dissent rejected this approach on two levels. First, Justice Scalia rightly suggested that this was not an issue of the court’s jurisdiction, but a question of whether a particular law applies to the particular conduct at issue.<sup>36</sup> The Court has since adopted Justice Scalia’s approach to the meaning of “jurisdiction.”<sup>37</sup> Second, framing the issue as a question of statutory interpretation, Justice Scalia used international law limits on legislative jurisdiction as a tool to divine congressional meaning, relying on the so-called *Charming Betsy* canon.<sup>38</sup> As Justice Scalia wrote:

---

34. *Hartford Fire*, 509 U.S. at 794–99. Justice Scalia used the term “prescriptive comity” to clarify the majority’s reference to “comity”:

The “comity” they refer to is not the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed “prescriptive comity”: the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted.

*Id.* at 817 (Scalia, J., dissenting).

35. Justice Souter’s use of the term “true conflict” does not accord with the traditional use of that term in conflict of laws. Under Professor Brainerd Currie’s interest analysis, a “true conflict” exists where two or more states have an interest in the application of their laws to given facts; it says nothing of the ability of a party to comply with those laws. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 182–89 (1963).

36. *Hartford Fire*, 509 U.S. at 812–13 (Scalia, J., dissenting) (“It is important to distinguish two distinct questions raised by this petition: whether the District Court had jurisdiction, and whether the Sherman Act reaches the extraterritorial conduct alleged here. On the first question, I believe that the District Court had subject-matter jurisdiction over the Sherman Act claims against all the defendants (personal jurisdiction is not contested). Respondents asserted nonfrivolous claims under the Sherman Act, and 28 U.S.C. § 1331 vests district courts with subject-matter jurisdiction over cases ‘arising under’ federal statutes. . . . The second question—the extraterritorial reach of the Sherman Act—has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct.”).

37. In particular, the *Empagran* decision later confirmed that the Court has left behind the notion that legislative-jurisdictional issues raise questions of subject-matter jurisdiction. 542 U.S. at 163–75.

38. *Hartford Fire*, 509 U.S. at 813 (Scalia, J., dissenting). The *Charming Betsy* canon finds its roots in the 1804 Supreme Court decision *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). This case asked whether Jared Shattuck,

“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.”<sup>39</sup> As this comment suggests, this rule of interpretation is not a limit on the authority of Congress, as the traditional notion of legislative jurisdiction would be. Justice Scalia’s bank shot limits Congress not by reference to its authority under international law *per se*, but by holding that courts should presume that Congress was aware of these “limits” and would have said so if it intended to exceed them. Again, the Court has since adopted the *Hartford Fire* dissent’s approach.<sup>40</sup>

Justice Scalia’s dual criticisms of the *Hartford Fire* majority appear to have won the day, and in so doing revealed the term “legislative jurisdiction” to be a misnomer in U.S. law. Like the Holy Roman Empire,<sup>41</sup> legislative jurisdiction is neither a restriction on the legislature nor a question of jurisdiction.<sup>42</sup> U.S. courts do not treat legislative jurisdiction as a *per se* limitation on the power of the legislature, but rather the courts have incorporated the notion of legislative jurisdiction into U.S. law through statutory interpretation. Further, the Supreme Court repeatedly reminds litigants that

---

who was born an American citizen but became a Danish subject, and his schooner flying under the Danish flag, would fall within the scope of the Nonintercourse Act, which restricted trade with France and its dependencies. *See* Federal Nonintercourse Act, ch. 10, § 1, 2 Stat. 7, 8 (1800) (expired 1801). Chief Justice Marshall concluded that the law did not apply. Citing the principle that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,” Marshall held that the Nonintercourse Act could not apply to Shattuck because his capture would violate international norms prohibiting the capture of the citizens of neutral nations during war. 6 U.S. (2 Cranch) at 118.

39. *Hartford Fire*, 509 U.S. at 815 (Scalia, J., dissenting). Unambiguous text, however, can overcome this presumption. *See supra* note 17 (discussing statutes with explicitly extraterritorial reach).

40. In *Empagran*, the Supreme Court again avoided relying on the *Hartford Fire* majority opinion and endorsed the dissent’s approach on this issue. 542 U.S. at 163–75.

41. *See* Michael Myers (Linda Richman), Coffee Talk, *Saturday Night Live* (NBC television broadcast) (“The Holy Roman Empire was neither holy nor Roman nor an empire. Discuss.”) (invoking Voltaire, *ESSAI SUR L’HISTOIRE GÉNÉRALE ET SUR LES MŒURS ET L’ESPRIT DES NATIONS* ch. 70 (1756) (“Ce corps qui s’appelait, et qui s’appelle encore le saint empire romain, n’était en aucune manière ni saint, ni romain, ni empire.”)).

42. Legislative jurisdiction is actually a misnomer for a third reason: the rules of “legislative jurisdiction” apply not only to legislation but also to regulations, executive orders, and other rules, which explains why many jurists and scholars prefer the term “prescriptive jurisdiction” or “jurisdiction to prescribe.” *See, e.g.*, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 401(a); *Hartford Fire*, 509 U.S. at 813 (Scalia, J., dissenting).

jurisdiction has a particular meaning; the concept that we call legislative jurisdiction says nothing about the court's ability to hear a case.<sup>43</sup>

In any event, the *Charming Betsy* canon is now "beyond debate,"<sup>44</sup> and limits on legislative jurisdiction are part of the international law that informs that canon.<sup>45</sup> As a result, the *Charming Betsy* canon and principles of legislative jurisdiction play a role in the courts's assessment of the extraterritorial application of statutes. At the same time, the Supreme Court has been clear that the *Charming Betsy* canon is distinct from the presumption against extraterritoriality,<sup>46</sup> a different canon of interpretation to which this Article now turns.

### B. *The Presumption against Extraterritoriality*

The presumption against extraterritoriality is aptly named: it calls for courts to presume that U.S. law does not apply extraterritorially. The presumption is not simply the logical extension of the recognition of territorial jurisdiction, although its early invocations can be found in cases discussing legislative-jurisdictional limits.<sup>47</sup> The presumption against extraterritoriality is a stand-alone tool of statutory interpretation, designed by courts to create a stable rule against which congressional intent may be evaluated without inquir-

---

43. See, e.g., *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243–44 (2010) ("Jurisdiction" refers to a court's adjudicatory authority. Accordingly, the term 'jurisdictional' properly applies only to prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) implicating that authority. While perhaps clear in theory, the distinction between jurisdictional conditions and claim-processing rules can be confusing in practice. . . . Our recent cases evince a marked desire to curtail such drive-by jurisdictional rulings . . .") (internal citations and quotation marks omitted).

44. *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr.*, 485 U.S. 568, 575 (1988). For the rare exceptions that prove the rule, see Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 262–70 (1993) (calling for "decanonization"); Note, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1231–36 (2008) (offering alternatives to the canon).

45. See, e.g., *Hartford Fire*, 509 U.S. at 815 (Scalia, J., dissenting); *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 21–22 (1963).

46. Justice Scalia's dissent in *Hartford Fire* called these canons "wholly independent." 509 U.S. at 815 (Scalia, J., dissenting) (quoting *EEOC v. Arabian Amer. Oil Co.*, 499 U.S. 244, 264 (1991) (Marshall, J., dissenting)); see *infra* note 83 (discussing the differences between the twin canons).

47. See, e.g., BORN & RUTLEDGE, *supra* note 16, at 614–19. See *infra* note 83 (discussing the differences between the twin canons).

ing into legislative jurisdiction.<sup>48</sup> This Section covers the history of and justifications for the presumption against extraterritoriality, as expressed in a series of Supreme Court decisions throughout the Twentieth Century.

The first key case is *American Banana Co. v. United Fruit Co.*<sup>49</sup> Interpreting the reach of the Sherman Antitrust Act, Justice Holmes assumed that “[a]ll legislation is prima facie territorial.”<sup>50</sup> Holmes pressed further, concluding 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 is done.”<sup>51</sup> On this basis, he concluded that the Sherman Antitrust Act did not apply extraterritorially.<sup>52</sup> Holmes’s formulation of the presumption may sound like previous articulations of the territorial limits of legislative jurisdiction or conflict of laws, but it has been understood as staking out a separate rule of interpretation. Indeed, the Supreme Court expressed this understanding throughout the first half of the Twentieth Century,<sup>53</sup> culminating in *Foley Brothers, Inc. v. Filardo*: “The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . .

---

48. See, e.g., *United States v. Bowman*, 260 U.S. 94, 97 (1922) (“We have in this case a question of statutory construction. The necessary locus, when not specially defined, depends upon the purpose of Congress . . .”). Admittedly, the *Charming Betsy* canon imports notions of legislative jurisdiction into the question of congressional intent as well, but as suggested earlier, extraterritoriality has a different relationship to congressional intent in the two canons.

49. 213 U.S. 347 (1909). In this case, United Fruit ordered the Costa Rican militia to invade Panama and seize American Banana’s assets. *Id.* at 354. American Banana sued United Fruit in federal court for anticompetitive behavior made unlawful by the Sherman Antitrust Act, 15 U.S.C. §§ 1–7.

50. 213 U.S. at 357 (quoting *Ex parte Blain*, 12 Ch. Div. 522, 528 (1879) (Brett, L.J.) (U.K.) and citing *State v. Carter*, 27 N.J.L. 499 (1859)).

51. 213 U.S. at 356.

52. While *American Banana*’s formulation of the presumption against extraterritoriality has endured, its interpretation of the Sherman Antitrust Act has been overcome by amendment, Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-920, § 402, 96 Stat. 1246 (codified at 15 U.S.C. § 6a (2006)), and subsequent case law. See, e.g., *Hartford Fire*, 509 U.S. at 764.

53. See, e.g., *Blackmer v. United States*, 284 U.S. 421, 437 (1932) (“[T]he legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States . . .”); *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918) (“Legislation is presumptively territorial . . .”).

is a valid approach whereby unexpressed congressional intent may be ascertained."<sup>54</sup>

Following *Foley Brothers's* reaffirmation of the presumption in 1949, the Supreme Court remained largely quiet on the issue for 40 years.<sup>55</sup> That is, until the Rehnquist Court resurrected the presumption in the 1990s, most clearly in *Aramco*.<sup>56</sup> *Aramco*, a Delaware corporation, discharged Ali Boureslan, a naturalized United States citizen born in Lebanon and employed by *Aramco* in Saudi Arabia. Boureslan argued that Title VII of the Civil Rights Act of 1964 prohibited his removal.<sup>57</sup> Recalling the cases from the first half of the century, Chief Justice Rehnquist construed the statute (and congressional intent) with reference to the presumption: "We assume that Congress legislates against the backdrop of the presumption against extraterritoriality."<sup>58</sup> Quoting *Foley Brothers*, Rehnquist reaffirmed the principle "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdic-

---

54. 336 U.S. 281, 285 (1949) (internal citation omitted). In *Foley Brothers*, the Supreme Court rejected the application of the Eight Hour Law to a U.S. citizen working abroad. The Act provided that "[e]very contract made to which the United States . . . is a party . . . shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor . . . shall be required or permitted to work more than eight hours in any one calendar day upon such work . . ." Eight Hour Law, ch. 174, 37 Stat. 137 (1912) (codified at 40 U.S.C. § 324 (1946)). The case asked the court to determine the geographic scope of "every" contract. 336 U.S. at 287.

During this period, some decisions espoused a broad view of territoriality, including understanding territoriality to include conduct that had effects in the United States. *E.g.*, *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) ("Acts 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."); *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 443 (2d Cir. 1945) (articulating the "effects test" that provided the basis for much of the jurisprudence on questions of extraterritoriality, stating that "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends"). See also *infra* notes 88–94 and accompanying text (discussing the various "tests" for triggering the presumption).

55. See William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 91 (1998).

56. 499 U.S. 244 (1991).

57. Boureslan sought relief under Title VII, 42 U.S.C. § 2000e-1-17 (2006), arguing that he was subject to harassment and was discharged on account of his race, religion, and national origin. 499 U.S. at 247. Boureslan was a U.S. citizen and was hired by *Aramco* in the United States to work in Saudi Arabia. *Id.*

58. 499 U.S. at 248.

tion of the United States.”<sup>59</sup> Finding no such contrary intent, the Court concluded that Title VII did not apply. Later in the decade, the Court reaffirmed the presumption with reference to the Federal Tort Claims Act,<sup>60</sup> the Immigration and Nationality Act,<sup>61</sup> and the Endangered Species Act.<sup>62</sup>

Courts and scholars have justified the presumption in various ways. In his significant article on the presumption against extraterritoriality, Professor William Dodge articulated six potential justifications for the presumption.<sup>63</sup> This Article takes Dodge’s list as the starting point and returns to it with the discussion of *Morrison* below.

Dodge raises the first two justifications and then dismisses them as out of date. First is the international law on legislative jurisdiction.<sup>64</sup> Professor Dodge eschews this justification because, in his view, international law no longer includes strict territorial limits on

---

59. *Id.* (quoting *Foley Bros.*, 336 U.S. at 285). The dissenters had no quarrel with the idea of the presumption, only objecting to the majority’s seeming creation of a presumption that may only be overcome with *express* language, i.e. a “clear statement” rule. *Id.* at 260–61 (Marshall, J., dissenting) (“As the majority recognizes, our inquiry into congressional intent in this setting is informed by the traditional canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. But contrary to what one would conclude from the majority’s analysis, this canon is not a clear statement rule, the application of which relieves a court of the duty to give effect to all available indicia of the legislative will. . . . [A] court may properly rely on this presumption only after exhausting all of the traditional tools whereby unexpressed congressional intent may be ascertained.”) (internal citations and quotations marks omitted). Rehnquist’s majority opinion demanded “the affirmative intention of the Congress clearly expressed” to overcome the presumption. *Id.* at 248.

60. *Smith v. United States*, 507 U.S. 197 (1993).

61. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 158–59 (1993).

62. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581–89 (1992) (Stevens, J., concurring in the judgment).

63. Dodge, *supra* note 55, at 112–23; see *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2891–92, nn.7–8 (2010) (Stevens, J., concurring) (citing Dodge’s article). In *A Reappraisal of the Extraterritorial Reach of U.S. Law*, Born notes that the earlier incarnation of the territoriality presumption was supported by three related justifications: public international law, conflict of laws analysis, and international comity. See Born, *supra* note 25, at 9–21. Professor Dodge’s list draws its first five reasons from another significant article by Professor Curtis Bradley. See Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505 (1997). The sixth justification is derived from the work of Professor William Eskridge. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 275 (1994).

64. See Dodge, *supra* note 55, at 113–14 (citing *The Apollon*, the *Charming Betsy* canon, and international law scholarship); see also Born, *supra* note 25, at 61–71.



jurisdiction.<sup>65</sup> The Court has given us another reason to ignore this justification: the *Charming Betsy* canon—which incorporates the international law on legislative jurisdiction—is distinct from the presumption against extraterritoriality. Second, Professor Dodge observes that Justice Holmes’s opinion in *American Banana* relied on the “vested rights” theory of conflict of laws.<sup>66</sup> The vested rights theory proclaimed: “[T]he character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”<sup>67</sup> Dodge observed that, like international law, conflict of laws theory would no longer support the presumption as articulated in *American Banana*.<sup>68</sup>

Turning to more robust justifications, Dodge suggests that the desire to avoid conflicts with foreign law could justify the presumption.<sup>69</sup> Chief Justice Rehnquist expressed this view in *Aramco*, noting that the canon “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”<sup>70</sup> Dodge suggests that the Supreme Court has not been vigilant in protecting this interest, even in cases since *Aramco*,<sup>71</sup> but this does not render it inapplicable. Further, al-

65. Dodge, *supra* note 55, at 113–14 (citing the *Lotus Case*, 1927 P.C.I.J., (ser. A) No. 10 (Sept. 7), and the RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, §§ 402 & 404).

66. *Id.* at 114–15 (citing *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909), and Elliott E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945), discussing the vested rights theory).

67. *Am. Banana Co.*, 213 U.S. at 356.

68. Dodge, *supra* note 55, at 115 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971)); see also Born, *supra* note 25, at 71–74.

69. Dodge, *supra* note 55, at 115–17; see also Born, *supra* note 25, at 76–79 (arguing that the desire to avoid conflicts with foreign law is an insufficient basis for the territoriality presumption).

70. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (citing *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 20–22 (1963)).

71. Dodge, *supra* note 55, at 116 (citing *Smith v. United States*, 507 U.S. 197 (1993) (applying the presumption without risk of conflict with foreign law), *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (same), and *Hartford Fire*, 509 U.S. 764 (not applying the presumption when there was a risk of conflict with foreign law)). *Smith* is a straightforward example of Dodge’s point. In *Smith*, the Court determined that the Federal Tort Claims Act did not provide a cause of action for torts against the federal government arising out of conduct in Antarctica. The Court applied the presumption even though there was no risk of conflict with foreign law. 507 U.S. 197.

*Sale* is a different, and more interesting, matter. Justice Stevens opened the opinion for the Court with this concise description of the case: “The President has 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 may qualify as refugees.” 509 U.S. at 158. The Court

though one could argue that the *Charming Betsy* canon protects this interest by applying legislative-jurisdictional limits through statutory interpretation, the two canons are not coextensive.<sup>72</sup>

This foreign conflict concern dovetails with another one of Dodge's justifications: separation of powers.<sup>73</sup> The desire to avoid conflicts with foreign law reflects a concern with upsetting a foreign government; this justification reflects the view that if the United States is going to ruffle foreign feathers, it should be the legislature—rather than the judiciary—doing the ruffling.<sup>74</sup> Dodge articulates this concern with reference to institutional competence, although democratic legitimacy could also support this proposi-

---

concluded that Section 243(h)(1) of the Immigration and Nationality Act—which prevents the United States from “deport[ing] or return[ing] any alien” to a country where that alien’s freedom or life would be threatened on account of his membership in certain groups—did not apply extraterritorially, and thus did not apply to the Coast Guard’s actions on the High Seas. Justice Stevens suggested that this outcome did not conflict with foreign law, but applied the presumption anyway. *Id.* at 173–74. In dissent, Justice Blackmun noted that this conduct violated the United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968. Invoking the *Charming Betsy* canon, the dissent noted that the Coast Guard’s actions would violate international law—here, the substantive international law in the Protocol rather than the customary international law of legislative jurisdiction discussed elsewhere in this Article. Justice Blackmun argued, on this basis and on others, that the statute should grant rights to the Haitians. Justice Blackmun believed that the presumption caused, rather than prevented, international conflicts in this case, since it led the Court to reach a conclusion that “flies in the face of the international obligation . . . .” *Id.* at 207. Note, however, that Justice Blackmun’s opinion expressed concern about a conflict with *international* law, while Justice Stevens’s majority opinion referred to potential conflict with *foreign* law, which *Aramco* said undergirded the presumption. *See id.* at 173–74 (“The Court of Appeals held that the presumption against extraterritoriality had ‘no relevance in the present context’ because there was no risk that § 243(h), which can be enforced only in United States courts against the United States Attorney General, would conflict with the laws of *other* nations.”) (emphasis added); *Aramco*, 499 U.S. at 248 (discussing “unintended clashes between our laws and those of *other* nations”) (emphasis added). *See also* Dodge, *supra* note 55, at 97 (“[T]he Court downplayed the risk of conflict with *foreign* law [in *Sale*] as a reason for the presumption against extraterritoriality because there was no such risk.”) (emphasis added).

72. *See infra* note 83.

73. Dodge, *supra* note 55, at 120–22.

74. *Aramco* and Title VII are a perfect example. The Court was cautious about extending Title VII extraterritorially as originally drafted, but shortly after the decision Congress amended the statute to make explicit its intent for extraterritorial application. *See* 42 U.S.C. § 2000e(f) (2006). *Morrison* and the Securities Exchange Act tell the same story. *See infra* note 178.

tion.<sup>75</sup> Either way, this view suggests a more cautious posture for courts, deferring to the legislature (and the executive) on these questions.<sup>76</sup>

The next justification reflects the sentiment that "Congress is primarily concerned with domestic conditions."<sup>77</sup> In short, the Court assumes a domestic intent. From that assumption, the presumption against extraterritoriality logically follows. The Court has not been clear about the source of this assumption, nor is it self-evident, given the increasingly globalized world and Congress's not-infrequent attention to international affairs.<sup>78</sup> That being said, the repetition of this justification in Supreme Court opinions demands that it too must be taken into account.<sup>79</sup>

The final justification is that the Court should provide stable background rules against which Congress can legislate. Dodge relies on the work of Professor Eskridge for the proposition that the Court chooses clear presumptions in order to give Congress guidance on how the Court thinks (and thus how the Court will interpret future statutes).<sup>80</sup> In this view, the Court is the first mover, establishing a background rule against which Congress operates—and against which its statutes will be judged. Although courts may

---

75. Dodge, *supra* note 55, at 120 (citing *inter alia* Bradley, *supra* note 63, at 552 (discussing "judicial activism"); William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 145 (1998) (discussing institutional competence in discerning congressional intent); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1690–93 (1997) (discussing courts's "unguided intuitive judgment").

76. The Court in *Sale* suggested a slightly different separation of powers argument, noting that the presumption "has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility." *Sale*, 509 U.S. at 188. Professor Knox, for example, rejects this justification. Knox, *supra* note 23, at 387–88.

77. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949); *see also* *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

78. *See, e.g.*, Knox, *supra* note 23, at 383–84 (explaining and then questioning the justification that Congress is concerned only with domestic conditions); Born, *supra* note 25, at 74–75 (rejecting this justification). *But see* Dodge, *supra* note 55, at 117–23 (arguing that this is the only proper justification for the presumption).

79. *See supra* note 77; *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010); *id.* at 2892 (Stevens, J., concurring in the judgment); *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 585 (1992) (Stevens, J., concurring in the judgment).

80. ESKRIDGE, *supra* note 63, at 277. Eskridge ultimately rejects this view as applied to *Aramco*. His approach requires three conditions to be met in order to justify the presumption on this basis: (1) Congress is capable of knowing and working with an interpretative regime; (2) the application of the regime must be transparent to Congress; and (3) the regime should not change unpredictably. Eskridge concluded that *Aramco* failed the second and third elements of this test. *Id.* at 278.

prefer straightforward rules, this justification does not animate any particular background rule. Rather, the more natural justifications of conflicts with foreign law, separation of powers, and congressional intent relate directly to the court's adoption of this presumption. What *Morrison* has to say on this issue, and what this tells us about the extraterritorial application of criminal statutes, is taken up again below.

In any event, despite its roots in earlier times, the presumption against extraterritoriality—as distinct from considerations of legislative jurisdiction, comity, or the *Charming Betsy* canon—found its voice in the Twentieth Century. The line of cases starting with *American Banana* focused on the question whether Congress intended a U.S. law to apply outside the territory of the United States. And the Supreme Court reaffirmed the presumption in a series of cases in the 1990s, beginning with *Aramco*. Admittedly, courts have not always been consistent in the application of the presumption, occasionally failing to distinguish it from legislative jurisdiction or relying on these twin lines of cases interchangeably.<sup>81</sup> Indeed, commentators such as Professors John Knox and Jeffrey Meyer have argued that these presumptions should be collapsed into one rule—a “presumption against extrajurisdictionality” or a “dual illegality” rule, respectively.<sup>82</sup> But particularly in the age of *Aramco*, the Court

---

81. See, e.g., *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10 (1963) (citing the territoriality presumption but relying on legislative-jurisdictional considerations to reject the extraterritorial application of the statute); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957) (same); see also Brief of Law Professors as Amici Curiae in Support of Petition for Writ of Certiorari, *British Am. Tobacco (Investments) Ltd. v. United States*, 130 S. Ct. 3502 (2010) (No. 09-980), 2010 WL 1186417, at \*6–12 (collecting cases and scholarship). Compare *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948) (discussing the application of a statute to a U.S. military base overseas without reference to the presumption), with *United States v. Spelar*, 338 U.S. 217 (1949) (answering the same question about a different statute, one year later, with reference to the presumption).

82. See Knox, *supra* note 23 (advocating a three-tiered presumption against extrajurisdictionality: (1) rejecting application of U.S. law where there is no basis for legislative jurisdiction; (2) presuming that U.S. law extends to situations where the United States has the “primary” legislative jurisdiction; and (3) allowing evidence of congressional intent to overcome a soft presumption against the application of U.S. law in situations where the United States has less-than-primary legislative jurisdiction); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 119 (2010) (proposing a “dual illegality rule” under which courts decline to apply U.S. law to extraterritorial conduct unless that conduct would be illegal or similarly regulated in the territorial state).

has been clear about the independence of the twin canons.<sup>83</sup> The Supreme Court seems invested in a distinct rule that presumes that legislation should not be extended extraterritorially without the indication of congressional intent to the contrary—the presumption against extraterritoriality.

### C. *The Operation of the Presumption*

The previous Section outlined the history and justification of the presumption against extraterritoriality. This Section pauses to address two aspects of its operation. When presented a case with some extraterritorial aspects, a court must answer two central questions with respect to the presumption. One is explicit in the articulation of the presumption: courts presume statutes do not apply extraterritorially unless a contrary intent appears, so a court must determine whether there is such a contrary intent. If such intent is uncovered, the case “overcomes” the presumption and may pro-

---

83. See, e.g., *Hartford Fire*, 509 U.S. at 813 (Scalia, J., dissenting); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 207 (1993) (Blackmun, J., dissenting); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 264 (1991) (Marshall, J., dissenting). The twin canons are not coextensive. For example, the facts of *Aramco* are ones that could pass the *Charming Betsy* canon—relying on nationality for legislative jurisdiction—but fail the presumption against extraterritoriality. One can also imagine cases that fail the *Charming Betsy* canon but pass the presumption. For example, in his *Hartford Fire* dissent, Justice Scalia points to two Jones Act cases where the presumption of extraterritoriality would not apply (since the conduct occurred in American waters), but principles of international law countenanced against extending legislative jurisdiction to the claims of foreign sailors against foreign employers. 509 U.S. at 815–16 (Scalia, J., dissenting) (citing *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 383 (1959) and *Lauritzen v. Larsen*, 345 U.S. 571 (1953)). Indeed, in this connection, Justice Scalia imagines that the presumption against extraterritoriality precedes, rather than follows, the *Charming Betsy* canon. *Id.* at 814–15. International law’s reasonableness limit on the exercise of legislative jurisdiction provides another way to achieve this result. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 403(1) (“Even when one of the bases for jurisdiction under § 402 is present, 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.”). Assume that a court has used the *Charming Betsy* canon to incorporate this reasonableness check. One could imagine a court finding that the presumption permits the application of U.S. law based on “weakly” territorial conduct—the creation of a website viewed in the United States; a single telephone call to a foreign cell phone using a U.S. cell phone tower or satellite—but holding the application of the statute to the facts would be an unreasonable extension of legislative jurisdiction, and thus ruling that the *Charming Betsy* canon precludes the court from applying the ambiguous statute. See, e.g., *In re Hijazi*, 589 F.3d 401 (7th Cir. 2009) (discussing indictment of foreign national for conduct abroad that included sending emails to email addresses with American domain names, e.g., @Halliburton.com).

ceed. The other question is implicit in the presumption and antecedent to its application. The presumption is only relevant where the court is asked to apply U.S. law extraterritorially. While it appears straightforward on its surface, whether a case may be characterized as “extraterritorial” in the first place has been the subject of intense scholarly and judicial debate. If the case is not “extraterritorial,” then the presumption does not apply (or can be “avoided”) and the case moves ahead. This Section briefly surveys the background on these two operational issues: when the presumption can be overcome, and when it applies or is avoided.

### 1. Overcoming the Presumption

The classic statement of the presumption is that statutes do not apply extraterritorially *unless a contrary intent appears*. Such a formulation means that courts will only reject the extraterritorial application of a U.S. law after concluding that there is no contrary intent. This Article will refer to this act as “overcoming” the presumption: in a situation where the presumption could apply, legislative intent may allow a court to *overcome* the presumption.

For explicitly extraterritorial statutes, this job is easy—where Congress says that a law should apply extraterritorially, that expression of intent overcomes the presumption. However, there are many statutes for which there is an argument that an extraterritorial intent could be inferred. Can the presumption be overcome by implication? One option is to treat the presumption as a clear-statement rule—unless Congress expressly calls for the extraterritorial application of a law, the presumption directs courts to apply the ambiguous law only within the territory of the United States. Alternatively, courts could have the latitude to read an extraterritorial intent into ambiguous statutes. If the presumption can be overcome by implication, then a number of additional interpretative challenges arise: What sources can be consulted to determine congressional intent? How easily must the intent be ascertained? What rules of interpretation should guide that inquiry?

In *Aramco*, the majority appeared to make it more difficult to overcome the presumption, making multiple references to a “clear expression” of congressional intent and once explicitly mentioning the need for a “clear statement.”<sup>84</sup> In a dissent joined by Justices Blackmun and Stevens, Justice Thurgood Marshall rejected the ma-

---

84. 499 U.S. at 248 (“[U]nless there is the affirmative intention of the Congress *clearly expressed*, we must presume it is primarily concerned with domestic conditions.”) (emphasis added) (internal citations and quotation marks omitted); *id.* at 258 (“Congress’s awareness of the need to make a clear statement that a statute

majority's clear-statement rule, noting that this approach was contrary to decisions like *Foley Brothers*.<sup>85</sup> Marshall observed that the presumption was a tool of ascertaining congressional intent and that "[c]lear-statement rules operate less to reveal *actual* congressional intent than to shield important values from an *insufficiently strong* legislative intent to displace them."<sup>86</sup> Inferring congressional intent for the extraterritorial application of Title VII, the dissent concluded that the suit could go forward.<sup>87</sup>

This Article will not venture to resolve these disputes or determine which tools of interpretation should be used to divine congressional intent, but it will again consider how courts can overcome the presumption in the discussions of *Bowman* and *Morrison*. For the moment, it suffices to say that the general trend in Supreme Court decisions has been to make it more difficult to overcome the presumption.

## 2. Applying or Avoiding the Presumption

So far, the discussion of the presumption has addressed whether a law may apply extraterritorially. But courts considering the presumption against extraterritoriality must also answer a threshold question: In which cases does the presumption apply? How do we know if a particular case should be treated as "territorial" or "extraterritorial"? Or, in other words, what territorial connections are necessary to avoid the presumption altogether?

While this seems like a simple question on the surface, in fact it has comprised the central fight with respect to extraterritoriality for decades—although it is not always phrased in this way. In his article, Professor Dodge identifies three theories, which he associates with Justice Holmes, Judge Bork, and Judge Mikva, that respond to this question.<sup>88</sup> The Holmes view, exemplified by *American Banana*, looks at the location of the relevant *conduct*: courts should presume

---

applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute.").

85. *Id.* at 261–66 (Marshall, J., dissenting). The dissent notes that cases such as *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), and *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), which appear to support a clear-statement rule, represent situations in which the extraterritorial application of the statute would violate international law, i.e., the *Charming Betsy* canon. *Id.* at 264–65 (Marshall, J., dissenting).

86. *Id.* at 262 (Marshall, J., dissenting).

87. *Id.* at 278 (Marshall, J., dissenting).

88. See Dodge, *supra* note 55, at 101–10.

that statutes do not apply to extraterritorial conduct.<sup>89</sup> The Bork view, expressed in *Zoelsch v. Arthur Anderson & Co.*, ignores the location of the conduct in favor of the location of its *effects*: are the relevant effects within the United States?<sup>90</sup> Finally, the Mikva view, articulated in *Environmental Defense Fund v. Massey*, is most willing to avoid the presumption.<sup>91</sup> Mikva presumes that Congress intended its statutes to apply to *conduct* within the United States and to conduct with *effects* in the United States—meaning that the presumption applies (and the law would be inapplicable) where neither the conduct or effects are inside the territory of the United States.<sup>92</sup> For this reason, Judge Mikva's view may also be called the conduct-and-effects test. Prior to *Morrison*, the conduct-and-effects test represented the dominant view of the lower courts and the scholarly community.<sup>93</sup> In the particularly significant areas of securities law—which Professor Dodge refers to as the “\$64,000 question” of extraterritorially—and antitrust law, the conduct-and-effects approach has been considered the starting point for this analysis.<sup>94</sup>

The commonality among these three approaches to extraterritoriality is revealing. Each test seeks to establish a universal rule that directs courts when to apply the presumption against extraterritoriality—when the conduct is extraterritorial, when the effects are extraterritorial, or when both are extraterritorial. While there is merit to selecting a trigger that would apply to all statutes (as these three proposals do), courts are not necessarily bound to domain-general approaches. An alternative not discussed by Dodge or most other

---

89. *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909); *see also* *Subafilms, Ltd. v. MGM-Pathe Commc'ns Co.*, 24 F.3d 1088 (9th Cir. 1994) (en banc) (adopting this view after *Aramco*).

90. 824 F.2d 27, 30 (D.C. Cir. 1987); *see also* *Robinson v. TCI/US West Commc'ns*, 117 F.3d 900, 905–07 (5th Cir. 1997) (adopting this view after *Aramco*).

91. 986 F.2d 528, 530–32 (D.C. Cir. 1993).

92. *Id.* at 531.

93. *See, e.g.*, *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878–80 (collecting cases); *id.* at 2888–95 (Stevens, J., concurring in the judgment) (defending this approach); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 402; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965); Dodge, *supra* note 55, at 101–05 (collecting cases).

94. *See, e.g.*, *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416 (2d Cir. 1945); Dodge, *supra* note 55, at 101–05; Born, *supra* note 25, at 29–39, 45–48; BORN & RUTLEDGE, *supra* note 16, at 640–58; JAMES R. ATWOOD & KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD §§ 6.05–6.08 (2d ed. 1981); *infra* notes 160–162 and accompanying text (discussing the Second Circuit's approach to securities cases leading up to *Morrison*). As Justice Stevens wrote in his separate opinion in *Morrison*, “The Second Circuit's test became the ‘north star’ of [Securities Exchange Act] jurisprudence, not just regionally but nationally as well.” 130 S. Ct. at 2889 (Stevens, J., concurring in the judgment) (internal citation omitted).



commentators on this issue is an approach that asks the *statute* to determine the subject of the extraterritoriality inquiry.<sup>95</sup> In other words, courts could engage in a statute-specific inquiry about what Congress intended to cover before asking whether the territorial elements fit that description. Sometimes Congress cares about the conduct; sometimes it cares about the effects; and sometimes it may care about some wholly different consideration. Moreover, sometimes Congress may care only about a certain type of conduct or effect, not any conduct or effect that would be sufficient to provide a nominally territorial basis for the action. Why not look to the statute (and its context) to determine what Congress intended?

Although commentators typically do not talk about the presumption in this way, there is support for this approach in (among others) the Supreme Court's most recent opinion on the presumption, *Morrison v. National Australia Bank*. In *Morrison*, the Court announced that the test of territoriality applied to the "focus" of the statute, and, in the process, assigned to courts the task of divining Congress's "focus." In short, only territorial connections related to the statute's focus can save a case from the presumption.<sup>96</sup>

In sum, cases like *Aramco* have made it harder to overcome the presumption, and as described later in Part III, *Morrison* seems to have made it harder to avoid the presumption with claims of territoriality. Before turning to that inquiry, Part II looks at the application of the presumption in criminal cases before *Morrison*.

## II. EXTRATERRITORIAL CRIMINAL LAW: *UNITED STATES V. BOWMAN*

*Foley Brothers*, *Aramco*, and *Morrison* expounded on the presumption against extraterritoriality in the civil context. For criminal cases, the Supreme Court's 1922 decision in *United States v. Bowman* remains the governing precedent.<sup>97</sup> Like the civil cases described

---

95. See, e.g., *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the *purpose and context of the statute*, and consulting any precedents or authorities that inform the analysis.") (emphasis added).

96. See *Morrison*, 130 S. Ct. at 2883–86; *infra* notes 164–167 and accompanying text (discussing *Morrison's* focus test).

97. *United States v. Bowman*, 260 U.S. 94 (1922). *Bowman* recognized the importance of civil precedent in criminal cases, but also, by its terms, drew a distinction between criminal and civil law with respect to the presumption. Therefore we cannot presume that civil decisions since *Bowman* have overruled it. See, e.g., *United States v. Leija-Sanchez*, 602 F.3d 797, 798–99 (7th Cir. 2010) (making this argument in a prosecution under 18 U.S.C. § 1959).

above, *Bowman* and its progeny do not question the power of Congress to enact extraterritorial criminal laws. Instead, these cases ask whether a court should apply an ambiguous criminal statute extraterritorially.

For centuries, the answer to that question was flatly “no.” Strict territoriality was the rule for criminal cases. As Chief Justice John Marshall wrote:

No principle of general law is more universally acknowledged, than the perfect equality of nations. . . . It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone.<sup>98</sup>

The reverence for territoriality was particularly strong in the criminal context because it involved a state seeking to directly enforce its laws abroad.<sup>99</sup> Courts and scholars have looked back to the Nineteenth Century as an era of strict territoriality in criminal cases,<sup>100</sup> though many of these early criminal decisions focused on legislative-jurisdictional concerns, rather than relying on a separate presumption.<sup>101</sup> *Bowman* is a criminal case that articulates a stand-alone presumption against extraterritoriality distinct from any legislative-jurisdictional analysis.<sup>102</sup>

The facts of *Bowman* arise out of the United States’s defense preparations leading up to its entry into World War I. In 1917, the

---

98. *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825); see WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* §§ 4.2(d), 4.4 (2d ed. 2003).

99. See Born, *supra* note 25, at 51. But see *infra* notes 208–209 and accompanying text (discussing civil-enforcement actions brought by the government).

100. See, e.g., *Small v. United States*, 544 U.S. 385, 388–89 (2005) (citing *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818)); Born, *supra* note 25, at 51.

101. See Knox, *supra* note 23, at 362–66. Three early piracy cases are often cited in this connection: *Palmer*, 16 U.S. (3 Wheat.) at 620; *United States v. Klinton*, 18 U.S. (5 Wheat.) 144 (1820); and *United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820). But Knox correctly observes that these early piracy cases do not tell us much about the presumption since the statute was expressly extraterritorial. See Act of April 30, 1790 § 8, 1 Stat. 112, 113–14.

102. 260 U.S. 94. Other important cases from the era include *Ford v. United States*, 273 U.S. 593 (1927) (permitting the prosecution for conspiracy to smuggle liquor into the United States where defendant acted on the high seas but intended the effects to occur in the United States and conspired with others within the United States); *Lamar v. United States*, 240 U.S. 60 (1916) (permitting the prosecution for fraudulent impersonation carried out by telephone originating out of state); and *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (“Acts 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.”).

United States established the United States Shipping Board Emergency Fleet Corporation to acquire, maintain, and operate a fleet of merchant ships for commerce and national defense.<sup>103</sup> The United States was the sole stockholder in the Fleet Corporation. The Fleet Corporation, in turn, owned and operated the steamship *Dio*.<sup>104</sup> The *Dio* was supposed to acquire one thousand tons of oil in Rio de Janeiro and deliver it to the United States. A Standard Oil agent, a merchant in Rio, and four men on the ship (including Raymond Bowman) hatched a plan to defraud the U.S. government: the schemers planned to buy and deliver only 600 tons of fuel and keep the funds earmarked for the remaining 400 tons for themselves. The U.S. government uncovered the plan and charged the four men from the *Dio* with conspiracy to defraud the Fleet Corporation in which the United States was a stockholder.<sup>105</sup> Three of the four men, all American citizens, appeared in federal court in the Southern District of New York and requested that the district court dismiss the indictment for lack of jurisdiction. The district court conceded that the United States had the power to “regulate the ships under its flag and the conduct of its citizens on those ships” (i.e. legislative jurisdiction), but the court rejected the indictment based on its interpretation of the criminal statute.<sup>106</sup> “Congress had always expressly indicated it when it intended that its laws should be operative on the high seas”; because there was no such express indication in the statute at issue, the district court concluded that it did not apply to Bowman and his compatriots.<sup>107</sup>

The Supreme Court agreed on the focus of the inquiry: “We have in this case a question of statutory construction.”<sup>108</sup> Legislative jurisdiction was not an issue. The Court also concurred with the district court on the background rule: “If punishment of [certain offenses] is to be extended to include those committed outside of

---

103. See Shipping Act, ch. 451, 39 Stat. 728 (1916) (creating the Shipping Board, which subsequently established the Emergency Fleet Corporation in 1917). See also *Records of the United States Shipping Board*, NATIONAL ARCHIVES, <http://www.archives.gov/research/guide-fed-records/groups/032.html> (last visited Sept. 21, 2011).

104. *Bowman*, 260 U.S. at 95. The remainder of the factual description comes from the Supreme Court opinion.

105. The *Bowman* decision provides the full text of the criminal provision at issue in the indictment. *Id.* at 100 n.1 (quoting Section 35 of the Criminal Code, as amended by Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015). Suffice it to say, the statute is ambiguous as to its extraterritorial application.

106. 260 U.S. at 97. See *United States v. Bowman*, 287 F. 588 (S.D.N.Y. 1921).

107. *Bowman*, 260 U.S. at 97.

108. *Id.*

the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.”<sup>109</sup> This is the presumption against extraterritoriality applied in a criminal case. The Court articulated this rule with a citation to *American Banana*, noting that “[*American Banana*] was a civil case, but as the statute is criminal as well as civil, it presents an analogy.”<sup>110</sup>

From there, however, the Supreme Court broke from the district court. The Court described different classes of criminal statutes. “Crimes against private individuals or their property,” the first category, are presumed to apply territorially unless Congress indicates otherwise.<sup>111</sup> But not all crimes fit this description; the Court identified a second category of crimes “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.”<sup>112</sup> For such offenses, to avoid “curtail[ing] the scope and usefulness of the statute and leav[ing] open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home,” a court must conclude that the statute applies extraterritorially, even if Congress does not so expressly provide.<sup>113</sup> “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.”<sup>114</sup>

Turning to the statute in question, the Court inferred an extraterritorial intent from the nature of the offense:

[The statute] is directed generally against whoever presents a false claim against the United States, knowing it to be such, to any officer of the civil, military or naval service or to any de-

---

109. *Id.* at 98.

110. *Id.*

111. *Id.* (“Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and fraud of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.”).

112. *Id.*

113. *Id.*

114. *Id.* See also *id.* at 98–99 (describing other similar offenses from which an extraterritorial intent may be inferred).

partment thereof, or any corporation in which the United States is a stockholder, or whoever connives at the same by the use of any cheating device, or whoever enters a conspiracy to do these things. The section was amended in 1918 to include a corporation in which the United States owns stock. This was evidently intended to protect the Emergency Fleet Corporation in which the United States was the sole stockholder, from fraud of this character. That Corporation was expected to engage in, and did engage in, a most extensive ocean transportation business and its ships were seen in every great port of the world open during the war. The same section of the statute protects the arms, ammunition, stores and property of the army and navy from fraudulent devices of a similar character. We can not suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the Government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intend to include them in the section.<sup>115</sup>

For these reasons, the Court held that the statute applied to Bowman and his co-conspirators.<sup>116</sup>

The Court summarized its rule as follows: "The necessary locus, when not specifically defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations."<sup>117</sup> This summary fits nicely into the Court's current twin-presumption approach. The last portion's reference to the "jurisdiction of a government to punish crime under the law of nations" evokes legislative-

---

115. *Id.* at 101-02.

116. *Id.* In addition, the Court appeared to reject a rule of lenity argument. *Id.* at 102 (quoting *United States v. Lacher*, 134 U.S. 624, 629 (1890)). See *infra* note 214 and accompanying text.

Contemporaneous accounts suggested an additional reason to allow the extra-territorial application of certain statutes—the fear that individuals would intentionally leave a jurisdiction in order to commit crimes within it. See 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, 593 (2007) (quoting *Laws Apply at Sea, Supreme Court Rules*, WASH. POST, Nov. 14, 1922, at 5 (“[U]nless the ruling of the lower court was set aside the criminal statutes of the United States could be violated with impunity by persons going outside the 3-mile limit.”)).

117. *Bowman*, 260 U.S. at 97-98.

(or personal-) jurisdictional limits.<sup>118</sup> The earlier requirement looks to the purpose of Congress as part of a canon of interpretation that starts with a presumption against extraterritoriality.

In the years since, U.S. courts of appeals have relied on *Bowman* and civil precedents to apply U.S. criminal laws extraterritorially.<sup>119</sup> These cases reveal two important trends: courts of appeals have cited *Bowman* alongside the civil cases, and these courts have repeatedly stretched the substantive reasoning of *Bowman* to apply more and more criminal statutes extraterritorially.

---

118. This was not the Court's only reference to legislative or personal jurisdiction. The Court also observed:

Section 41 of the Judicial Code provides that 'the trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.' The three defendants who were found in New York were citizens of the United States and were certainly subject to such laws as it might pass to protect itself and its property. Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance. The other defendant is a subject of Great Britain. He has never been apprehended, and 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.

*Id.* at 102–03. Whether this latter statement's reference to "jurisdiction" means legislative jurisdiction or personal jurisdiction, it appears to be separate from the rule of statutory construction described in the text of this Article. *See, e.g., In re Hijazi*, 589 F.3d 401, 410 (7th Cir. 2009) (arguing that the excerpt quoted in this footnote refers to personal jurisdiction).

119. This Section relies on a comprehensive survey of all courts of appeals decisions citing the *Bowman* decision. Since this Article is concerned with the presumption against extraterritoriality, this Section ignores the many cases in which *Bowman* is used to address other topics, including (often) the "special territorial" or "maritime" jurisdiction of the United States. *See, e.g., United States v. Neil*, 312 F.3d 419, 421 (9th Cir. 2002) (discussing the passive personality principle); *United States v. Corey*, 232 F.3d 1166, 1169–70 (9th Cir. 2000) (addressing the special maritime and territorial jurisdiction of the United States); *Kollias v. D & G Marine Maint.*, 29 F.3d 67, 68 (2d Cir. 1994) (application of statute to "injuries sustained on the high seas"); *United States v. Smith*, 680 F.2d 255 (1st Cir. 1982) (addressing maritime jurisdiction of the United States); *Agee v. Muskie*, 629 F.2d 80 (D.C. Cir. 1980) (addressing revocation of American passport based upon citizen's conduct abroad); *United States v. Erdos*, 474 F.2d 157 (4th Cir. 1973) (addressing the murder of an American citizen on an American diplomatic compound); *United States v. Townsend*, 474 F.2d 209 (5th Cir. 1973) (addressing theft from a military base). This Article also excludes the most infamous defendant invoking *Bowman* because there was no extraterritorial issue in that case. *See Capone v. United States*, 51 F.2d 609, 614 (7th Cir. 1931) (rejecting the appellant's argument, which was based on *Bowman* and others, that the false claims statute did not apply to the territorial facts of Scarface Al's case).

Courts applying *Bowman* have taken the opportunity to explain its relationship to civil precedents. Some of these decisions suggested that *Bowman* merely restated the *American Banana* rule that statutes are presumed to apply territorially unless Congress has indicated otherwise.<sup>120</sup> Others suggested that *Bowman* created a limited exception to the presumption.<sup>121</sup> Either way, despite the outcomes described below, the courts of appeals say that *Bowman* and the civil law precedents live in harmony.<sup>122</sup>

Turning to the reach of *Bowman*, it is important to recall that *Bowman* was a case about fraud against the U.S. government, and its reasoning (as quoted above) expressly applied to those criminal laws that “are enacted because of the right of the Government to

---

120. See, e.g., *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 6–7 (1st Cir. 1997) (taking this position and rejecting the district court’s view that the presumption is stronger in the criminal context). This approach has been adopted by other circuits. See, e.g., *United States v. Belfast*, 611 F.3d 783, 810–15 (11th Cir. 2010); *United States v. Leija-Sanchez*, 602 F.3d 797, 798–800 (7th Cir. 2010); *United States v. Villanueva*, 408 F.3d 193, 197 (5th Cir. 2005); *United States v. Delgado-Garcia*, 374 F.3d 1337, 1345–47 (D.C. Cir. 2004); *United States v. Harvey*, 2 F.3d 1318, 1327–30 (3d Cir. 1993); *United States v. Larsen*, 952 F.2d 1099, 1100 (9th Cir. 1991).

121. See, e.g., *United States v. Frank*, 599 F.3d 1221, 1230 (11th Cir. 2010); *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000); *United States v. Dawn*, 129 F.3d 878 (7th Cir. 1997); *United States v. Vasquez-Velasco*, 15 F.3d 833 (9th Cir. 1994); *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977); see also Meyer, *supra* note 82, at 135 (referring to *Bowman* as an exception to the strict territoriality rule). The “exceptions” track the substantive categories described below, e.g., crimes against the interests of government or crimes where the “nature of the offense” implies an extraterritorial application. Further, many courts have applied the presumption in concert with some limit on legislative jurisdiction, for example, *United States v. Vasquez-Velasco*, 15 F.3d 833, 839–41 (9th Cir. 1994); *United States v. Wright-Barker*, 784 F.2d 161, 167–70 (3d Cir. 1986), although some have muddled the two inquiries. See, e.g., *United States v. Columba-Colella*, 604 F.2d 356 (5th Cir. 1979); *United States v. Birch*, 470 F.2d 808 (4th Cir. 1972); *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir. 1968). Indeed, the Supreme Court may be partially responsible, since its decision in *Skiriotes v. Florida* connected *Bowman* and the nationality basis of legislative jurisdiction: “[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.” 313 U.S. 69, 73–74 (1941).

122. For example, numerous decisions cite favorably to *Bowman* and *Aramco*. See, e.g., *United States v. Weingarten*, 632 F.3d 60, 66–67 (2d Cir. 2011); *Leija-Sanchez*, 602 F.3d at 799; *United States v. Corey*, 232 F.3d 1166 (9th Cir. 2000); *United States v. MacAllister*, 160 F.3d 1304 (11th Cir. 1998). Others cite favorably to *Bowman* and *American Banana*. See *supra* note 120. And none of these cases suggests that the Supreme Court’s recent civil law decisions overrule *Bowman*. See, e.g., *Leija-Sanchez*, 602 F.3d at 798 (expressly rejecting this position).

defend itself against obstruction, or fraud wherever perpetrated . . . .”<sup>123</sup> The fairest reading—or at least the narrowest one—would provide that a court can overcome the presumption and infer congressional intent to apply extraterritorially those statutes that protect government contracts from fraud and obstruction. The outcomes of courts of appeals cases show that these courts do not always hew to this narrow reading; instead, these courts routinely reconstruct *Bowman* to overcome the presumption and apply a U.S. criminal law abroad.<sup>124</sup> Such cases can be categorized into four groups ranging from the narrowest to widest readings of the *Bowman* holding.<sup>125</sup>

---

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

124. Scholars observing this trend include Podgor & Filler, *supra* note 116, at 592 and Born, *supra* note 25, at 53.

125. The courts of appeals cases that have dealt with extraterritoriality of criminal statutes since *Bowman* are: *Leija-Sanchez*, 602 F.3d 797 (7th Cir.) (violent crimes (here, murder) in furtherance of a racketeering enterprise, 18 U.S.C. § 1959); *Frank*, 599 F.3d at 1227 (11th Cir.) (obtaining custody of a minor with the intent to produce child pornography, 18 U.S.C. § 2251A(b)(2)(A)); *United States v. Dasilva*, 271 Fed. App’x 856 (11th Cir. 2008) (per curiam) (attempted reentry into the United States, 8 U.S.C. § 1326(a)); *United States v. Strevell*, 185 Fed. App’x 841 (11th Cir. 2006) (per curiam) (sex tourism, 18 U.S.C. § 2423(c), and attempting to obtain or induce a minor to engage in prostitution, 18 U.S.C. §§ 1591(a), 1594(a), 2422(b)); *Villanueva*, 408 F.3d 193 (5th Cir.) (conspiracy to bring undocumented aliens into the United States, 8 U.S.C. § 1324(a)(2)(B)(ii)); *United States v. Delgado-Garcia*, 374 F.3d 1337, 1345–47 (D.C. Cir. 2004) (conspiracy to induce aliens to enter the United States illegally or to attempt to bring illegal aliens into the United States, 8 U.S.C. § 1324(a)); *United States v. Plummer*, 221 F.3d 1298 (11th Cir. 2000) (conspiracy to smuggle drugs into the United States, 18 U.S.C. § 545); *MacAllister*, 160 F.3d 1304 (11th Cir.) (conspiracy to export narcotics from the United States, 18 U.S.C. §§ 953, 963); *Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir.) (price-fixing, 15 U.S.C. §§ 1–7); *Vasquez-Velasco*, 15 F.3d 833 (9th Cir.) (violent crimes in aid of racketeering, 18 U.S.C. § 1959); *Larsen*, 952 F.2d at 1100 (9th Cir.) (possession with intent to distribute marijuana, 21 U.S.C. § 841(a)(1)); *United States v. Felix-Gutierrez*, 940 F.2d 1200 (9th Cir. 1991) (accessory after the fact to the commission of an offense against the United States, 18 U.S.C. § 3); *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989) (inducing aliens to enter the United States, 18 U.S.C. § 1324(a)(4)); *United States v. Layton*, 855 F.2d 1388 (9th Cir. 1988) (conspiracy to kill a Congressperson and aiding and abetting that act, 18 U.S.C. § 351); *United States v. Goldberg*, 830 F.2d 459 (3d Cir. 1987) (transportation of fraudulently obtained money in interstate or foreign commerce, 18 U.S.C. § 2314, and wire fraud, 18 U.S.C. § 1343); *United States v. Walczak*, 783 F.2d 852 (9th Cir. 1986) (false statements (here on a Customs form), 18 U.S.C. § 1001); *United States v. Wright-Barker*, 784 F.2d 161 (3d Cir. 1986) (conspiracy to import contraband, 21 U.S.C. §§ 952(a) & 960(a)(1), and possession of contraband with intent to distribute, 21 U.S.C. § 841(a)(1)); *United States v. Aguilar*, 756 F.2d 1418 (9th Cir. 1985) (impersonation of government official, 18 U.S.C. § 912); *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984) (conspiring to murder DEA agents, 18 U.S.C. §§ 1114, 1117, assaulting DEA agents, 18 U.S.C.



The first group extends *Bowman* only slightly beyond government-fraud cases by characterizing *Bowman* as allowing the extraterritorial application of laws punishing all crimes against the United States government.<sup>126</sup> Claiming a direct analogy to the facts of *Bow-*

---

§§ 111, 2, and stealing government property, 18 U.S.C. §§ 2112, 2); *United States v. Perez-Herrera*, 610 F.2d 289 (5th Cir. 1980) (forbidding the manufacture or distribution of drugs for the purposes of importation, 21 U.S.C. § 959); *United States v. Baker*, 609 F.2d 134 (5th Cir. 1980) (possession of marijuana with the intent to distribute, 21 U.S.C. § 841(a)(1)); *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978) (conspiracy to import controlled substances into the United States, 21 U.S.C. §§ 952, 963); *United States v. Castillo-Felix*, 539 F.2d 9 (9th Cir. 1976) (reproduction of citizenship papers, 18 U.S.C. § 1426(a), and encouraging and inducing unlawful entry into the United States, 8 U.S.C. § 1324(a)(4)); *United States v. Cotten*, 471 F.2d 744 (9th Cir. 1973) (theft of government property, 18 U.S.C. § 641, and conspiracy, 18 U.S.C. § 371); *United States v. Birch*, 470 F.2d 808 (4th Cir. 1972) (forging military documents, 18 U.S.C. § 499); *Stegeman v. United States*, 425 F.2d 984 (9th Cir. 1970) (fraudulent transfers and concealment of assets in contemplation of bankruptcy, 18 U.S.C. § 152); *Brulay v. United States*, 383 F.2d 345 (9th Cir. 1967) (conspiracy to smuggle controlled substances into the United States, 18 U.S.C. §§ 371, 545); *see also* *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003) (applying 18 U.S.C. §§ 32(a)(1), 371, conspiracy to bomb United States aircraft, extraterritorially based on *Bowman* and the "special aircraft jurisdiction"). *But see* *United States v. Lopez-Vanegas*, 493 F.3d 1305 (11th Cir. 2007) (holding that 21 U.S.C. §§ 841(a)(1), 846, which make it unlawful for any person to conspire to possess with the intent to distribute a controlled substance, do not apply extraterritorially based on *Bowman*); *United States v. Reeves*, 62 M.J. 88 (C.A.A.F. 2005) (rejecting the extraterritorial application of the Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2251, 2252, 2252A, 2260(b), based on *Bowman*); *United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005) (same); *Mitchell*, 553 F.2d 996 (5th Cir.) (holding that the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1407, does not apply extraterritorially based on *Bowman*). For a discussion of the cases excluded from this comprehensive survey, *see supra* note 119.

126. *United States v. Gatlin*, 216 F.3d 207, 211 n.5 (2d Cir. 2000) ("Statutes prohibiting crimes *against the United States government* may be applied extraterritorially even in the absence of 'clear evidence' that Congress so intended."); *Vasquez-Velasco*, 15 F.3d at 839 ("Where the locus of the conduct is not relevant to the end sought by the enactment of the statute, and the statute prohibits conduct that obstructs the functioning of the United States government, it is reasonable to infer congressional intent to reach crimes committed abroad."); *Felix-Gutierrez*, 940 F.2d 1200; *Goldberg*, 830 F.2d at 462 (finding that *Bowman* "held that in case of offenses against the operations of the Government of the United States, Congress need not have specified that extraterritorial jurisdiction existed before there could be prosecution in our courts"); *Aguilar*, 756 F.2d at 1424; *Benitez*, 741 F.2d at 1316–17 (finding that theft of government property as well as assault and attempted murder of U.S. government agents are "exactly the type of crime[s] that Congress must have intended to apply extraterritorially"); *Cotten*, 471 F.2d at 751 ("It is not reasonable to imagine that Congress intended, by Section 641, to punish this type of offense against the United States when committed domestically but to leave it unpunished when committed abroad. Section 641 is not susceptible to that construction. It

*man*, these cases include prosecutions for the theft of government property<sup>127</sup> and for crimes against government agents.<sup>128</sup>

The second group stretches *Bowman* to those criminal laws that can be characterized as protecting the “interests of government.”<sup>129</sup> Again drawing a line to *Bowman*, these decisions remark on, for example, the interests of the United States in maintaining its borders<sup>130</sup> and operating a functional bankruptcy system.<sup>131</sup> Notably, immigration-related offenses appeared frequently in the review of cases applying *Bowman*, relying on the “interests of government” logic or some of the additional interpretations described below.<sup>132</sup>

In the third group of cases, some courts have drawn on *Bowman*’s reference to the “nature” of the offense as creating an exception for certain classes of criminal laws—but have done so without limiting the exception to crimes with a direct effect on the United States government, as was the case in *Bowman*.<sup>133</sup> For example,

---

prohibits conduct which is obstructive of the functions of government. The locus of the conduct is not relevant to the end sought by the enactment. The effective operation of government cannot condone the hiatus in the law that a contrary construction would cause. The only reasonable construction of Section 641 is that it prohibits theft of government property wherever located.”). *See Delgado-Garcia*, 374 F.3d at 1354–55 (Rogers, J., dissenting); *see also Layton*, 855 F.2d at 1395 (applying 18 U.S.C. § 351, conspiracy to kill a Congressperson and aiding and abetting that killing, extraterritorially based on the “nature of the offense”).

127. *Cotten*, 471 F.2d at 751.

128. *Felix-Gutierrez*, 940 F.2d 1200.

129. *Stegeman*, 425 F.2d at 986 (arguing that the prohibition on fraudulent transfers and concealment of assets in contemplation of bankruptcy “was enacted to serve important interests of government, not merely to protect individuals who might be harmed by the prohibited conduct”); *see United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989) (applying *Bowman* to extraterritorial crimes that “negatively affect the United States”); *see also Castillo-Felix*, 539 F.2d 9 (applying 18 U.S.C. § 1426(a), reproduction of citizenship papers, and 8 U.S.C. § 1324(a)(4), encouraging and inducing unlawful entry into the United States, extraterritorially based on the “nature of the offense,” *infra* notes 133–138); *United States v. Birch*, 470 F.2d 808 (4th Cir. 1972) (applying 18 U.S.C. § 499, forging military documents, extraterritorially based on *Bowman*).

130. *United States v. Aguilar*, 756 F.2d 1418 (9th Cir. 1985).

131. *Stegeman*, 425 F.2d at 986.

132. *E.g.*, *United States v. Dasilva*, 271 Fed. App’x 856 (11th Cir. 2008) (*per curiam*); *United States v. Villanueva*, 408 F.3d 193, 199 (5th Cir. 2005); *Delgado-Garcia*, 374 F.3d 1337; *Aguilar*, 883 F.2d 662; *Castillo-Felix*, 539 F.2d at 13.

133. *See United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010) (using and carrying a firearm in relation to a crime of violence (here, a violation of the Torture Act)); *United States v. Leija-Sanchez*, 602 F.3d 797 (7th Cir. 2010) (murder in furtherance of a racketeering enterprise); *United States v. Frank*, 599 F.3d 1221 (11th Cir. 2010) (sex tourism); *Dasilva*, 271 Fed. App’x 856 (attempted reentry into the United States); *Villanueva*, 408 F.3d at 199 (conspiracy to bring undocumented aliens into the United States); *Delgado-Garcia*, 374 F.3d at 1356 (same);

courts have claimed that the “nature” of smuggling offenses implies an extraterritorial intent because “smuggling by its very nature involves foreign countries.”<sup>134</sup> The “nature of the offense” approach is commonly applied to crimes that frequently manifest in trans-border conduct or effects: immigration (as mentioned above),<sup>135</sup> sex tourism and human trafficking,<sup>136</sup> and drug trafficking.<sup>137</sup> Courts also have applied RICO laws extraterritorially, citing both the nature of the offense and the interests of the government.<sup>138</sup>

Finally, courts have stepped beyond the core holding of *Bowman* to consider policy justifications for the extraterritorial applica-

---

United States v. MacAllister, 160 F.3d 1304 (11th Cir. 1998) (conspiracy to export drugs from the United States); United States v. Nippon Paper Indus. Co., 109 F.3d 1 (1st Cir. 1997) (price fixing); United States v. Larsen, 952 F.2d 1099 (9th Cir. 1991) (drug possession with the intent to distribute; collecting cases); United States v. Baker, 609 F.2d 134 (5th Cir. 1980) (same); United States v. Castillo-Felix, 539 F.2d 9 (9th Cir. 1976) (counterfeiting citizenship papers and encouraging illegal entry into the United States). *But see* United States v. Mitchell, 553 F.2d 996 (5th Cir. 1977) (holding that the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361 et seq., does not apply extraterritorially based on the nature of the offense).

134. *Brulay v. United States*, 383 F.2d 345, 350 (9th Cir. 1967) (“Since smuggling by its very nature involves foreign countries, and since the accomplishment of the crime always requires some action in a foreign country, we have no difficulty inferring that Congress did intend that the provisions of 18 U.S.C. § 545 [criminalizing the smuggling of goods into the United States] should extend to foreign countries at least as to citizens of the United States, and that 18 U.S.C. § 371, the conspiracy section, is extended along with it.”); *see* United States v. Plummer, 221 F.3d 1298 (11th Cir. 2000) (adopting *Brulay* on this point). With respect to conspiracy, the Supreme Court said in *Ford v. United States* that the government may prosecute for conspiracy when the defendant was abroad but the conspiracy was, in whole or in part, within the United States. 273 U.S. 593, 624 (1927).

135. *Supra* note 132; *see also* United States v. Walczak, 783 F.2d 852 (9th Cir. 1986) (applying 18 U.S.C. § 1001 to false statements on a Customs form).

136. *E.g.*, *Frank*, 599 F.3d 1221; United States v. Strevell, 185 Fed. App’x 841 (11th Cir. 2006) (*per curiam*).

137. *E.g.*, *Plummer*, 221 F.3d 1298; *MacAllister*, 160 F.3d 1304; *Larsen*, 952 F.2d 1099; United States v. Perez-Herrera, 610 F.2d 289 (5th Cir. 1980); *Baker*, 609 F.2d 134; United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978); *Brulay*, 383 F.2d 345; *see* United States v. Wright-Barker, 784 F.2d 161 (3d Cir. 1986) (relying on policy justifications, *infra* note 139). *But see* United States v. Lopez-Vanegas, 493 F.3d 1305 (11th Cir. 2007) (holding that 21 U.S.C. §§ 841(a)(1), 846, which make it unlawful for any person to conspire to possess with the intent to distribute a controlled substance, do not apply extraterritorially under *Bowman*).

138. United States v. Leija-Sanchez, 602 F.3d 797, 799 (7th Cir. 2010) (relying on the “language and function of the prohibition”); United States v. Vasquez-Velasco, 15 F.3d 833 (9th Cir. 1994) (applying the racketeering laws in light of the murder of a government agent).

tion of U.S. law<sup>139</sup> and to rely on the existence of a comprehensive statutory scheme to find congressional intent for extraterritorial application, often mixing in policy justifications along the way.<sup>140</sup>

The Supreme Court's decision in *Bowman* permitted the extraterritorial application of one statute that protected the United States government from fraud. As this Section has shown, courts of appeals have taken the *Bowman* decision and extended it to apply U.S. laws extraterritorially to protect the government, to protect the interests of the government, in response to the nature of the offense, and to effectuate policy goals. All of these readings appear to

---

139. *E.g.*, *Wright-Barker*, 784 F.2d at 167 ("Congress undoubtedly intended to prohibit conspiracies to import controlled substances into the United States, and intentions to distribute such contraband there, as part of its continuing effort to contain the evils caused on American soil by foreign as well as domestic suppliers of illegal narcotics. Application of these laws to smugglers on the high seas is necessary to accomplish this purpose, such that extraterritorial application may be readily implied. To deny such use of the criminal provisions would be greatly to curtail the scope and usefulness of the statutes.") (internal quotation marks omitted). *See also Perez-Herrera*, 610 F.2d 289 (discussing the effectiveness of the statute and its legislative history in light of the extraterritoriality question).

140. *E.g.*, *Frank*, 599 F.3d at 1231 ("Furthermore, extraterritorial application is supported by the nature of § 2251A and Congress's other efforts to combat child pornography. Section 2251A is part of a comprehensive scheme created by Congress to eradicate the sexual exploitation of children and eliminate child pornography, and therefore warrants a broad sweep."); *United States v. Harvey*, 2 F.3d 1318, 1327–30 (3d Cir. 1993) (expressing concern that the failure to apply the statute extraterritorially would greatly curtail the effectiveness of the statutory scheme); *United States v. Thomas*, 893 F.2d 1066, 1068–69 (9th Cir. 1990) ("Congress has created a comprehensive statutory scheme to eradicate sexual exploitation of children. As part of that scheme, Congress has proscribed the transportation, mailing, and receipt of child pornography. Punishing the creation of child pornography outside the United States that is actually, is intended to be, or may reasonably be expected to be transported in interstate or foreign commerce is an important enforcement tool. We, therefore, believe it likely that under section 2251(a) Congress intended to reach extraterritorial acts that otherwise satisfy the statutory elements.") (internal citation omitted); *Baker*, 609 F.2d at 136–37 ("Absent an express intention on the face of the statutes to do so, the exercise of that power may be inferred from the nature of the offenses and Congress's other legislative efforts to eliminate the type of crime involved. . . . [These] statutes are part of a comprehensive legislative scheme designed to halt drug abuse in the United States by exercising effective control over the various domestic and foreign sources of illegal drugs."). *But see Lopez-Vanegas*, 493 F.3d at 1312–13 (relying on the nature of the offense and the statutory scheme to reject the extraterritorial application of 21 U.S.C. §§ 841(a)(1), 846, which make it unlawful for any person to conspire to possess with the intent to distribute a controlled substance). Professors Podgor and Filler observe that the *Baker* decision appeared to flip the presumption, assuming extraterritorial application without contrary evidence. *See Podgor & Filler*, *supra* note 116, at 592.

fit in the category of decisions that “overcome” the presumption. Yet on the civil side, the Supreme Court has been clear throughout this period that the bar for overcoming the presumption is quite high. *Aramco* goes so far as to suggest that the presumption against extraterritoriality is a clear-statement rule. Even though the Court has not always required a clear statement, its civil law decisions consistently reflect disinclination to overcoming the presumption by implication. Though these decisions are from the civil area, *Bowman* itself (and many of the court of appeals decisions cited in this Section) acknowledged that the civil law decisions should not be wholly ignored in criminal cases.<sup>141</sup>

In any event, it is clear that courts have extended the holding of *Bowman* to apply numerous ambiguous statutes extraterritorially, and continued to do so as late as weeks before the Supreme Court’s most recent reaffirmation of the presumption in *Morrison*,<sup>142</sup> a case to which this Article now turns.

### III.

#### *MORRISON V. NATIONAL AUSTRALIA BANK*

The housing bubble increased the profits of myriad businesses related to the real estate industry, including Florida-based HomeSide Lending, Inc. (HomeSide). Attempting to cash in on the bubble, National Australia Bank (National)—the largest bank in Australia—purchased HomeSide in February 1998.<sup>143</sup> HomeSide was a mortgage servicing company, so National was purchasing the right to the income stream that arose from that business.<sup>144</sup> Over the next few years, National reported the value of HomeSide’s business through formal and informal channels, touting the success of the venture. Twice in 2001, however, National announced that it was writing down the value of HomeSide’s assets. National’s stock price plummeted. Believing that this was the result of misconduct, stockholders (including Robert Morrison) sued National, Home-

---

141. See *infra* notes 110, 120–122 and accompanying text (discussing the view of civil precedent in *Bowman* and its progeny).

142. See *United States v. Leija-Sanchez*, 602 F.3d 797 (7th Cir. 2010) (decided April 8, 2010).

143. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2875 (2010).

144. Mortgage servicing is, essentially, the set of administrative tasks that are necessary to collect mortgage payments. *Id.* (citing JERRY ROSENBERG, *DICTIONARY OF BANKING AND FINANCIAL SERVICES* 600 (2d ed. 1985)).

Side, and various executives in federal court under U.S. securities laws.<sup>145</sup>

The suit in *Morrison v. National Australia Bank* was a so-called “foreign cubed” action. Although it was filed in an American court under American law, the case featured *foreign* plaintiffs suing a *foreign* issuer of stock based on securities transactions in a *foreign* country.<sup>146</sup> As Justice Stevens wrote, “this case has Australia written all over it.”<sup>147</sup> That may be true, but note that the case was not entirely divorced from the United States. The shareholders, for example, contended that there was a territorial basis for the suit because HomeSide was a Florida company and the inflated projections were created in Florida.<sup>148</sup>

The securities laws at issue are ambiguous with respect to their geographic scope. The district court and Second Circuit, applying well-settled circuit precedent, concluded that they did not have jurisdiction to hear the case because these laws did not apply extrater-

---

145. *Id.* at 2875–76. The shareholders alleged violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78t(a) (2006), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (2009). The named defendants are National Australia Bank, Ltd., HomeSide Lending, Inc., Frank Cicutto (managing director and CEO of National), Hugh R. Harris (CEO of HomeSide), Kevin Race (COO of HomeSide), and W. Blake Wilson (CFO of HomeSide). *Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167 (2d Cir. 2008).

146. *Morrison*, 130 S. Ct. at 2894 n.11 (Stevens, J., concurring in the judgment) (citing *Morrison*, 547 F.3d at 172).

147. *Morrison*, 130 S. Ct. at 2895 (Stevens, J., concurring in the judgment); *see Morrison*, 547 F.3d at 175–76 (noting that the acts performed in the United States did not “comprise[ ] the heart of the alleged fraud”); *In re Nat’l Austl. Bank Sec. Litig.*, No. 03 Civ. 6537 (BSJ), 2006 WL 3844465, at \*8 (S.D.N.Y. Oct. 25, 2006) (noting that the acts in the United States were, “at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad,” and observing “(i) [National’s] allegedly knowing incorporation of HomeSide’s false information; (ii) in public filings and statements made abroad; (iii) to investors abroad; (iv) who detrimentally relied on the information in purchasing securities abroad”); Brief for Respondents at 1–18, *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010) (No. 08-1191), 2010 WL 665167 (“Petitioners’s allegations of fraud stem entirely from disclosures NAB made in Australia about HomeSide Lending . . .”).

148. *See* Brief for Petitioners at 7–10, *Morrison*, 130 S. Ct. 2869 (No. 08-1191) (“The central allegation of Petitioners’s claims is that the fraudulent scheme occurred in Florida. HomeSide and the individual defendants engaged in a deceptive act and scheme whose principal purpose and effect was to create a false appearance of financial strength. In addition, every false statement made by NAB concerning HomeSide’s operations, results and value was an exact repetition of the false financial information that HomeSide concocted in Florida for the very purpose of misleading NAB’s shareholders about HomeSide’s value and financial results.”) (internal citation omitted).

ritorially.<sup>149</sup> Although the Supreme Court reached a similar disposition, it rejected both the notion that extraterritoriality was a matter of subject-matter jurisdiction,<sup>150</sup> as well as the Second Circuit's conduct-and-effects test.

On the merits, all members of the Court concluded that the interpretation of the securities laws depended on the presumption against extraterritoriality and that the U.S. securities laws did not apply to this case as alleged.<sup>151</sup> The majority opinion was not shy in its dedication to the presumption. Justice Scalia, writing for the majority, started his analysis with *Aramco* quoting *Foley Brothers* for the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"<sup>152</sup> According to the opinion, the presumption is based on "the perception that Congress ordinarily legislates with respect to domestic, not foreign matters."<sup>153</sup> The opinion continued, noting that the risk of a conflict with foreign law is not a necessary or sufficient condition for the presumption to apply.<sup>154</sup>

Turning to the text of the statute at issue, the majority found that Congress did not express an intent for the law to apply extra-

149. *Morrison*, 547 F.3d 167; *In re Nat'l Austl. Bank Sec. Litig.*, 2006 WL 3844465, at \*3-5.

150. *Morrison*, 130 S. Ct. at 2877. Since the same arguments applied to a motion to dismiss for the failure to state a claim under Rule 12(b)(6), the court proceeded to the merits: "a remand would only require a new Rule 12(b)(6) label for the same Rule 12(b)(1) conclusion." *Id.* Despite the Court's clear statement on this point, at least one district court has since remarked that it lacked *subject-matter jurisdiction* over Exchange Act claims based on transactions on foreign exchanges, citing *Morrison* for this proposition. See *In re Celestica Inc. Sec. Litig.*, No. 07 CV 312, 2010 WL 4159587, at \*1 n.1 (S.D.N.Y. Oct. 14, 2010).

151. *Morrison*, 130 S. Ct. at 2888; *id.* (Breyer, J., concurring in part and concurring in the judgment); *id.* at 2895 (Stevens, J., concurring in the judgment). Legislative jurisdiction was not an issue. As Justice Breyer remarked during oral argument: "[I]n my mind the difficult issue in this case is not the jurisdictional issue under principles of international law. It's the question of the scope of the statute." Transcript of Oral Argument at 13, *Morrison*, 130 S. Ct. 2869 (No. 08-1191).

152. *Morrison*, 130 S. Ct. at 2877 (internal citations omitted).

153. *Id.* (citing *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)). Justice Stevens's concurring opinion, discussed in more detail below, agrees with the presumption and this justification. See *Morrison*, 130 S. Ct., at 2892 (Stevens, J., concurring in the judgment) (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

154. *Morrison*, 130 S. Ct. at 2877-78 (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173-74 (1993)).

territorially.<sup>155</sup> Without a clear indication, the majority would summon the presumption and reject an extraterritorial application.<sup>156</sup> “In short, there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not.”<sup>157</sup> Although Justice Scalia seems to step back from *Aramco*’s clear-statement rule,<sup>158</sup> the requirement of an “affirmative indication” or a “clearly expressed” congressional intent nonetheless creates a high bar to overcoming the presumption.<sup>159</sup>

Seems simple enough—a straightforward rule (presumption against extraterritoriality) applied in a straightforward way (applies without indication otherwise). But Justice Scalia said more. First, he recounted and rejected the Second Circuit’s longstanding analysis of extraterritoriality questions, the so-called conduct-and-effects test.<sup>160</sup> As noted above, this test represented the dominant approach in lower courts to questions of extraterritoriality as applied to securities laws (if not to all civil laws).<sup>161</sup> Justice Scalia argued that the test addressed questions of policy—would it be good policy for the law to apply to the conduct at issue?<sup>162</sup> In the majority’s

---

155. *Morrison*, 130 S. Ct. at 2881–83. In his quest to identify “the most faithful reading” of a statute, Justice Scalia concedes that “[a]ssuredly context can be consulted as well.” *Id.* at 2883.

156. *Id.*

157. *Id.*

158. *Id.* at 2883 (“But we do not say, as the concurrence seems to think, that the presumption against extraterritoriality is a ‘clear statement rule,’ if by that is meant a requirement that a statute say ‘this law applies abroad.’ Assuredly context can be consulted as well. But whatever sources of statutory meaning one consults to give the most faithful reading of the text, there is no clear indication of extraterritoriality here.”) (internal quotation marks and citations omitted).

159. *E.g., id.* at 2877 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991)). Justice Stevens, for his part, accuses the majority of establishing a clear-statement rule in contrast to previous decisions. *Morrison*, 130 S. Ct. at 2891 (Stevens, J., concurring in the judgment) (objecting to what he believes was the Court’s decision “to transform the presumption from a flexible rule of thumb into something more like a clear statement rule”).

160. The opinion traces the conduct test to *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206–10 (2d Cir.), *aff’d en banc*, 405 F.2d 215, 217 (2d Cir. 1968) (finding Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), granted the court subject matter jurisdiction) and the effects test to *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972). See SEC v. Berger, 322 F.3d 187, 192–93 (2d Cir. 2003) (outlining the conduct and the effects tests, then finding jurisdiction under the conduct test). Professor Dodge associates the conduct-and-effects test with Judge Mikva and *Environmental Defense Fund v. Massey*. See *supra* note 92 and accompanying text.

161. See *supra* note 93 and accompanying text.

162. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878–81 (2010) (citing *Schoenbaum*, 405 F.2d at 206 (finding that the application of Section 10(b) was



view, the difficulty in answering these questions and the inappropriateness of the judiciary as the policy arbiter underscored the importance of the presumption. “Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.”<sup>163</sup>

Justice Scalia then turned to the threshold question of whether the presumption applies, i.e. whether a case is extraterritorial. On this point, his opinion began with a concession: “[I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.”<sup>164</sup> This concession implies that the presumption is not, in fact, a mechanical answer to a question of statutory interpretation.

Justice Scalia’s opinion also offered a new mechanism to answer this threshold question. Reading his approach into existing precedent, Justice Scalia first observed that in *Aramco* the Court applied the presumption to a plaintiff *employed* abroad. As he saw it, Title VII “focuses” on the plaintiff’s employment (which occurred abroad), rather than his hiring (which occurred in the United States) or his nationality (which was American).<sup>165</sup> Turning to the case at hand, Scalia concluded that the “focus” of the Exchange Act was the purchase and sale of securities, since Section 10(b) punishes 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.”<sup>166</sup> According to the opinion, a close reading of the statute’s text—and the text of the companion 1933

---

“necessary to protect American investors”); *Leasco*, 468 F.2d at 1337 (“[W]e must ask ourselves whether, if Congress had thought about the point, it would not have wished to protect an American investor if a foreigner comes to the United States and fraudulently induces him to purchase foreign securities abroad . . . .”); *see also* *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424–25 (9th Cir. 1983); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 667 (7th Cir. 1998); *Cont’l Grain (Austl.) PTY. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 421–22 (8th Cir. 1979) (“frankly admit[ing] that the finding of subject matter jurisdiction in the present case is largely a policy decision”); *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977) (“recogniz[ing] that this case in a large measure calls for a policy decision”).

163. *Morrison*, 130 S. Ct. at 2881.

164. *Id.* at 2884.

165. *Id.*

166. *Id.* (quoting 15 U.S.C. § 78j(b)). Justice Stevens referred to this approach as the “transactional test”—in contradistinction to the conduct-and-effects test. *Morrison*, 130 S. Ct. at 2888 (Stevens, J., concurring in the judgment).

Act—confirmed this assessment.<sup>167</sup> As applied to Section 10(b), the focus inquiry functions as what Justice Stevens called a “transactional test,” holding that Section 10(b) applied only when the securities transaction occurred in the United States.<sup>168</sup> Relying on this test, the Court concluded that the plaintiffs failed to state a claim within the scope of the Act.

So, when facts comprising the focus of the statute are territorial, the law applies without concern for the presumption. But when the facts comprising the focus are extraterritorial, the presumption blocks the suits, and no amount of territorial connections can save it.<sup>169</sup> Contrary to fact-specific triggers like conduct and effects,

---

167. *Morrison*, 130 S. Ct. at 2884–86. It is the text of the statute that also permits Justice Scalia to distinguish this case from *Pasquantino v. United States*, 544 U.S. 349 (2005), which held that the wire-fraud statute, 18 U.S.C. § 1343, applied to defendants who ordered liquor by telephone in the United States with the intent to smuggle it into Canada (to the detriment of Canadian tax revenues). Justice Scalia noted that the wire-fraud statute applied to any fraud, not only frauds “in connection with” any particular transaction or event; Section 10(b), however, included such a connection requirement, thus changing the “focus” for the purpose of the presumption. *Morrison*, 130 S. Ct. at 2886–87.

It is noteworthy in this connection that Justice Breyer, concurring in part and concurring in the judgment, remarked that state law or other federal fraud statutes may apply to the domestic conduct in this case. *Id.* at 2888 (Breyer, J., concurring in part and concurring in the judgment). Using the parlance of the majority, these statutes may “focus” on deceptive conduct that allegedly occurred in the United States.

168. *Id.* at 2888 (Stevens, J., concurring in the judgment); see, e.g., *Elliott Assocs. v. Porsche Automobil Holding SE*, Nos. 10 Civ. 0532(HB) & 10 Civ. 4155(HB), 2010 WL 5463846, at \*5 (S.D.N.Y. Dec. 30, 2010) (collecting cases holding that the “transactional test” does not permit suits based on U.S. “buy orders” for securities listed on foreign exchanges); *In re Nat’l Century Fin. Enters., Inc.*, Inv. Litig., No. 2:03-md-1565, 2010 WL 5174585, at \*22–28 (S.D. Ohio Dec. 13, 2010) (applying this test to the Ohio Securities Act); *Stackhouse v. Toyota Motor Co.*, No. CV 10-0922 DSF (AJWx), 2010 WL 3377409, at \*1 (C.D. Cal. July 16, 2010) (debating whether this rule looks at the location of the exchange or the location of the purchaser or seller). The “transactional test” is an application of the “focus test”—the focus of Section 10(b) is the transaction, but presumably other statutes will beget other focus tests.

169. Justice Stevens provided the following hypothetical case to show how the majority opinion’s new rule strengthened the presumption:

Imagine, for example, an American investor who buys shares in a company listed only on an overseas exchange. That company has a major American subsidiary with executives based in New York City; and it was in New York City that the executives masterminded and implemented a massive deception which artificially inflated the stock price—and which will, upon its disclosure, cause the price to plummet. Or, imagine that those same executives go knocking on doors in Manhattan and convince an unsophisticated retiree, on the basis of material misrepresentations, to invest her life savings in the company’s

therefore, the focus test calls for courts to establish a *statute-specific* method to determine whether the case is “extraterritorial”—a question antecedent to the question of whether the presumption against extraterritoriality has been overcome by congressional intent.<sup>170</sup> And by concluding that certain territorial connections were insufficient to avoid the presumption, a straightforward application of the focus test seemingly would strengthen the presumption, i.e. would require courts to reject more suits as improperly extraterritorial, at least as compared to the prevailing conduct-and-effects test. In this way, the *Morrison* decision continued the trend described in Part I, in which the Supreme Court has constrained the extraterritorial application of U.S. civil law.

The bases for this focus inquiry are reminiscent of the arguments in favor of the presumption itself. Self evidently, Justice Scalia is looking at the intent of Congress as expressed in the statute’s focus. Additionally, Justice Scalia explicitly justified his approach with reference to “[t]he probability of incompatibility with the applicable laws of other countries.”<sup>171</sup> While the majority did not need conflicts with foreign law to justify the presumption,<sup>172</sup> here Justice Scalia used that concern to support his attention to the statute’s “focus.”<sup>173</sup>

Justice Stevens took aim at the majority in his concurring opinion. Justice Stevens rightly observed that “[t]he real motor of the Court’s opinion, it seems, is not the presumption against extraterritoriality but rather the Court’s belief that transactions on domestic exchanges are ‘the focus of the Exchange Act’ and ‘the objects of

---

doomed securities. Both of these investors would, under the Court’s new test, be barred from seeking relief under § 10(b).

The oddity of that result should give pause. For in walling off such individuals from § 10(b), the Court narrows the provision’s reach to a degree that would surprise and alarm generations of American investors—and, I am convinced, the Congress that passed the Exchange Act. Indeed, the Court’s rule turns § 10(b) jurisprudence (and the presumption against extraterritoriality) on its head, by withdrawing the statute’s application from cases in which there is *both* substantial wrongful conduct that occurred in the United States *and* a substantial injurious effect on United States markets and citizens.

*Id.* at 2895 (Stevens, J., concurring in the judgment).

170. *Morrison*, 130 S. Ct. at 2876–77.

171. *Id.* at 2885.

172. *Id.* at 2877–78 (“The canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law.”).

173. *Id.* at 2885–86.

[its] solicitude.”<sup>174</sup> In other words, Justice Stevens focused on the focus test. And on this question, he believed that the majority improperly expanded the situations in which the presumption could be used to reject the application of U.S. law. In his view, the conduct-and-effects test was the best method to determine Congress’s intent and thus to identify the proper focus of the presumption. He argued that using the conduct-and-effects test to identify the focus was faithful to the statute<sup>175</sup> and justified by congressional intent, “limiting conflict with foreign law,” and policy considerations.<sup>176</sup>

To summarize, Justices Scalia and Stevens agreed that there is a presumption against extraterritoriality, justified by (at a minimum) Congress’s focus on domestic conditions. The Justices agreed that there is a statute-specific trigger for the presumption. And they agreed that the trigger should be derived from the statute’s text and context, and with an eye to potential conflicts with foreign law. While they differed on the best test for Section 10(b)—looking only to the location of the transaction versus considering any relevant conduct or effects—this difference was built on the foundation of substantial agreement.<sup>177</sup>

Before asking where this decision would lead the Court in a criminal case, one comment from Justice Stevens may prove instructive. When criticizing the majority’s “transactional test,” Justice Stevens lamented that certain fraudulent acts will not be amenable to private action under the majority’s approach. But in a footnote, Justice Stevens suggested to readers that all was not lost:

---

174. *Id.* at 2894 (Stevens, J., concurring in the judgment) (quoting *id.* at 2884). Justice Stevens’s objection to a “clear statement” interpretation of the presumption covers well-worn territory and this Article need not rehearse it here. *See id.* at 2889–92 (Stevens, J., concurring in the judgment).

175. *Id.* at 2892–93 (Stevens, J., concurring in the judgment) (“In developing its conduct-and-effects test, the Second Circuit endeavored to derive a solution from the Exchange Act’s text, structure, history, and purpose. . . . The Second Circuit draws the line as follows: § 10(b) extends to transnational frauds only when substantial acts in furtherance of the fraud were committed within the United States, or when the fraud was intended to produce and did produce detrimental effects within the United States.”) (internal citations and quotation marks omitted).

176. *Id.* at 2893–94 (Stevens, J., concurring in the judgment). With respect to policy, Justice Stevens notes that his reading addresses “the goals of ‘preventing the export of fraud from America,’ protecting shareholders, enhancing investor confidence, and deterring corporate misconduct.” *Id.* (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167, 175 (2d Cir. 2008)).

177. Finally, on the facts of this case, the Justices agree on the outcome—all eight Justices participating in this case signed on to opinions concluding that dismissal for the failure to state a claim upon which relief can be granted was the proper disposition.

The Court's opinion does not, however, foreclose the [Securities and Exchange] Commission from bringing enforcement actions in additional circumstances, as no issue concerning the Commission's authority is presented by this case. The Commission's enforcement proceedings not only differ from private § 10(b) actions in numerous potentially relevant respects, but they also pose a lesser threat to international comity.<sup>178</sup>

For the final point, Justice Stevens offered a telling quotation from *Empagran*: “[P]rivate plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government.”<sup>179</sup> Justice Stevens did not explain how the Court would reach that conclusion for a statutory provision that applies to both private plaintiffs and the government. But, at least in the mind of Justice Stevens, the reduced potential for foreign conflicts augured in favor of some lenience to extraterritorial actions initiated by the executive branch.<sup>180</sup>

---

178. *Morrison*, 130 S. Ct. at 2894 n.12 (Stevens, J., concurring in the judgment) (internal citations omitted). However, it is noteworthy that *Aramco* was a case brought by the EEOC, and the Court did not seem to grant that executive agency any deference vis-à-vis private plaintiffs. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991).

With respect to the Securities Exchange Acts, this issue may now be moot: the Dodd-Frank Wall Street Reform and Consumer Protection Act amended the Acts to expressly provide for the extraterritorial enforcement of certain securities laws by the SEC. Dodd-Frank Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864–65 (2010) (adding 15 U.S.C. § 77v(c) and 15 U.S.C. § 78aa(b)); cf. *supra* note 74 (discussing the amendments to Title VII following *Aramco*). Interestingly, the Dodd-Frank Act also called upon the SEC to conduct a study on extraterritorial private rights of action under the U.S. securities laws. Dodd-Frank Act, § 929Y, 124 Stat. at 1871.

179. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2894 n.12 (2010) (quoting *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 171 (2004) (quoting Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 194 (1999))).

180. Notably, this was not the first time that Justice Stevens revealed an approach to the presumption that deferred to the executive. Here, Justice Stevens suggested a narrower presumption with respect to executive actions on securities fraud cases; in *Sale v. Haitian Ctrs. Council, Inc.*, he broadened the presumption to reject statutorily-imposed constraints on executive action, concluding that the executive was free to interdict Haitian refugees and return them to Haiti without the process required by the INA. 509 U.S. 155, 188 (1993) (“Th[e] presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility.”).

That said, the Supreme Court turned down the opportunity to completely defer to the executive branch, declining to adopt the rules proposed by the United

IV.  
*MORRISON* AND EXTRATERRITORIAL  
CRIMINAL LAW

With *Morrison* on the books, what should we surmise about the Supreme Court's attitude toward the presumption against extraterritoriality in the criminal context? And how (if at all) will courts reconcile *Morrison* with *Bowman*? This Section suggests that some of the criminal law decisions that have followed *Bowman* may find support in the logic of *Morrison*.

Not all courts may see things this way. The central holding of *Morrison* is a forceful articulation of the presumption against extraterritoriality. A court looking at an ambiguous criminal statute may treat *Morrison* as the straw that broke *Bowman*'s back, requiring a stringent presumption in criminal as well as civil cases. This would require revisiting many of the pre-*Morrison* criminal decisions described in Part II. The Second Circuit recently rejected a civil RICO action because *Morrison* "wholeheartedly embrace[d]" the presumption against extraterritoriality.<sup>181</sup> Although this decision addressed a civil complaint, it is notable that RICO includes both criminal and civil provisions.<sup>182</sup> It would not be outrageous for a court to conclude that *Morrison*'s wholehearted embrace carries the day in criminal cases as well.

Alternatively, but still taking *Morrison* to stand for a strong presumption against extraterritoriality, courts could declare that *Bowman* represents an exception to *Morrison*'s presumption.<sup>183</sup> The presumption against extraterritoriality would remain the default rule, but the class of statutes identified in *Bowman* would be applied extraterritorially even without explicit congressional authorization—allowing courts to overcome the presumption by implication

---

States as amicus curiae. See Brief for the United States as Amicus Curiae Supporting Respondents, *Morrison*, 130 S. Ct. 2869 (No. 08-1191).

181. *Norex Petroleum Ltd. v. Access Indus.*, 631 F.3d 29, 32 (2d Cir. 2010). Since Second Circuit precedent conceded that "RICO is silent as to any extraterritorial application," the court held that *Morrison* compelled it to conclude that the civil RICO statute did not apply extraterritorially. *Id.* (quoting *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996)). Notably, at least one judge found *Morrison*'s emphatic support of the presumption to be grounds to reject the extraterritorial application of the Alien Tort Statute. *Sarei v. Rio Tinto, PLC*, 625 F.3d 561, 562–63 (9th Cir. 2010) (Kleinfeld, J., dissenting from an order referring the case for mediation).

182. Compare 18 U.S.C. § 1963 (2006) (criminal penalties), with 18 U.S.C. § 1964 (2006) (civil remedies).

183. See *supra* note 121 (collecting cases that refer to *Bowman* as an exception to the presumption).

for criminal statutes in this class, but requiring something closer to a clear statement for other statutes.

In the months following *Morrison*, the District of Hawaii adopted something akin to this approach in *United States v. Finch*.<sup>184</sup> Finch and his co-defendants were charged with, *inter alia*, conspiracy to defraud the United States through bribery and money laundering in connection with U.S. military operations in Afghanistan.<sup>185</sup> The defense argued that under *Morrison* the criminal statutes did not apply because they were not explicitly extraterritorial. The district court rejected this argument based on *Bowman*; the court held that *Morrison* did not overrule *Bowman* and that the anti-bribery statutes were exactly the sort of laws from which the *Bowman* court said an extraterritorial intent could be inferred.<sup>186</sup>

---

184. *United States v. Finch*, No. 10-00333, 2010 WL 3938176, at \*3–4 (D. Haw. Sept. 30, 2010). The Eastern District of Virginia reached a similar result in *U.S. v. Ayesch*, applying the prohibitions on conversion of government property, 18 U.S.C. § 641, and bribery of government officials, 18 U.S.C. § 208, extraterritorially based on *Bowman*. No. 1:10cr388, 2011 WL 325903, at \*14 (E.D. Va. Jan. 28, 2011). This decision was issued after *Morrison* but did not cite it. *Id.* See also *United States v. Jack*, No. 2:07-cr-00266 FCD DAD, 2010 WL 4718613 (E.D. Cal. Nov. 12, 2010) (holding that 18 U.S.C. § 922(o), transfer or possession of a machinegun, does not apply extraterritorially based on *Bowman* without discussion of *Morrison*); *United States v. Hasan*, No. 2:10cr56, 2010 WL 4282015, at \*28 (E.D. Va. Oct. 29, 2010) (applying 18 U.S.C. § 924, use of a firearm in relation to a crime of violence (here, piracy), extraterritorially based on *Bowman* without discussion of *Morrison*). In addition, at least two courts of appeals have addressed *Bowman* since *Morrison*, although the treatment was in *dicta* and was not deep. See *United States v. Weingarten*, 632 F.3d 60, 66 (2d Cir. 2011) (holding that the prohibition on sex tourism, 18 U.S.C. § 2423, applies extraterritorially based on *Morrison* and *Bowman* because the statute explicitly applies to travel in foreign commerce and congressional intent for extraterritorial application may be inferred); *United States v. Belfast*, 611 F.3d 783, 810–16 (11th Cir. 2010) (noting *Morrison*'s affirmation of the presumption; applying the Torture Act, 18 U.S.C. § 2340, extraterritorially based on its explicit language; and applying 18 U.S.C. § 924(c), using and carrying a firearm in relation to a crime of violence (here, the Torture Act violation), extraterritorially based on *Bowman*).

185. *Finch*, 2010 WL 3938176, at \*1–2. See 18 U.S.C. § 371 (2006) (conspiracy to defraud the United States); 18 U.S.C. § 201(b)(2)(A), (B) (2006) (bribery of public officials).

186. *Finch*, 2010 WL 3938176, at \*3–4. Indeed, the *Bowman* decision specifically referred to bribery statutes in this connection. As the court wrote in *Finch*,

Reviewing examples of statutes that implicitly intended to cover acts occurring outside the United States, the *Bowman* Court referred to laws against the bribing of a United States officer. The Court noted that such crimes could be tried in the United States, even if the acts of bribery occurred overseas, stating, 'It is hardly reasonable to construe this [statute] not to include such offenses when the bribe is offered to a[n] . . . army or a naval officer in a foreign country or

Although the court did not call *Bowman* an exception, its reasoning suggests such a conclusion.<sup>187</sup>

For a number of reasons, *Finch* is not a complete response to many of the cases reviewed in Part II: because the statute in *Finch* was close to the heartland of *Bowman* (fraud upon the United States government), the court did not have to tread as far as the aforementioned court of appeals decisions. In other words, the *Finch* court did not face the challenge of affirming both *Morrison* and, in the same breath, those cases that stretched *Bowman* beyond this narrow category. Moreover, nothing in *Morrison*—or any Supreme Court case since *Bowman*—suggests that the Court would countenance an exception with respect to the evidence required to show congressional intent.

More to the point, neither the wholehearted embrace nor *Finch*'s exception sufficiently engages the reasoning of *Morrison*. Although *Bowman* did not rely exclusively on *American Banana* for its conclusion, it used that civil case to arrive at its decision; any court

---

on the high seas, whose duties are being performed there, and when his connivance at such fraud must occur *there*.'

*Id.* (emphasis added).

187. The court stated:

*Morrison* does not, however, hold that all federal statutes lacking express language authorizing extraterritorial application must necessarily apply only to acts occurring entirely in the United States. . . . [T]he language of the conspiracy and bribery laws in this case are broader in scope than the Securities Exchange Act provision in *Morrison*. The statute at issue in *Morrison* concerned "transactions in securities listed on domestic exchanges and domestic transactions in other securities." *Morrison* neither explicitly nor implicitly overrules *Bowman*, which counsels courts to examine statutes with an eye toward whether Congress intended to protect the Government from crimes wherever perpetrated.

*Id.* at \*4 (internal citation omitted). The Eleventh Circuit made a similar point in *dicta*, arguing that the Torture Act would apply extraterritorially after *Morrison* even if it was not explicitly extraterritorial because congressional intent may be inferred. *United States v. Belfast*, 611 F.3d 783, 811 (11th Cir. 2010) ("[E]ven if the language of the Torture Act were not so remarkably clear, the intent to apply the statute to acts occurring outside United States territory could be inferred . . . . First, the nature of the harm to which the [Convention Against Torture] and the Torture Act are directed—'torture and other cruel, inhuman or degrading treatment or punishment throughout the world,'—is quintessentially international in scope. Second, and relatedly, the international focus of the statute is 'self-evident': Congress's concern was not to prevent official torture within the borders of the United States, but in nations where the rule of law has broken down and the ruling government has become the enemy, rather than the protector, of its citizens. Finally, limiting the prohibitions of the Torture Act to conduct occurring in the United States would dramatically, if not entirely, reduce their efficacy." (internal citations omitted)).



looking at an extraterritorial criminal case today should use *Morrison* as an analog for its reasoning. Such an analysis must take into account the “real motor” of *Morrison*—the threshold inquiry into the focus of the statute—which distinguishes *Morrison*, at least on its face, from the Supreme Court’s previous civil decisions applying the presumption. So far, courts applying the presumption in criminal cases have eschewed this threshold question.<sup>188</sup> And yet, this analysis may offer courts a natural way to reconcile the leading case on the reasoning of the presumption against extraterritoriality (*Morrison*) with the leading case on criminal extraterritoriality (*Bowman*), and also provides new support for some of the lower court criminal decisions that took liberties with the *Bowman* holding.

Turning first to the reasoning of *Morrison*, the key is the focus test. Some cases with *bona fide* territorial connections may still be treated as extraterritorial if those connections are outside the focus of the statute. It is the duty of courts to assess which locations matter to which statutes before choosing to apply the presumption (or not). Combine this with the Court’s recognition of a separate canon based on legislative jurisdiction, and the Court’s recent opinions create a two-part inquiry for extraterritoriality cases—a determination of what Congress deemed the focus (to which the presumption applies) and the *Charming Betsy* canon. *Bowman*, it turns out, reached the same conclusion almost 90 years earlier: “The necessary locus, when not specifically defined, depends upon the purpose of Congress as evidenced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations.”<sup>189</sup> Under both *Bowman* and *Morrison*, a finding of extraterritoriality “depends” on two considerations: “the purpose of the statute” (i.e. the presumption and the focus) and “the power and jurisdiction of a government to punish crime under the law of nations” (i.e. the *Charming Betsy* canon).<sup>190</sup> *Bowman* lives!

This union of the civil and criminal precedents would have required jurisprudential acrobatics prior to Justice Scalia’s explicit endorsement of the focus test—trying to define an exceptional class

---

188. See *supra* note 184 (collecting cases since *Morrison*).

189. *United States v. Bowman*, 260 U.S. 94, 97–98 (1922).

190. As noted earlier, it is possible that this latter quotation from *Bowman* refers to personal-jurisdictional limits. See *supra* note 118. That may be so—and there is no denying that there are at least theoretical limits to the personal jurisdiction of the federal courts in this area, see *supra* note 16—but it is also clear that the Supreme Court recognizes that the “law of nations” is relevant to the interpretation of a statute via the *Charming Betsy* canon. See *supra* note 45.

of statutes for which congressional intent may be inferred while also recognizing that the Supreme Court has all but required a clear statement. With the new theoretical overlap in place, however, courts can move the action to the antecedent question about whether the presumption applies, which is now guided by the focus of the statute.

What, then, is the “focus” of a criminal statute? This Article will not delve into the classic gun-across-the-border hypothetical or the debates between conduct and results theories of criminal law.<sup>191</sup> However, among the decisions surveyed in Part II, two classes of statutes stand out as leading candidates to take advantage of *Morrison*’s focus test.

First, as described above, some lower court decisions applied *Bowman* to crimes against the government.<sup>192</sup> This class of decisions could be seen as one manifestation of the focus rule. Laws about defrauding the U.S. government, stealing its property, and harming its representatives *focus* on the United States; the application of those criminal laws would not be “extraterritorial,” because their focus is always the United States itself. In this view, the presumption would never apply to prosecutions based on these statutes. This interpretation would amount to a reaffirmation of the core holding of *Bowman* on *Morrison*’s terms.<sup>193</sup>

A second category represents a subset of those decisions that stretched *Bowman* beyond the government-focused reading. Recall that lower courts have extended *Bowman* to crimes such as drug smuggling, human trafficking, and racketeering.<sup>194</sup> These courts have treated *Bowman* as an exception or suggested that the nature of the crime allows them to infer congressional intent for extraterritoriality, thus “overcoming” the presumption. *Morrison* permits a different approach: recognize a presumption without exception and eschew any implied congressional intent, but use the lever of congressional focus to conclude that the presumption does not ap-

---

191. See, e.g., *Strassheim v. Daily*, 221 U.S. 280 (1911); *Laker Airways Ltd. v. Sabena, Belg. World Airlines*, 731 F.2d 909, 922 (D.C. Cir. 1984); *Simpson v. State*, 17 S.E. 984 (Ga. 1893) (defendant, standing in South Carolina, shot at victim in Georgia); *Bradley*, *supra* note 63, at 575 n.341; Adelheid Puttler, *Extraterritorial Application of Criminal Law: Jurisdiction to Prosecute Drug Traffic Conducted by Aliens Abroad*, in *EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE* 103, 106–08 (Karl M. Meessen ed., 1996).

192. See *supra* note 126 (collecting cases).

193. See *Podgor & Filler*, *supra* note 116, at 595 (suggesting prior to *Morrison* that *Bowman* should be read to stand for a distinction between individual-focused and government-focused crimes).

194. See *supra* notes 133–138 (collecting cases).

ply. One could argue, for example, that statutes addressing any sort of “organized” crime focus on the criminal organization, not the individual act.<sup>195</sup> A court could deduce this focus from the broader statutory scheme: *Bowman* looked to other parts of the act at issue to determine the intent of Congress,<sup>196</sup> and Justice Scalia determined the focus of the provision in *Morrison* by reading the balance of the Securities Acts.<sup>197</sup> For many “organized” criminal cases, therefore, courts would not need to overcome the presumption if they found that the criminal organization—the “focus” of the statute—was territorial. And as such, many of the aforementioned lower court decisions that seemed out of step with Supreme Court precedent may find support in the logic of *Morrison*.

The Supreme Court’s stated logic for the presumption also could be harnessed by an approach that is more amenable to “extraterritoriality” in the criminal context (potentially tracking these

---

195. Perhaps the prohibition on traveling for the purpose of engaging in sexual conduct with a minor would not apply extraterritorially, but the prohibition on traveling for the purpose of engaging a minor in the production of child pornography would. *See* *United States v. Frank*, 599 F.3d 1221 (11th Cir. 2010) (18 U.S.C. § 2251A(b)(2)(A)). Perhaps murder laws would not apply extraterritorially, but the law against murder in furtherance of a domestic RICO enterprise would. *See* *United States v. Leija-Sanchez*, 602 F.3d 797 (7th Cir. 2010) (18 U.S.C. § 1959). Perhaps the law prohibiting the purchase of drugs does not apply extraterritorially, but the laws against participating in a drug-trafficking conspiracy would. *See* *United States v. Plummer*, 221 F.3d 1298 (11th Cir. 2000) (18 U.S.C. § 545). *But see* *Gonzales v. Raich*, 545 U.S. 1 (2005) (concluding that Congress had a rational basis to conclude that possessing, obtaining, or manufacturing marijuana for personal medical use affected *interstate* commerce).

A recent decision in the Southern District of New York adopted a version of this approach for civil RICO; because the RICO statute “focused” on the enterprise, the law did not cover conduct related to a foreign enterprise. *Cedeno v. Intech Group, Inc.*, No. 09 Civ. 9716, 2010 WL 3359468, at \*2 (S.D.N.Y. Aug. 25, 2010) (“So far as RICO is concerned, it is plain on the face of the statute that the statute is focused on how a pattern of racketeering affects an enterprise: it is these that the statute labels the ‘Prohibited activities,’ 18 U.S.C. § 1962. But nowhere does the statute evidence any concern with foreign enterprises, let alone a concern sufficiently clear to overcome the presumption against extraterritoriality. . . . Thus, the focus of RICO is on the enterprise as the recipient of, or cover for, a pattern of criminal activity. If, as noted above, RICO evidences no concern with foreign enterprises, RICO does not apply where, as here, the alleged enterprise and the impact of the predicate activity upon it are entirely foreign.”) (internal footnotes omitted).

196. 260 U.S. 94, 98–100 (1922).

197. 130 S. Ct 2869, 2884–86 (2010). Courts interpreting *Bowman* have similarly considered the statutory schemes to infer extraterritorial intent. *See, e.g., Frank*, 599 F.3d at 1231 (sexual exploitation of children and child pornography); *United States v. Thomas*, 893 F.2d 1066, 1068–69 (9th Cir. 1990) (same); *United States v. Baker*, 609 F.2d 134, 136–37 (5th Cir. 1980) (drug laws).

two categories of lower court decisions). Recall that the primary justifications for the canon are potential conflicts with foreign laws and Congress's default attention to domestic matters. Concern with international conflicts predicts more deference to extraterritorial criminal prosecutions. To the extent that this consideration evinces a concern with international relations, the courts may rely on the executive branch to pay due deference to potential conflicts in criminal cases.<sup>198</sup> The executive is, after all, constitutionally and practically the primary actor in international affairs.<sup>199</sup> Even if courts worry only about conflicts with foreign laws, the executive branch is likely to be more cognizant of these potential conflicts than the average civil plaintiff. As Justice Stevens recognized in *Morrison*, enforcement proceedings "pose a lesser threat to international comity" than private actions.<sup>200</sup> The congressional-attention prong also could favor a softer presumption in criminal cases. In a civil case, the court must decide congressional focus without the input of other government actors. In a criminal case, however, the executive branch has already weighed in—the decision to file an indictment is an expression of its view of the statute's scope.

The idea of applying *Chevron*-type deference to the executive branch in foreign affairs and national security law has received significant scholarly attention in recent years.<sup>201</sup> And history shows

---

198. See, e.g., *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 171 (2004) ("[P]rivate plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government.") (quoting Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 194 (1999)).

199. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (noting "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress"); David Gray Adler, *Court, Constitution, and Foreign Affairs*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 19 (David Gray Adler & Larry N. George eds., 1996); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001) (finding textual bases for presidential power); H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1473 n.7 (1999) (collecting cases articulating executive authority in foreign affairs).

200. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2894, n.12 (Stevens, J., concurring in the judgment).

201. See, e.g., Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007); Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005); see also Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783 (2011) (rejecting the *Chevron* framework for foreign relations law).

that courts have tended to defer to the executive branch on foreign affairs.<sup>202</sup> *Chevron* itself recognized a gap in institutional competence between the courts and executive agencies on “technical and complex” matters.<sup>203</sup> Perhaps courts will conclude that international relations represent sufficiently technical and complex calculations to justify deference. *Chevron* also suggested that political responsiveness supported deference.<sup>204</sup> Similar logic could support the conclusion that the executive is in a better position to effectuate congressional intent since those two branches should be responsive to the same political (and electoral) forces. This is not to say that courts should delegate statutory-interpretation issues to federal prosecutors, even where foreign relations may be affected; rather, these claims merely suggest that a court could adopt such an outlook in keeping with the stated bases of the presumption.<sup>205</sup>

There are at least two countervailing considerations, however, that courts may grapple with when applying the presumption to criminal cases. First, some statutes include both civil and criminal provisions.<sup>206</sup> Any preference for flexibility in criminal cases would have to be weighed against the desire to give a consistent meaning

---

202. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (holding that the President may suspend claims pending in U.S. courts by executive order); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948) (offering an expansive reading of Congress’s war powers); *Curtiss-Wright*, 299 U.S. at 319 (“In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.”).

203. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (noting that the agency was working in a “technical and complex” area while “[j]udges are not experts in the field”). A classic formulation of this view comes from *Board of Trade v. United States*, in which the Court remarked that “[w]e certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the [government].” 314 U.S. 534, 548 (1942).

204. *Chevron*, 467 U.S. at 865–66 (“[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”). See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* 137 (2008) (“[C]onforming judicial policies to democratic preferences can be regarded as a good thing in a society that prides itself on being the world’s leading democracy.”).

205. See *infra* note 224 (discussing “litigation positions”).

206. See, e.g., 15 U.S.C. §§ 1–3 (criminal penalties under the Sherman Antitrust Act), 15 (civil suits under the Sherman Antitrust Act), 15a (civil actions by the

to the same statutory text.<sup>207</sup> That said, such statutes are the exception, rather than the rule.

Notably, many of the statutes with civil and criminal provisions provide for civil-enforcement actions brought by the U.S. government. To the extent that a court is inclined to defer to the executive, this deference may be granted to criminal and civil-enforcement actions alike—both types of actions reflect the judgment of the executive branch.<sup>208</sup> Indeed, in the footnote to his

---

United States under the Sherman Antitrust Act); 18 U.S.C. §§ 1963 (criminal RICO), 1964 (civil RICO).

207. See, e.g., *Clark v. Martinez*, 543 U.S. 371, 378 (2005) (“To give these same words a different meaning for each category would be to invent a statute rather than interpret one.”).

208. See, e.g., *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (case brought by the EEOC); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 *YALE L.J.* 1875 (1992); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 *YALE L.J.* 1795 (1992) (discussing the growth in state-invoked civil punitive sanctions). Following *Morrison*, the Supreme Court declined to explore the extraterritorial application of just such a statute. In 1999, the United States brought a civil action against nine cigarette manufacturers and two trade organizations for violations of the RICO statute. The D.C. District Court found the defendants liable, and the D.C. Circuit affirmed the judgment. *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1105 (D.C. Cir. 2009) (per curiam); *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006). See also 18 U.S.C. §§ 1961–68 (RICO). One of the defendants, British American Tobacco (Investments) Ltd. (BATCo), argued that its relevant conduct occurred outside the United States, and, because the RICO statute should not be construed to apply extraterritorially, it should not be liable. The district court applied the “effects test,” and concluded that RICO should apply because BATCo’s conduct had substantial effects within the United States. *Phillip Morris USA*, 449 F. Supp. 2d at 873. The D.C. Circuit agreed, holding that the decision was “not an extraterritorial assertion of jurisdiction” because BATCo’s conduct had direct effects within the United States. *Phillip Morris USA*, 566 F.3d at 1130 (quoting *Laker Airways Ltd. v. Sabena, Belg. World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984) (emphasis omitted)).

BATCo petitioned for a writ of certiorari (prior to *Morrison*). Petition for a Writ of Certiorari, *British American Tobacco (Investments) Ltd. v. United States*, 130 S. Ct. 3502 (2010) (No. 09-980), 2010 WL 619538. BATCo argued that a conflict exists with respect to civil RICO, although it cited only cases addressing private causes of action. *Id.* (contrasting the D.C. Circuit decision with *North South Finance Corp. v. Al-Turki*, 100 F.3d 1046, 1051–52 (2d Cir. 1996) (casting doubt on the applicability of the conduct-and-effects test for civil RICO); *Jose v. M/V Fir Grove*, 801 F. Supp. 349, 357 (D. Or. 1991) (applying civil RICO only to conduct within the United States); *Doe v. Israel*, 400 F. Supp. 2d 86, 115–16 (D.D.C. 2005) (rejecting the extraterritorial application of civil RICO)). *Amici curiae* also argued that the D.C. Circuit erroneously concluded that the foreign conduct was “not extraterritorial.” The International Association of Defense Counsel argued that, to the extent that the court wanted to apply an “effects test,” it should be a factor in

opinion in *Morrison* quoted above, Justice Stevens conceded that he might have permitted a civil-enforcement action by the SEC where a private action failed.<sup>209</sup>

Second, courts also may tangle with the rule of lenity, which “requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.”<sup>210</sup> The rule of lenity and its justifications—protecting citizens from ambiguity and requiring clarity from the legislature<sup>211</sup>—suggest that the Court may think twice about applying an ambiguous criminal statute extraterritorially.<sup>212</sup>

---

assessing congressional intent (i.e. overcoming the presumption). Brief of the International Association of Defense Counsel as Amicus Curiae Supporting Petitioner at 4–6, *British American Tobacco (Investments) Ltd. v. United States of America*, 130 S. Ct. 3502 (2010) (No. 09-980), 2010 WL 1186418; A group of law professors asserted that the “effects test” is best understood as a limit on legislative jurisdiction. Brief of Law Professors as Amici Curiae in Support of Petition for Writ of Certiorari, *British American Tobacco (Investments) Ltd. v. United States of America*, 130 S. Ct. 3502 (2010) (No. 09-980), 2010 WL 1186417. For its part, the United States asserted that BATCo engaged in conduct in the United States and conspired with U.S. actors in furtherance of a territorial-based conspiracy. See Brief for the United States in Opposition at 62–70, *Philip Morris USA, Inc. v. United States of America*, 130 S. Ct. 3501 (2010) (Nos. 09-1012, 09-976, 09-977, 09-979, 09-980, 09-1012), 2010 WL 2132056. Despite these problems, the Supreme Court denied the petition after *Morrison*, *British American Tobacco (Investments) Ltd. v. United States*, 130 S. Ct. 3502 (2010), and denied BATCo’s petition for rehearing, which expressly invoked the *Morrison* decision. Petition for Rehearing, *British American Tobacco (Investments) Ltd. v. United States*, 131 S. Ct. 57 (2010) (No. 09-980), 2010 WL 2895480. This story is ongoing: in March 2011, the federal district court charged with enforcing the injunction in this case granted BATCo’s motion to reconsider, holding that *Morrison* applies to the RICO statute and that the government did not establish a domestic basis for RICO liability. *United States v. Philip Morris USA, Inc.*, No. 99-2496, slip op. at 7–12 (D.D.C. Mar. 28, 2011).

209. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2894 n.12 (Stevens, J., concurring in the judgment) (finding “[t]he Court’s opinion does not, however, foreclose the [SEC] from bringing enforcement actions” since the question of the SEC’s authority was not presented, and noting important differences between civil-enforcement proceedings and private Section 10(b) actions); see 15 U.S.C. § 78u(d)(3) (2006) (providing the SEC authority to bring civil actions to enforce the Act or associated regulations).

210. *United States v. Santos*, 553 U.S. 507, 514 (2008) (citing *United States v. Gradwell*, 243 U.S. 476, 485 (1917); *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *United States v. Bass*, 404 U.S. 336, 347–49 (1971)).

211. “This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress’s stead.” *Santos*, 553 U.S. at 514.

212. Indeed, in her dissenting opinion in *Pasquantino v. United States*, Justice Ginsburg argued that this rule countenanced against applying the wire-fraud stat-

That said, the Court has constructed a high standard for the rule of lenity.<sup>213</sup> Indeed, in *Bowman* itself, the Court *expressly* set aside these considerations to apply a criminal statute extraterritorially.<sup>214</sup> So at least as far as *Bowman* goes, the rule of lenity is no obstacle.

## V. CONCLUDING REMARKS

Part IV explored how the Supreme Court could find that the justifications of the presumption—Congress’s primary focus on domestic affairs and concern with the conflict with foreign laws—dovetail with *Bowman* and its progeny.<sup>215</sup> Some might view this reconciliation as an academic exercise. Numerous scholars have suggested that the stated justifications do not hold water: in many

---

ute to frauds against foreign governments. 544 U.S. 349, 383 (2005) (Ginsburg, J., dissenting) (“It is a ‘close question’ whether the wire fraud statute’s prohibition of ‘any scheme . . . to defraud’ includes schemes directed solely at defrauding foreign governments of tax revenues. We have long held that, when confronted with two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.”) (internal citation omitted).

213. *E.g.*, *Barber v. Thomas*, 130 S. Ct. 2499, 2508–09 (2010) (requiring a “grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended”) (internal citations and quotation marks omitted) (citing *Muscarello v. United States*, 524 U.S. 125, 139 (1998); *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *United States v. Hayes*, 55 U.S. 415 (2009); *United States v. R. L. C.*, 503 U.S. 291, 305–06 (1992) (plurality opinion)).

214. 260 U.S. 94, 102 (1922) (“Nor can the much quoted rule that criminal statutes are to be strictly construed avail. . . . ‘[P]enal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment.’ They are not to be strained either way. It needs no forced construction to interpret § 35 as we have done.”) (quoting *United States v. Lacher*, 134 U.S. 624, 629 (1890)). *See also* *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 7–8 (1st Cir. 1997) (rejecting the rule of lenity and applying the criminal provisions of the Sherman Antitrust Act extraterritorially).

215. Indeed, the Court’s recent decisions friendly to executive authority suggest that a more deferential approach to criminal cases may be in the cards. Consider *United States v. Comstock*, upholding the authority of the executive to civilly commit a mentally ill, sexually dangerous federal prisoner beyond the term of his sentence. 130 S. Ct. 1949 (2010). Not only does *Comstock* reflect a deference to the executive branch’s choice, it also—at least as far as some commentators are concerned—suggests that the Court may have one eye on national-security cases even when considering cases on other topics. *See, e.g.*, Kenneth Anderson, *Comstock and National Security Implications for Detention?*, THE VOLOKH CONSPIRACY (Jan. 12, 2010, 6:59 PM), <http://www.volokh.com/2010/01/12/comstock-and-national-security-implications-for-detention>; Dahlia Lithwick, *Detention Slip*, SLATE (May 18, 2010), <http://www.slate.com/id/2254223>. It would not take a significant leap to suggest that these considerations might influence a decision about the propriety of an extraterritorial criminal prosecution.



situations, Congress may be concerned with international issues<sup>216</sup> and, at the same time, may be unmoved by technical conflicts with foreign laws.<sup>217</sup>

Whether real or imagined, the use of the focus inquiry in criminal cases would serve to further these justifications. With respect to Congress's attention, a softer presumption for criminal cases will help to sweep in crimes that are likely within the focus of Congress: those harming the United States government directly or connected to a domestic criminal enterprise. Further, pulling back on the presumption in criminal cases has the concomitant effect of treating ambiguous statutes as a delegation to the executive, which may effectuate policy closer to congressional intent because it is accountable to the same (or at least a similar) political process.

With respect to conflicts, at least one court was persuaded by the intuitive position that U.S. criminal law presents fewer or less significant conflicts with foreign laws than U.S. civil law presents.<sup>218</sup> Even if this were not the case, the executive, unlike the private plaintiff, is in a position to take international comity into account. While some may say that prosecutors will seek the clearest path to a conviction—consider all of the prosecutions under the woefully vague “honest services” statute prior to the Supreme Court’s recent decisions on that law<sup>219</sup>—the executive branch, as compared to the

---

216. See, e.g., Dodge, *supra* note 55, at 115–19; Born, *supra* note 25, at 74–79 (explaining, for example, that Congress must often regulate conduct occurring outside the United States “[i]n order to regulate adequately ‘domestic conditions’ in today’s world”).

217. See, e.g., Born, *supra* note 25, at 76 (arguing that legislators are more concerned with the “desire [ ] to assist local constituencies, to further legislative programs and interests” than “to avoid conflicts with foreign laws”).

218. *United States v. Leija-Sanchez*, 602 F.3d 797, 799 (7th Cir. 2010) (“Nations differ in the way they treat the role of religion in employment [*Aramco*]; they do not differ to the same extent in the way they treat murder. They may use different approaches to defenses, burdens of proof and persuasion, the role of premeditation, and punishment, but none of these is at stake here. It is not as if murder were forbidden by U.S. law but required (or even tolerated) by Mexican law.”). This assertion, if true, could also cut the other way. Presumably an individual committing a murder abroad would have violated the laws of the territorial state. So even if U.S. criminal law does not apply, he could be prosecuted. Not so for civil law. Suppose courts applied a pure “conduct” test, and an individual traveled to outside the borders of the United States and committed an act which would have been against U.S. civil law. Even if that act had effects within the United States, such an individual technically did not violate U.S. law. And, if the Seventh Circuit is correct, then it is quite possible that he could not be reached by an action in a foreign court either.

219. *Skilling v. United States*, 130 S. Ct. 2896 (2010) (discussing 18 U.S.C. § 1346); *Black v. United States*, 130 S. Ct. 2963 (2010) (same); *Weyhrauch v.*

courts, is well-placed to weigh those interests against international comity. And, importantly, deference to the executive with respect to the application of the presumption says nothing of the *Charming Betsy* canon<sup>220</sup> and those limitations enshrined in extradition treaties,<sup>221</sup> which will provide significant protection against executive overreach in this area. Indeed, to the extent that courts adopt a deferential approach to the presumption, they should be encouraged to look even more strongly at those international legal constraints on executive action derived from the international law of jurisdiction and other public international law rules.<sup>222</sup>

Flipping the orientation of the branches, while the twin canons are tools of judicial interpretation of congressional (and executive) acts, they are not wholly irrelevant to the work of Congress and the executive. In particular, the rules of legislative jurisdiction could serve as a useful guide for legislative decisions about extraterritoriality. International law suggests certain limits on the scope of national laws. Congress could expressly adopt those limits in criminal (or civil) statutes. The same idea holds true for the executive branch. In the face of an ambiguous statute—or, for that matter, an unambiguously extraterritorial one—the Department of Justice could consider international law limits on legislative jurisdiction as a guide for charging decisions in criminal and civil enforcement cases.<sup>223</sup> Moreover, to the extent that courts will defer to executive judgments, *ex ante* policy statements should be looked at more fa-

---

United States, 130 S. Ct. 2971 (2010) (same); *see also* United States v. Giffen, 326 F. Supp. 2d 497 (S.D.N.Y. 2004) (rejecting the extraterritorial application of the honest-services statute).

220. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815–21 (1993) (Scalia, J., dissenting); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 403(2)(h) (considering the reasonableness of the exercise of legislative jurisdiction with reference to “the likelihood of conflict with regulation by another state”).

221. *See, e.g.*, Meyer, *supra* note 82, at 167–69 (discussing the “dual criminality” rule in extradition treaties and international law enforcement cooperation) (citing William V. Dunlap, *Dual Criminality in Penal Transfer Treaties*, 29 VA. J. INT’L L. 813, 829 (1989); John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441 (1988); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 476(1)(c)).

222. *See, e.g.*, Born, *supra* note 25, at 79–100 (arguing that an “international law presumption” is a suitable replacement for what he believes to be an outmoded presumption against extraterritoriality). Moreover, this is to say nothing of the Constitutional or procedural protections afforded to criminal defendants that are not available to their civil counterparts.

223. Indeed, the law criminalizing homicide and assault against U.S. nationals outside the United States, 18 U.S.C. § 2332 (2006), expressly requires the certification of the Attorney General.

vorably than mere litigation positions.<sup>224</sup> Such an approach may encourage the executive to lay out those positions independent of any given criminal case, and any such positions should be informed by international legal rules.

It goes without saying that Congress could—and should—resolve all doubt by writing unambiguous statutes. The twin canons are not constraints on the power of Congress, and ultimately Congress must decide how broadly its laws should apply. Still, until Congress stops writing ambiguous statutes, the presumption against extraterritoriality appears here to stay. And, if *stare decisis* has any pull on the judiciary, the presumption may survive in concert with *Bowman*. Justice Scalia reaffirmed the presumption in *Morrison* in part to “preserv[e] a stable background against which Congress can legislate with predictable effects.”<sup>225</sup> To the extent that the courts prefer to create a durable legal environment, this Article demonstrates that *Bowman* remains an attractive precedent that can be maintained consistently with the Court’s decision in *Morrison*.

---

224. *Chevron* deference does not apply to “litigation position[s],” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988), and the Supreme Court expressly declined to adopt the EEOC’s litigation position in *EEOC v. Arabian Am. Oil Co.* 499 U.S. 244, 257–58 (1991). Some scholars have called for a *Chevron*-like approach that includes deference to litigation positions. See, e.g., Posner & Sunstein, *supra* note 201, at 1203. Even without this deference, in administrative law, agency policy statements are typically entitled to some deference under *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

225. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct 2869, 2881 (2010).