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## DETERMINING EXTRATERRITORIALITY

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### ABSTRACT

*This Article addresses an underexplored but critical aspect of the presumption against extraterritoriality. The presumption against extraterritoriality—which the United States Supreme Court has increasingly invoked in recent years—calls for courts to presume that Congress does not intend U.S. statutes to govern events outside the United States. The most difficult issue presented by the presumption arises when relevant events occur both inside and outside the United States, as in the classic example, if a shooter on one side of the border kills a victim on the other, or if, as in the leading case, false statements originating inside the United States impact the price paid in purchasing stock outside the United States. How should a court decide whether such cases involve extraterritoriality and trigger the presumption? In a world in which both the performance and impact of regulated activities increasingly occur within more than one*

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*nation, the need for courts to resolve this sort of question is likely to arise with increasing frequency.*

*In Morrison v. National Australia Bank Ltd., the United States Supreme Court established the Court's test for resolving this question: determining extraterritoriality based upon the location of the event that constitutes the "focus" of the statute at issue. Yet, if the focus of the statute determines extraterritoriality, what is the test for determining the focus of the statute? The Court's answer was to evaluate the language and purpose of the statute in order to see whether Congress intended it to reach the events in question when they take place outside the United States. The result is entirely circular because it required the Court to determine whether Congress intended the statute to reach the situation in order to invoke the presumption to determine whether Congress intended the statute to reach the situation.*

*This Article argues that a better approach determines extraterritoriality in light of the purposes for the presumption against extraterritoriality: specifically whether applying the statute to the situation before the court will trigger international relations concerns. I explore the parameters and implications of this approach. This includes considering approaches to determine when applying U.S. law to situations involving events both inside and outside the United States triggers international relations concerns, and noting some of the unusual implications of this approach—for example, that international relations concerns may sometimes call for a presumption in favor of applying U.S. law to a situation involving events both inside and outside the United States.*

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## INTRODUCTION

The United States Supreme Court resolved significant cases by invoking the presumption against extraterritoriality twice in the last four years.<sup>1</sup> This presumption calls for the Court to interpret U.S. statutes, in the absence of evidence of intent to the contrary, as not applying to events outside the nation's borders.<sup>2</sup> The Court's current affinity for the presumption follows a trend that began a little over twenty years ago<sup>3</sup> and seems likely to continue in the future.

The most difficult issue presented by the presumption against extraterritoriality is determining when a proposed application of a statute actually involves extraterritoriality so as to trigger the presumption. To use the classic illustration,<sup>4</sup> if a person standing within the United States shoots a rifle and kills a victim standing across the border in Mexico, or if a person in Mexico shoots a rifle and kills a victim standing within the United States, would prosecuting the shooter under domestic law in the United States for murder involve, in either case, extraterritorial application of the domestic law? Or, to give a more likely example, if a corporation makes a false statement in the United States that impacts the price paid for its stock in sales taking place overseas, or if a corporation makes a false statement overseas that impacts the price paid for its stock in the United States, would the United States be applying its law extraterritorially, in either case, by prosecuting the corporation for violating the U.S. law prohibiting fraud in connection with the purchase or sale of a security? A court might say there is extraterritoriality in these examples and invoke the presumption because it would be applying domestic law to events—conduct, effect of the conduct, or elements of the prohibited act—that occurred beyond our

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1. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (holding that the Alien Tort Statute does not reach conduct inside other nations); *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010) (holding that section 10(b) of the Securities Exchange Act does not reach fraudulent conduct impacting sales of securities outside the United States).

2. *E.g.*, *EEOC v. Arabian Am. Oil Co. (ARAMCO)*, 499 U.S. 244, 248 (1991).

3. *See infra* notes 27-28 and accompanying text.

4. *See, e.g.*, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 illus. 2 (1965) [hereinafter 2D RESTATEMENT OF FOREIGN RELATIONS LAW].

borders. On the other hand, in each of these examples, a court might say there is no extraterritoriality and the presumption is irrelevant because it is applying domestic law to conduct, effects, or elements of the prohibited act that took place within the United States. Or, for all these examples, a court might say that whether the situation involves extraterritoriality depends upon the statute and the specific circumstances. In a world in which both the performance and impact of regulated activities increasingly occur within more than one nation, the need for courts to resolve this sort of question is likely to arise with increasing frequency.

The U.S. Supreme Court established its test for answering this question in its 2010 decision in *Morrison v. National Australia Bank Ltd.*<sup>5</sup> This test looks to the location of the event that constitutes the “focus” of the statute. If the event that constitutes the focus of the statute occurs outside the United States, the situation involves extraterritoriality; if the event that constitutes the focus of the statute occurs inside the United States, the situation does not involve extraterritoriality.<sup>6</sup> Yet, if statutory focus provides the test for determining if the situation involves extraterritoriality, what is the test for determining the statutory focus? For example, is the statutory focus of the law against murder the act of pulling the trigger with intent to kill, or is it the fatal impact of the bullet striking the victim?

In *Morrison*, the Supreme Court held that the focus of the U.S. law prohibiting fraud in connection with the purchase or sale of a security was the sale, not the fraud, and hence the prohibition did not reach the plaintiffs’ claim that misrepresentations originating in the United States impacted the price they paid for their stock in Australia.<sup>7</sup> Critically, however, the reasons the Court gave for concluding that the sale was the focus of the statute involved various arguments, ranging from the language of the statute to policy considerations, which suggested to the Court that Congress did not intend the statute to reach fraud in connection with sales outside the United States.<sup>8</sup> This makes the test entirely circular

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5. 130 S. Ct. 2869.

6. *Id.* at 2884.

7. *Id.*

8. *Id.* at 2882.

because the purpose of asking whether the claim involves extraterritoriality is to decide whether to invoke the presumption as a means to determine Congress's intent. The circularity of the statutory focus test renders the presumption against extraterritoriality useless except in easy cases in which none of the challenged conduct or its effects occurs in the United States.

This Article proposes a better test for determining extraterritoriality in situations involving misconduct with performance or effect occurring both inside and outside the United States. Instead of looking to the focus or purpose of the statute, this Article proposes looking to the purpose of the presumption against extraterritoriality. Specifically, this Article advocates looking to the potential impact on international relations of applying the statute to the situation at hand in order to decide whether there is extraterritoriality. Put simply, if the situation is one in which the effort to apply U.S. law to events reaching outside the United States will trigger hostile foreign government reaction, the Court should demand some indication that this is what Congress really had in mind; if the situation is one in which no such reaction is likely, then the Court should determine whether Congress intended the statute to reach the situation in the same manner that the Court interprets statutes generally and without prejudging Congress's intent.

Determining the likely foreign government reaction may often not be straightforward, and this Article explores some approaches to address this question. This Article also explores some of the implications of determining extraterritoriality by the impact on international relations from applying U.S. laws to misconduct involving conduct or effect occurring both inside and outside the United States. For example, this Article will argue that the international relations rationale suggests that the presumption should work both ways: specifically, in situations in which failure to extend U.S. laws to misconduct risks a negative impact on international relations, there should in fact be a presumption in favor of applying the nation's laws even though some conduct or effect occurs outside the United States.<sup>9</sup>

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9. See *infra* Part III.C.

This Article will proceed in three parts. Part I will provide some background regarding the presumption against extraterritoriality and the problem that courts face in determining whether a given claim, arising out of conduct or effect in more than one nation, entails extraterritoriality, so as to trigger the presumption. Part II will discuss the Supreme Court's effort to resolve this problem in *Morrison*, as well as in a concurring opinion in the recent *Kiobel v. Royal Dutch Petroleum Co.* decision, in which two Justices discussed how *Morrison's* statutory focus test would apply to the Alien Tort Statute.<sup>10</sup> Part II also discusses quixotic recent efforts by lower federal courts to apply the statutory focus test to claims that events inside and outside the United States violated RICO. Part III then sets out a framework for determining whether a claim involves extraterritoriality based upon the three basic rationales for the presumption against extraterritoriality. After finding that a test looking to the presence of international relations concerns is the only one of the three rationales that enables the presumption against extraterritoriality to serve any useful purpose when activities straddle national borders, Part III explores the parameters and implications of this test.

## I. BACKGROUND

### A. *The Presumption Against Extraterritoriality*

In a simpler time, issues of applying U.S. law beyond the young nation's borders arose on ships and involved pirates,<sup>11</sup> murder at sea,<sup>12</sup> and customs duties.<sup>13</sup> By the twentieth century, an industrialized and powerful United States was dealing with those who used subtler means to enrich themselves at the expense of others. Congress responded with statutes to protect consumers, competitors, workers, investors, and the like.<sup>14</sup> As economic transactions

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10. 133 S. Ct. 1659, 1662-64 (2013); *id.* at 1669-70 (Alito, J., concurring).

11. *E.g.*, *United States v. Klinton*, 18 U.S. (5 Wheat.) 144 (1820).

12. *E.g.*, *United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820).

13. *The Apollon*, 22 U.S. (9 Wheat.) 362, 368-69 (1824).

14. *E.g.*, Sherman Act, 15 U.S.C. §§ 1, 2 (2012) (protecting consumers and competitors from combinations in restraint of trade and monopolization); Securities Exchange Act, 15 U.S.C. §§ 78a-78pp (2012) (protecting investors); Eight Hour Law, 40 U.S.C. §§ 324-25 (1940)

increasingly crossed national boundaries, issues arose regarding the degree to which such statutes applied to events that occurred in other nations. Courts responded with decisions applying or refusing to apply U.S. antitrust laws,<sup>15</sup> employment laws,<sup>16</sup> securities laws,<sup>17</sup> and trademark laws,<sup>18</sup> as well as a variety of other laws,<sup>19</sup> to activities abroad.

In the course of deciding these cases, the Supreme Court often referred to rules of construction or presumptions regarding Congress's intent with respect to applying U.S. laws to events beyond our borders. In its early decisions dealing with murder at sea and enforcing customs duties, the Court explained that even though a statute used broad, general language regarding its reach, the Court presumed that Congress only intended to legislate within Congress's "authority and jurisdiction."<sup>20</sup> It is debatable whether this referred to legislating only with respect to events within the territory of the United States or legislating only within the limits imposed by international law on the permissible reach of a nation's statutes.<sup>21</sup> Justice Holmes's opinion in *American Banana Co. v. United Fruit Co.* marked an important point in the evolution of the law in this area when he stated that the presumed limit is one of territory.<sup>22</sup> Specifically, Justice Holmes asserted that the legality of an act nearly universally depends upon the law of the nation in which it takes place, which, in turn, leads courts to construe statutes only to apply within the nation's territorial limits.<sup>23</sup>

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(repealed 1962) (protecting workers through wage and hour regulation).

15. See *F. Hoffmann-La Roche v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004); *infra* notes 22-24 and accompanying text.

16. See Jonathan Turley, "When in Rome": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 617-27 (1990) (discussing cases dealing with extraterritorial application of U.S. employment law); *infra* notes 25-26 and accompanying text.

17. See *infra* notes 57-68 and accompanying text.

18. *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952).

19. *E.g.*, *Smith v. United States*, 507 U.S. 197 (1993) (involving the Federal Torts Claim Act); Turley, *supra* note 16, at 627-34 (discussing cases dealing with extraterritorial application of U.S. environmental protection laws).

20. *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824).

21. *E.g.*, John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 363-66 (2010).

22. 213 U.S. 347, 356-57 (1909).

23. *Id.* at 359.

Justice Holmes's strict notions of territoriality subsequently fell out of favor in the very field in which *American Banana* arose, as courts increasingly applied U.S. antitrust laws to overseas conduct that had an effect in the United States.<sup>24</sup> In employment law, however, the Supreme Court continued to invoke a presumption against applying U.S. laws to events beyond our territory—extraterritoriality—in order to construe U.S. law as not reaching labor practices outside the United States.<sup>25</sup> This hit an important milestone in the Court's 1991 decision in *EEOC v. Arabian American Oil Co. (ARAMCO)*, in which the Supreme Court invoked the presumption against extraterritoriality in order to hold that the Equal Employment Opportunity Act did not apply to the discriminatory firing of an American citizen by an American company when the firing took place in Saudi Arabia.<sup>26</sup> *ARAMCO* marked a turning point in the frequency with which the Supreme Court invoked the presumption against extraterritoriality. Whereas the eight decades between *American Banana* and *ARAMCO* saw the Supreme Court decreasingly invoke the presumption to restrict the application of U.S. statutes,<sup>27</sup> in the two decades since *ARAMCO* the presumption has found much greater favor in the Supreme Court's eyes.<sup>28</sup>

The Supreme Court's growing fondness toward the presumption against extraterritoriality has, not surprisingly, drawn scholars to the topic.<sup>29</sup> Although these scholars disagree regarding what the

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24. *E.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

25. *E.g.*, *Foley Bros. v. Filardo*, 336 U.S. 281, 282 (1949) (holding that the Eight Hour Law did not apply to employment overseas).

26. 499 U.S. 244 (1991).

27. William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 91 (1998) (explaining how the Supreme Court did not invoke the presumption against extraterritoriality in the four decades after applying it to the Eight Hour Law in 1949, even though it had opportunities to do so).

28. *Id.* at 87 (listing Supreme Court opinions invoking the presumption against extraterritoriality in the decade following *ARAMCO*); see also *supra* note 1 and accompanying text.

29. *E.g.*, Lea Brilmayer, *New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. U. L. REV. 655 (2011); Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631 (2009); Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019 (2011); Dodge, *supra* note 27; Knox, *supra* note 21; Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT'L L. 750

Court should do with the presumption,<sup>30</sup> on one point there seems widespread agreement: the Court has made a hash of the subject.<sup>31</sup> Inconsistencies in the Court's opinions abound. Some opinions rely on the presumption, whereas other opinions dealing with application of U.S. law to events beyond the nation's borders barely, if at all, mention it.<sup>32</sup> The Court cannot make up its mind about the purposes for the presumption<sup>33</sup> and its relationship to the presumption against violating international law.<sup>34</sup> The Court's opinions differ on the evidence of legislative intent necessary to overcome the presumption.<sup>35</sup> Finally, Supreme Court opinions are confusing or inconsistent regarding when a claim involves extraterritoriality, so

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(1995); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110 (2010); Austen L. Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455 (2008); Yaad Rotem, *Economic Regulation and the Presumption Against Extraterritoriality—A New Justification*, 3 WM. & MARY POL'Y REV. 229 (2012).

30. *E.g.*, Colangelo, *supra* note 29, at 1022-28 (advocating that courts limit the presumption to situations in which the law comes from unilateral (domestic) as opposed to multilateral (international) sources); Dodge, *supra* note 27, at 90-91 (advocating that courts base the presumption on the absence of effects in the United States); Knox, *supra* note 21, at 353 (advocating that courts base the presumption on international law rules regarding jurisdiction to apply a nation's law); Meyer, *supra* note 29, at 119-21 (advocating that courts limit the presumption to situations in which only one nation prohibits the conduct); Parrish, *supra* note 29, at 1462 (advocating that courts reject the effects test as a basis for extending the reach of U.S. laws).

31. *E.g.*, Colangelo, *supra* note 29, at 1021, 1028 (“[T]he only thing ... scholars [writing on the presumption against extraterritoriality] seem to agree on is that the law in this area is a mess.”).

32. *E.g.*, Kramer, *supra* note 29 (contrasting *ARAMCO* with *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), in which the Supreme Court does not explicitly mention the presumption).

33. Compare *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (quoting *ARAMCO*'s statement that the presumption against extraterritoriality “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord”), with *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010) (stating that the presumption against extraterritoriality is not about comity or avoiding conflicts with other nations' laws).

34. See *infra* notes 201-04 and accompanying text (discussing Supreme Court opinions dealing with the relationship between the presumption against extraterritoriality, the presumption against violations of international law, and interpreting the reach of statutes to avoid conflicts with foreign laws).

35. *E.g.*, Dodge, *supra* note 27, at 96-97 (discussing statements by the Supreme Court in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 176-77 (1993), *Smith v. United States*, 507 U.S. 197, 201-04 (1993), and *EEOC v. Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244 (1991), with different formulations for the amount of evidence necessary to overcome the presumption).

as to trigger the presumption.<sup>36</sup> This Article focuses on this last problem, although the lack of clarity about the purposes of the presumption against extraterritoriality and its relationship to the presumption against violating international law complicates our inquiry.

### *B. The Problem of Identifying Extraterritoriality*

In many cases, it is easy to determine that a claim involves the extraterritorial application of a U.S. statute. So, for example, in the recent *Kiobel* case, all of the conduct by the Nigerian military alleged to violate international human rights law, as well as all of the conduct by the defendant corporations alleged to have aided and abetted this conduct—thereby, the plaintiffs argued, creating a claim under the U.S. Alien Tort Statute—took place in Nigeria, and the plaintiffs pointed to no impact of this conduct in the United States.<sup>37</sup> Under these circumstances, normally, the nation<sup>38</sup> in which the wrongful conduct took place would apply its law to prosecute the defendants, reflecting the traditional approach under which laws govern events taking place within the nation's own territory.<sup>39</sup> This is not to say, however, that nations do not sometimes prosecute wrongful conduct that only occurs and creates an impact in another nation's territory. This might happen, for example, because the victim was a citizen of the nation seeking to prosecute (sometimes

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36. Beyond the problem addressed in this Article with the Supreme Court's approach to situations involving conduct or effect in more than one nation, the Court has been inconsistent with respect to whether ships or bases constitute U.S. territory for purposes of determining extraterritoriality. *E.g.*, Knox, *supra* note 21, at 390-92.

37. *Kiobel*, 133 S. Ct. at 1663-65.

38. Within the term "nation," I include political subdivisions of nations, such as "states" within the United States of America, which prosecute crimes such as murder committed within the political subdivision.

39. *E.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. c (1986) [hereinafter 3D RESTATEMENT OF FOREIGN RELATIONS LAW] ("The territorial principle is by far the most common basis for the exercise of jurisdiction to prescribe."); INTERNATIONAL BAR ASSOCIATION, REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 11 (2009) [hereinafter IBA REPORT], available at <http://perma.cc/9X89-99G8>, ("The starting point for jurisdiction is that all [nations] have competence over events occurring and persons ... present in their territory. This principle, known as the 'principle of territoriality', is the most common and least controversial basis for jurisdiction.").

referred to as the passive personality principle);<sup>40</sup> because the defendant is a citizen of the nation seeking to prosecute (referred to as the nationality or active personality principle);<sup>41</sup> because of some special interest of the nation in the misconduct (for example, the victim was undertaking an important task for the government of the nation seeking to prosecute leading the nation to assert jurisdiction based upon the protective principle);<sup>42</sup> or, as particularly relevant to *Kiobel*, because the special nature of the crime, such as piracy or genocide, gives all nations jurisdiction to prosecute based upon universal jurisdiction.<sup>43</sup> In any of these cases in which a nation might seek to prosecute wrongful conduct with no connection to its territory, one can say that the nation is applying its law extra-territorially.

Applying the concept of extraterritoriality becomes less straightforward as events straddle borders. In the classic example, the defendant, who is standing in one nation, shoots a rifle and kills the intended victim, who is standing near the border in another nation. In which nation's territory does the wrong occur: the nation of the act or the nation of the injury? Although some early court opinions viewed this as a situation in which the defendant's conduct occurred in both nations—based upon the metaphysical notion that the defendant's conduct traveled with the bullet<sup>44</sup>—the general view is that this situation involves conduct in one nation—where the defendant pulled the trigger—and an effect in another na-

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40. *E.g.*, 3D RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 39, § 402 cmt. g; IBA REPORT, *supra* note 39, at 147 (“Of the 27 [nations] surveyed for this chapter, just over half adopted some version of the passive personality principle of jurisdiction, although generally only for certain crimes.”).

41. *E.g.*, 3D RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 39, § 402(2); IBA REPORT, *supra* note 39, at 145 (“Almost all (25 out of 27) of the [nations] surveyed for this chapter grant some degree of jurisdiction to their courts based on the active personality principle, in the sense of criminalising certain conduct by nationals under domestic law.”).

42. *E.g.*, 3D RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 39, § 402(3); IBA REPORT, *supra* note 39, at 150 (“Of the 27 [nations] surveyed for this chapter, 22 have enacted legislation based on some form of the protective principle.”).

43. *E.g.*, 3D RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 39, § 404; IBA REPORT, *supra* note 39, at 153 (“A majority of the [nations] surveyed for this chapter (25 out of 27) provide for some form of universal jurisdiction to be exercised by national courts.”).

44. *See, e.g.*, *Simpson v. State*, 17 S.E. 984, 985 (Ga. 1893) (“[I]f a man in the State of South Carolina criminally fires a ball into the State of Georgia, the law regards him as accompanying the ball, and as being represented by it, up to the point where it strikes.”).

tion—where the bullet struck the victim.<sup>45</sup> Hence, this example illustrates that prohibited conduct may have a connection to a territory either by occurring there or by creating an effect there. Whether one views the situation through the lens of where conduct and effect occur, or through the lens of where the necessary elements of a crime took place, the example shows that situations can arise in which one might say that a prohibited act occurs in more than one nation. In such an event, the critical question for purposes of the presumption against extraterritoriality is whether either nation would be applying its law extraterritorially if, in this example, it prosecuted the shooter for murder.

There are three answers to this question: yes, no, and maybe. The affirmative answer follows from what I will label the “half-empty” viewpoint because it requires all contacts to be within a single nation in order to avoid extraterritoriality. Under this view, both nations in the cross-border shooting example would be applying their law extraterritorially if they prosecuted the defendant for murder because they would be prosecuting a crime in which some of the conduct or effect—or the elements—took place in another nation.<sup>46</sup> At the other extreme is what I will label the “half-full” viewpoint because it requires only some contact within a nation in order to avoid extraterritoriality. Under this view, neither of the nations in the cross-border shooting example would be applying law extraterritorially if either prosecuted the defendant for murder because, for both, at least some of the conduct, effect, or elements of the crime took place in that nation.<sup>47</sup> In between these two viewpoints is middle ground in which one nation might be applying its law extraterritorially and one might not. For example, a highly traditional view would be that a nation punishing the conduct of pulling the trigger within the nation’s territory would not be

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45. See, e.g., 2D RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 4, § 18 cmt. c, illus. 2; STEPHEN C. MCCAFFREY, UNDERSTANDING INTERNATIONAL LAW 178 (2006) (referring to subjective and objective territoriality as where the act and the injury occur, respectively).

46. E.g., Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1218 & n.3 (1992) (using the term extraterritoriality to refer to a case in which at least one relevant event occurs in another nation).

47. See, e.g., 3D RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 39, § 402(1)-(2) & cmt. d (treating situations in which either conduct or effect occurs within a nation as creating jurisdiction to apply a nation’s law based upon territoriality).

applying its law extraterritorially, whereas a nation punishing conduct that occurred elsewhere would be applying its law extraterritorially, even though the conduct elsewhere produced an effect (the death) within the nation's territory.<sup>48</sup>

Although cross-border shootings may not be common, it has become a sad fact of modern life that terrorist activities often straddle national borders as plots hatched in meetings in one part of the world are consummated with death and destruction in another. Less dramatic, but more prevalent, are activities in cross-border drug smuggling, human trafficking, computer hacking, and similar criminal activities that involve conduct and effect in more than one nation.<sup>49</sup> Shifting to "white collar" misdeeds, violations of laws governing business commonly involve conduct and impact in more than one nation. For example, producers bent upon price fixing may form their cartel and agree on prices or production in secret meetings in one part of the world, implement their agreement through their pricing and production decisions in other nations in which they make and sell their product,<sup>50</sup> and create an impact in yet other nations whose consumers pay more because of the global impact of reduced supplies and higher prices.<sup>51</sup> With multinational corporations and the global trading of securities, it may be not only increasingly difficult to isolate the nation in which a false statement or a securities transaction occurs,<sup>52</sup> but false statements in one

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48. *E.g.*, Parrish, *supra* note 29, at 1456-60 (discussing the traditional approach under which application of a statute based upon effects, but not conduct, is extraterritorial).

49. *See, e.g.*, Colangelo, *supra* note 29, at 1021 (giving examples of cybercrime and child sex tourism as transnational criminal conduct).

50. *See, e.g.*, Case 89/85, Åhlström Osakeyhtiö v. Comm'n (*Wood Pulp*), 1988 E.C.R. 5193, 5243 (holding that price fixing by wood pulp producers outside the European Union violated European Union competition law when the conspiracy was implemented by selling at the illegally agreed prices in the European Union).

51. *See, e.g.*, *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (holding that a cartel of foreign producers of aluminum who agreed to limit production violated U.S. antitrust law, even though the limit covered only production of aluminum outside the United States, because less worldwide supply of aluminum would mean higher aluminum prices in the United States).

52. *See, e.g.*, Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 *NW. J. INT'L L. & BUS.* 207, 216-18 (1996) (explaining how conduct in securities transactions often occurs in more than one country).

nation can impact the prices at which securities are sold in other nations.<sup>53</sup>

Deciding whether to apply the presumption against extraterritoriality in all these cases in which misconduct and its effect occurs inside and outside the nation is difficult because the two simple answers simply do not work. The problem with the “half-empty” approach of finding extraterritoriality any time some arguably relevant conduct or effect occurs outside the nation is fairly obvious. If each nation’s courts apply a presumption against extraterritoriality when any conduct or effect occurs in another nation, then no nation will prosecute cross-border misconduct like the classic cross-border shooting example in the all too common<sup>54</sup> situation in which legislatures neglect to specify the territorial reach of statutes (which, of course, is why courts created the presumption).<sup>55</sup> Not only is this a poor result as a policy matter, but it is also difficult to imagine that legislatures intended this result.<sup>56</sup> On the other hand, if courts follow the “half-full” approach and find no extraterritoriality any time some arguably relevant conduct or effect occurs inside the nation, then, in an increasingly interconnected world, it may be too easy for imaginative plaintiffs to avoid the presumption against extraterritoriality by pointing to some attenuated conduct or effect that occurred within the nation. This problem appears to require a “Goldilocks” solution.

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53. See, e.g., Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT’L L. 14, 44-48 (2007) (discussing the impact of fraudulent representations in the United States on prices in foreign markets).

54. At least this will be the case in common law jurisdictions. E.g., Kenneth S. Gallant, *The Indeterminate Law of Jurisdiction, the Presumption Against Extraterritorial Application of Statutes, and Uncertainty in U.S. Criminal Law*, 27 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 219, 224 (2014).

55. See, e.g., *United States v. Pac. & Arctic Ry. & Navigation Co.*, 228 U.S. 87, 98 (1913) (pointing out that the logic of the defendants’ argument that the Sherman Act did not reach price fixing involving a railroad between the United States and Canada because there was conduct outside the United States would mean that neither the United States nor Canada would prohibit the cross-border price fixing).

56. Indeed, after an English court held that neither nation could prosecute when a blow was struck in one country and death ensued in another country, the English Parliament passed legislation to overturn this rule. E.g., *S.S. Lotus*, (Fr. v. Turk), 1927 P.C.I.J. (ser. A) No. 10, at 65, 78 (Sept. 7) (Moore, J., dissenting).

## II. *MORRISON* AND THE STATUTORY FOCUS TEST

### A. *Application of U.S. Law to Transnational Securities Frauds* *Pre-Morrison*

In order to understand the test that the Supreme Court crafted in *Morrison* for determining whether a claim involves extraterritoriality, it helps to review how the lower courts before *Morrison* decided whether to apply the antifraud provision in U.S. securities law to events beyond the country. It is ironic that the Supreme Court in *Morrison* so criticized the lower courts for ignoring the presumption against extraterritoriality, when the very essence of the test developed by the lower courts for determining whether U.S. law covered transnational securities frauds relied on jurisdiction based upon territoriality, and specifically, whether some conduct or effect occurred within the United States.

Application of U.S. securities laws to fraudulent transactions outside the United States started in the 1960s. In *Schoenbaum v. Firstbrook*, the Second Circuit confronted a situation in which directors of a Canadian corporation allegedly defrauded their corporation by having it issue stock cheaply to other companies in Canada.<sup>57</sup> This diluted the value of stock previously issued by the corporation, some of which traded on the American Stock Exchange, and triggered a lawsuit by shareholders in the United States.<sup>58</sup> The shareholders asserted that the directors' action violated section 10(b) of the Securities Exchange Act<sup>59</sup> and Rule 10b-5<sup>60</sup> promulgated by the Securities Exchange Commission pursuant to section 10(b). The combination of this section and rule prohibits fraud in connection with the purchase or sale of a security, and courts have held that private parties injured by the violation have an implied cause of action against the wrongdoer.<sup>61</sup> Recognizing that the purpose of the Securities Exchange Act encompasses protecting

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57. 405 F.2d 200, 204-05 (2d Cir. 1968).

58. *Id.*

59. *Id.*; see 15 U.S.C. § 78j(b).

60. *Schoenbaum*, 405 F.2d at 205-06; see 17 C.F.R. § 240.10b5 (2013).

61. *E.g.*, *Kardon v. Nat'l Gypsum Co.*, 73 F. Supp. 798, 802 (E.D. Pa. 1947).

investors trading on U.S. securities exchanges, the Second Circuit held that section 10(b) applied based upon the domestic effect even though the fraud occurred in Canada.<sup>62</sup>

A few years later, the Second Circuit confronted a situation in *Leasco Data Processing Equipment Corp. v. Maxwell* in which officials of an English company convinced an American company to purchase stock in the English company by misrepresentations that took place in the United States and in England.<sup>63</sup> The court again held that section 10(b) and Rule 10b-5 could apply—in this case based upon the occurrence of conduct (some of the misrepresentations) in the United States.<sup>64</sup> The combination of *Schoenbaum* and *Leasco* created what became known as the conduct and effects test to determine the reach of section 10(b) and Rule 10b-5 with respect to securities fraud having a transnational dimension.<sup>65</sup> Under this test, conduct or effects in the United States might—depending upon a balancing of factors<sup>66</sup>—subject a securities fraud to the reach of the U.S. prohibition. The test spread from the Second Circuit to the other circuits,<sup>67</sup> albeit with some differences.<sup>68</sup>

The early cases developing the conduct and effects test seem not to have provoked too much controversy. This changed over time. In part, increasingly aggressive applications of the conduct and effects test provoked reaction. This was particularly true with the use of the test to reach so-called F-cubed cases—those in which the plaintiffs were foreigners, the defendant was a foreign corporation, and the purchases or sales of securities took place on foreign securities markets.<sup>69</sup> Under these circumstances, critics asked what

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62. *Schoenbaum*, 405 F.2d at 205-06.

63. 468 F.2d 1326, 1330-33 (2d Cir. 1972).

64. *Id.* at 1333-39.

65. *E.g.*, SEC v. Berger, 322 F.3d 187, 192-93 (2d Cir. 2003).

66. *E.g.*, *Eur. & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 129-31 (2d Cir. 1998) (balancing various factors in holding that section 10(b) did not apply); *Cont'l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 414 (8th Cir. 1979) (stating that the test looks at a number of factors with no one factor dispositive).

67. *E.g.*, *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 667 (7th Cir. 1998); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424-25 (9th Cir. 1983); *Pac. Oilseeds Inc.*, 592 F.2d at 414; *SEC v. Kasser*, 548 F.2d 109, 115 (3d Cir. 1977).

68. *E.g.*, *Sternberg*, 149 F.3d at 665 (“The predominant difference among the circuits, it appears, is the degree to which the American-based conduct must be related causally to the fraud and the resultant harm to justify the application of American securities law.”).

69. See, e.g., Daniel Kantor, Note, *The Limits of Federal Jurisdiction and the F-cubed*

possible interest the United States had in applying its securities fraud law to the plaintiffs' claims, simply by virtue of the fact that some of the conduct in creating or promulgating the false or misleading statements took place in the United States.<sup>70</sup>

A second source of reaction arose out of cases in which application of U.S. law highlighted policy tensions. In a case like *Leasco*, in which a solitary defrauded investor sued the company that lied to its representatives, no one other than the defendant was likely to object to the application of U.S. securities laws. In large shareholder class actions against prominent foreign corporations, however, hostile reactions arose.<sup>71</sup> This is not surprising because such class actions have been controversial in the United States.<sup>72</sup> Exacerbating the problem are differences in substantive laws (such as the fraud on the market presumption<sup>73</sup>) and procedural laws (with regard to

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*Case: Adjudicating Transnational Securities Disputes in Federal Courts*, 65 N.Y.U. ANN. SURV. AM. L. 839, 841 (2010) (discussing F-cubed cases).

70. *See, e.g.*, Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 493-96 (2009) (arguing that including purchasers on foreign stock markets in securities fraud class actions is unnecessary to protect the interests of U.S. investors or the purposes of the Securities Exchange Act).

71. *See, e.g.*, STAFF OF THE SEC. EXCH. COMM'N, STUDY ON THE CROSS-BORDER SCOPE OF THE PRIVATE RIGHT OF ACTION UNDER SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934, at 23-24 (2012) (quoting amicus briefs filed in *Morrison* by the British, French, and Australian governments that criticized the United States for allowing class actions seeking recovery for securities frauds in connection with trading shares on their markets).

72. *E.g.*, John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1534 (2006) ("The standard criticism from the business community, the corporate bar, and some academics has long been that securities class actions disproportionately assert frivolous claims and thereby reduce shareholder welfare on average.").

73. The fraud on the market presumption allows purchasers or sellers of securities in well-developed markets to claim indirect reliance on false statements they may never have heard based upon the theory that such statements impacted the price paid or received by the investors. The United States Supreme Court has accepted this presumption. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 247 (1988). Other nations have rejected it. *See Marco Ventoruzzo, Like Moths to a Flame? International Securities Litigation After Morrison: Correcting the Supreme Court's "Transactional Test,"* 52 VA. J. INT'L L. 405, 414 (2012).

such matters as class actions and contingency fees<sup>74</sup>) governing such actions in the United States versus the laws elsewhere.

A final source of reaction arose out of the objection that the conduct and effects test lacked clear definition and had devolved into ad hoc and unpredictable judicial decisions.<sup>75</sup> This last complaint loomed especially large in persuading the Supreme Court to seek a simpler test in *Morrison*.

### B. Morrison

*Morrison* was an F-cubed case: the plaintiffs were Australians who purchased stock in an Australian banking company through transactions on the Australian stock market.<sup>76</sup> Events in Florida explain the presence of the case in the United States. The Australian banking company, National Australia Bank, purchased a Florida firm, which conducted a business servicing mortgages.<sup>77</sup> The principal assets of such a business are the contracts it has to service mortgages. The value of these contracts, in turn, partially depends on how long the mortgages covered by the contracts will run. The executives of the Florida firm overestimated how long the mortgages would run before homeowners refinanced their mortgages, thereby significantly overestimating the value of the firm's mortgage-servicing contracts.<sup>78</sup> Because the National Australia Bank bought the Florida firm, this inflated value appeared on the financial reports that the bank filed in Australia and in the United States.<sup>79</sup>

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74. *E.g.*, Debra Lyn Bassett, *Implied "Consent" to Personal Jurisdiction in Transnational Class Litigation*, 2004 MICH. ST. L. REV. 619, 625, 628 (2004) (describing systems in other countries without U.S. style class actions); Ventrone, *supra* note 73, at 412 (describing the impact on securities fraud litigation of differences between the U.S. opt-out class actions and the collective actions in other nations in which members must affirmatively opt into the class, and contingency fees in the United States).

75. *E.g.*, Choi & Silberman, *supra* note 70, at 467.

76. Which a wag might say makes *Morrison* an A-cubed or AAA case.

77. *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 168-69 (2d Cir. 2008), *aff'd on other grounds*, 130 S. Ct. 2869 (2010).

78. *See id.* at 169.

79. Because the bank's American Depositary Receipts (ADRs) were listed for trading in the United States, the bank had to meet U.S. securities law reporting requirements, including disclosing financial statements. *See, e.g.*, Securities Exchange Commission, Form 20-F, available at <http://perma.cc/A8RR-AJ72> (providing the form for registering ADRs listed on a national stock exchange, which includes financial reporting requirements).

Eventually, as homeowners refinanced their mortgages faster than the Florida firm's executives predicted, National Australia Bank was forced to write down the value of the contracts held by the Florida firm, leading the bank's stock price to tumble.<sup>80</sup> This, in turn, led parties who bought shares in the Australian bank to sue in U.S. court alleging violations of section 10(b) and Rule 10b-5.<sup>81</sup> They claimed that the executives of the Florida firm deliberately exaggerated the expected life of the mortgages and the value of the mortgage-servicing contracts.<sup>82</sup>

To the lower courts applying the conduct and effects test, the issue was where the fraudulent conduct took place. The plaintiffs argued it took place in Florida, where the executives overestimated the expected life of the mortgages and the value of their contracts, and also made some misleading public statements touting the subsidiary's prospects.<sup>83</sup> The lower courts, however, viewed the fraudulent conduct as occurring in Australia, where the bank incorporated the overvaluations into the financial reports it made public.<sup>84</sup> As a result, the Southern District of New York dismissed the case, and the Court of Appeals for the Second Circuit affirmed the dismissal.<sup>85</sup>

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80. *Morrison*, 547 F.3d at 169.

81. *See id.*

82. *Id.*

83. *Id.*

84. The notion was that the fraud concocted in Florida did not hurt the plaintiffs who bought their stock in Australia until the bank repeated it in Australia, thus, it was not the direct cause of the plaintiff's injury. *Id.* at 176. The parallel might be to one who loads the rifle in one jurisdiction and fires it in another. Of course, if there was no fraud in Florida, there would be nothing misleading for the bank to repeat in Australia. It might be easier to deny a connection between the plaintiffs' trades in Australia and the misleading statements by the Florida subsidiary's executives or the misleading filings by the bank in the United States. Even here, however, a causal link probably exists because, with global communication, someone presumably would have noticed the inconsistency if the bank's U.S. filings or the executives' statements had not matched the bank's Australian misstatements.

85. The District Court dismissed the case for lack of subject matter jurisdiction, reflecting the way in which the courts before *Morrison* had characterized the issue of whether section 10(b) reached actions outside the United States. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2876 (2010). The Supreme Court's opinion in *Morrison* characterized the matter as a merits issue (whether section 10(b) prohibited the activity in question given where it took place), rather than a subject matter jurisdiction question (whether the nature of the matter was one that a federal court could hear), because federal courts have jurisdiction to hear cases involving the federal securities laws. *Id.* at 2877. Contributing to the complexity in terminology in this area is the use of the term "prescriptive jurisdiction" to refer to the power

When the case reached the Supreme Court, the plaintiffs found an even less hospitable reception. The Justices agreed the plaintiffs should lose,<sup>86</sup> but splintered in their reasoning. A concurring opinion by Justices Stevens and Ginsburg agreed with the lower courts that the case simply failed under the conduct and effects test.<sup>87</sup> In an opinion written by Justice Scalia, the majority took a broader approach to the problem. They rejected the entire conduct and effects test.<sup>88</sup> Instead, they ruled that section 10(b) did not apply unless the plaintiffs purchased or sold securities in the United States.<sup>89</sup>

In creating this new rule, the majority proclaimed reliance on the presumption against extraterritoriality. This required the majority to reject arguments that various provisions in the Securities Exchange Act rebutted the presumption against extraterritoriality.<sup>90</sup> More critically for purposes of the present discussion, the majority opinion needed to respond to the arguments that the presumption against extraterritoriality was irrelevant to the plaintiffs' claim given the existence of fraudulent conduct in Florida, as well as to the lower courts' conduct and effects test since this test required some misconduct or an effect therefrom in the United States.<sup>91</sup>

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of a nation to create law governing events beyond its borders. *E.g.*, 3D RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 39, § 402.

86. *Morrison*, 130 S. Ct. at 2874-75.

87. *Id.* at 2894 (Stevens, J., concurring).

88. *Id.* at 2878-81 (majority opinion).

89. *See id.* at 2883.

90. The majority dismissed the arguments that the presumption was rebutted by: (1) the language of section 10(b), which triggered application of the section upon using a means of interstate commerce (defined to include commerce between foreign nations and any state); (2) the prefatory section of the Securities Exchange Act, mentioning that prices set on U.S. securities exchanges are quoted in foreign countries; and (3) section 30(a) and (b), which showed an intent for the Securities Exchange Act to reach transactions outside the United States. *See id.* at 2881-83. The court relied on the precedent of *ARAMCO* in ignoring the so-called jurisdictional language of section 10(b) as not to be taken seriously. The implication of the language in the Act's prefatory section on the reach of section 10(b) is obscure. But the Court misunderstood section 30(a) and (b). *See infra* note 113.

91. The Court also dealt with an argument advanced by the Solicitor General, who proposed certain qualifiers on when conduct in the United States would be sufficient to trigger the statute and argued that applying the statute to situations in which such conduct exists would help promote honest markets in the United States and prevent the United States from becoming a Barbary Coast from which persons direct fraud at foreign markets. *See Morrison*, 130 S. Ct. at 2886.

*C. Morrison's Approach to Identifying Extraterritoriality**1. Roads Not Taken*

Before discussing the approach for determining extraterritoriality adopted by the Court in *Morrison*, it is useful to point out the approaches the Court did not adopt. Implicit in the Court's rejection of the lower courts' conduct and effects test, and explicit in the Court's discussion of the plaintiffs' contention that the case did not involve extraterritoriality because of the conduct in the United States, is a rejection of the "half-full" approach to determining extraterritoriality under which any conduct or effect within the United States renders the presumption irrelevant. Indeed, the Court characterized the presumption against extraterritoriality under such an approach as "a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case."<sup>92</sup> On the other hand, the Court clearly did not adopt the "half-empty" approach, under which any conduct or effect outside the United States triggers the presumption. Otherwise, the Court could simply have pointed to the false financials published in Australia, as well the plaintiffs' stock purchases there, as triggering the presumption without the need for further analysis regarding the focus of the statute.<sup>93</sup>

Most interesting of all, however, in terms of approaches rejected, is that the Court proclaimed such fealty to the presumption against extraterritoriality at the same time the Court abandoned—without the slightest acknowledgment—the traditionalist approach to determining extraterritoriality. Going back at least to *American Banana*, those favoring strong territorial limits on the reach of laws looked to the location of the ostensibly wrongful conduct.<sup>94</sup> This is why the debate between those continuing to favor a strong presumption against extraterritoriality and those finding territorial limits too confining repeatedly returns to the legitimacy and wisdom of

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92. *Id.* at 2884.

93. The Court could still have reached its ultimate result under which the location of sale dictates the application of section 10(b) if the Court applied the presumption against extraterritoriality based upon any conduct or effect outside the United States. It could simply have found the presumption to be rebutted for sales occurring in the United States.

94. *E.g.*, Parrish, *supra* note 29, at 1478-82 (arguing against the effects test).

going beyond the location of the wrongful conduct and extending the coverage of laws to reach conduct in another country that causes effects in this one (the “effects test” or “objective territoriality”).<sup>95</sup>

Whatever else one can say about *Morrison*’s approach for determining extraterritoriality for purposes of section 10(b) by the location of the plaintiffs’ purchase or sale of securities, this test is definitely not geared to where the wrongful conduct took place. In *Morrison*, the plaintiffs accused the defendant of making false statements in the United States and in Australia.<sup>96</sup> As is commonly the situation in securities fraud class actions,<sup>97</sup> however, the defendant was not selling stock to the plaintiffs. Instead, the plaintiffs purchased stock in secondary trading on the stock market from other shareholders (who apparently were innocent of any wrongdoing) at a price impacted by the defendant’s misrepresentations.<sup>98</sup> Hence, if one conceptualizes *Morrison*’s location of the purchase or sale in terms of conduct and effects, the test looked to the location of one effect (the purchase or sale at a price impacted by fraud), rather than the location of the defendant’s wrongful conduct (the fraudulent misrepresentation).<sup>99</sup>

It is not an accident that *Morrison* abandoned the traditional location of the conduct approach, for the situation in *Morrison* illustrates why the traditional approach can fail to satisfy anyone. *Morrison* is a case in which the wrongful conduct did not occur in just one nation—the misrepresentations occurred in both the United

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95. *Id.*; see also Meyer, *supra* note 29, at 114-18 (describing different schools of thought regarding extraterritoriality among legal scholars including those who would extend laws to protect against undesirable effects in the United States and those who would favor limiting laws to conduct in a nation’s territory and those who favor balancing interests).

96. See generally *Morrison*, 130 S. Ct. at 2875-76.

97. See, e.g., Coffee, *supra* note 72, at 1556 (discussing securities fraud litigation against corporations that are not issuing stock).

98. E-mail from George Conway, Att’y for Respondent in *Morrison*, to author (on file with author).

99. See, e.g., William S. Dodge, *Morrison’s Effects Test*, 40 SW. U. L. REV. 687 (2011). It would be spurious to say that *Morrison* was still looking at the location of conduct (the sale). This either misrepresents what happened in *Morrison*—erroneously assuming, as in the typical consumer fraud, that the person who made the misrepresentation also made the sale so that one can call either a portion of the wrongful conduct—or uses the idea of conduct to encompass the effects of the wrongful conduct so long as those effects constitute actions. The problem with this sleight of hand is that it would seem to say that the nation in which the funeral occurs can rely on the notion of regulating conduct in order to apply its law to a fatal shooting by a person across the border.

States and Australia. This is not an aberration, for such multi-jurisdiction misconduct has long existed in other securities fraud cases.<sup>100</sup> Nor is the problem confined to securities fraud. Indeed, any sort of international conspiracy—whether an anticompetitive cartel or a terrorist ring—will involve illegal conduct straddling countries. For example, if a group of producers from different nations agree on fixing prices, the potentially illegal conduct occurs not only in the nation(s) in which persons from the companies meet to form their agreement, but presumably in every nation in which any producer carries out the agreement when setting its prices. This is why the initial inroads on *American Banana's* territorialism in the antitrust area—both in the United States<sup>101</sup> and in Europe<sup>102</sup>—involved not an immediate jump to the effects test, but rather situations in which the relevant conduct occurred both within and outside the nation.

The fact that wrongful conduct often straddles borders punctures the hope that focusing on the location of the conduct will avoid the need for tough choices in determining when cases involve extraterritoriality. Using the facts in *Morrison* as an example, if both the United States and Australia had interpreted their securities fraud prohibitions not to apply unless all the wrongful conduct occurred either in the United States or in Australia, then neither nation's laws might have prohibited the fraud in *Morrison*. If both the United States and Australia had ignored the presumption because some conduct occurred in each nation, then the overlap in the application of laws would have continued.<sup>103</sup>

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100. *E.g.*, *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1331 (2d Cir. 1972) (involving misrepresentations which took place in meetings in the United States and England and in calls and mailings from England to the United States); *see Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665 (7th Cir. 1998) (“The predominant difference among the circuits, it appears, is the degree to which the American-based conduct must be related causally to the fraud and the resultant harm to justify the application of American securities law.”).

101. *E.g.*, *Kramer*, *supra* note 29, at 751-52 (pointing out that prior to the Supreme Court's 1993 decision in *Hartford Fire Insurance*, the Supreme Court had only applied the Sherman Act to conduct outside the United States in cases in which some of the anticompetitive conduct also occurred inside the United States).

102. *See, e.g.*, case 89185, *Åhlström Osakeyhtiö v. Comm'n (Wood Pulp)*, 1988 E.C.R. 5193, 5243 (holding that price fixing by wood pulp producers violated European Community law when the conspiracy was implemented in the European Community by selling at the illegally agreed prices).

103. One could try to limit the reach of the relevant conduct by attempting to distinguish

Moreover, *Morrison* illustrated that looking to the location of the wrongful conduct can still lead to applying a nation's law to situations in which it may both offend other nations and, at the same time, fail to advance the goals of the legislation, thereby triggering rationales underlying the presumption against extraterritoriality.<sup>104</sup> It was the occurrence of fraudulent conduct in the United States, as in *Morrison*, that provided the basis for the F-cubed cases of class actions by foreign investors against foreign corporations based upon foreign transactions.<sup>105</sup> And it was the F-cubed cases that provoked the most controversy both from those who saw little point in expending U.S. judicial resources on litigation that did not advance

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between mere preparation and the actual wrongful act, or between those actions directly versus indirectly causing the harm. This is returning, however, to the distinctions drawn under the Second Circuit's conduct and effects test. *E.g.*, *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 121-22 (2d Cir. 1995) (applying the conduct and effects test by looking at whether the conduct in the United States was more than merely preparatory and whether it directly versus indirectly caused the harm to investors). As discussed earlier, the Second Circuit's use of such distinctions had provoked criticism as hard to apply. *See supra* note 75 and accompanying text. At the other end, one could attempt to limit the range of the relevant effects by distinguishing between those which are direct or intended versus those which are indirect or unintended, or by only considering those which are necessary elements of the prohibited conduct, such as death in the case of murder. *E.g.*, R.Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146, 159-60 (1957) (distinguishing applying a statute based upon effects within a nation that are necessary elements of the crime, such as death in the case of murder, from applying a statute based upon other effects). Distinguishing direct or intended from indirect or unintended effects still confronts the criticism of supplying difficult lines to apply. Limiting effects only to those which are necessary elements may not prevent expansive application of U.S. law under the effects test in antitrust because anticompetitive impact can be part of establishing that an agreement constitutes an illegal restraint of trade under the rule of reason. *E.g.*, *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) ("[In determining whether an agreement violates the Sherman Act,] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable."). Yet, it is with the effects test in antitrust that there has been considerable controversy. *E.g.*, Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 32-33 (1993) (discussing foreign government protests and retaliation against application of U.S. antitrust law based upon the effects test).

104. *E.g.*, *EEOC v. Arabian Am. Oil Co. (ARAMCO)*, 499 U.S. 244, 248 (1991) (explaining that the presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord" and reflects the notion that, in legislating, Congress "is primarily concerned with domestic conditions").

105. *E.g.*, Buxbaum, *supra* note 53, at 24.

any U.S. interests,<sup>106</sup> and from foreign governments who saw such cases as interfering with their securities regulation.<sup>107</sup>

## 2. *The Statutory Focus Test*

Turning from what the Court rejected to what it adopted, *Morrison* invoked a test of statutory “focus” in order to resolve when a claim involves extraterritoriality: if the event which is the focus of the statute occurs in this country, there is no extraterritoriality; if the event which is the focus of the statute occurs abroad, there is. In applying this test to the situation before it, the Court in *Morrison* decided that the focus of section 10(b)’s prohibition of fraud in connection with the purchase or sale of securities is the purchase or sale.<sup>108</sup> Hence, section 10(b) reaches fraud in connection with purchases or sales of securities in the United States, but, following the presumption against extraterritoriality, the court presumed Congress did not intend section 10(b) to reach fraud in connection with purchases or sales of securities outside the United States—as in the stock purchases by the *Morrison* plaintiffs in Australia.<sup>109</sup>

This, however, raises the question of how the Court should decide what the focus of the statute is; in other words, if statutory focus provides the test for determining extraterritoriality, what is the test for determining statutory focus? Unfortunately, the Court in *Morrison* provided no general standards, but instead simply made a determination based on the statute before it. Hence, we must examine how the Court in *Morrison* decided that the focus of section 10(b)’s prohibition of fraud in connection with the purchase or sale of securities is the purchase or sale rather than the fraud,<sup>110</sup> and from this example deduce what it means to be the focus of the statute for purposes of determining extraterritoriality.

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106. See *supra* note 70 and accompanying text.

107. See *supra* note 71; see also Buxbaum, *supra* note 53, at 61-64 (arguing in 2007 that F-cubed class actions would increasingly produce conflict with other nations).

108. See *Morrison v. Nat’l Austl. Bank Ltd*, 130 S. Ct. 2869, 2884 (2010).

109. *Id.* at 2877-78.

110. See *id.* at 2884.

*a. Morrison's Circular Method for Identifying the Statutory Focus*

Rather than applying a general test for determining a statute's focus, the opinion of the Court in *Morrison* made a hodgepodge of arguments in support of its specific conclusion that the focus of section 10(b) is the purchase or sale. These ranged from the obvious, but question-begging, point that section 10(b) only penalizes fraud in connection with the purchase or sale of a security<sup>111</sup> to the argument that the statute's prologue (not to mention title) makes it clear that Congress intended the Securities Exchange Act to regulate national (U.S.) securities exchanges;<sup>112</sup> to an invocation of section 30(a) and (b) of the Securities Exchange Act (which limit the Act's regulation of brokers and dealers outside the United States);<sup>113</sup>

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111. *See id.* at 2881-84. Although it is true that section 10(b) does not penalize fraud that is not in connection with the purchase or sale of a security, it also does not deal with the purchase or sale of a security without fraud. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j-2 (2012). This does not tell us as between the fraud and the purchase or sale, which is the dog and which is the tail (or, to use the Court's language, which is the focus).

112. *See Morrison*, 130 S. Ct. at 2884. Section 10(b), however, is expressly not limited to exchange-traded securities, as Congress made painfully clear by stating that the section covers fraud in connection with "the purchase or sale of any security registered on a national securities exchange or any security not so registered." 15 U.S.C. § 78j. The Court was grasping at straws in its rejoinder, which argued that Congress must have meant domestic transactions when referring in section 10(b) to the purchase or sale of any security not registered on a national securities exchange, because otherwise it would have been simpler for the section just to say the purchase or sale of any security. The obvious problem with this argument is that it would have been simpler for Congress to say the purchase or sale of any security in the United States if the reason Congress used this verbose language was to indicate that it only wanted to cover domestic transactions. A more likely rationale for what is obviously a long-winded way of saying the purchase or sale of any security is to make it clear that Congress meant section 10(b) to reach any security whether registered or not, which is different from many other provisions of the Securities Exchange Act. *See, e.g.*, 15 U.S.C. § 78l (registration requirement for companies listing shares on a national securities exchange); 15 U.S.C. § 78n-1 (proxy solicitation rules for companies with shares listed on a national securities exchange); 15 U.S.C. § 78p(b) (dealing with short swing trades by insiders of companies with shares listed on a national securities exchange).

113. *Morrison*, 130 S. Ct. at 2882-83. Section 30(a), 15 U.S.C. § 78dd(a), prohibits a broker or dealer from effecting transactions in securities of U.S. companies on foreign securities exchanges in violation of regulations promulgated by the SEC to prevent evasion of the Securities Exchange Act. Section 30(b) provides that the Securities Exchange Act does "not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States," unless the person does so in violation of the SEC regulations referred to in section 30(a). *Id.* § 78dd(b). At first glance, these provisions seem to support *Morrison's* result, and indeed, one may wonder why it was even necessary for the Court to invoke the

to the SEC's interpretation of the reach of the 1933 Securities Act's prohibition on selling unregistered securities (generally not to reach

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presumption against extraterritoriality instead of simply citing section 30(b) for the proposition that the Securities Exchange Act does not apply to transactions outside the United States unless the SEC has promulgated a regulation specifically calling for such application. A more careful reading of section 30(b) reveals that the section does not prevent provisions of the Securities Exchange Act from applying to transactions outside the United States; rather, it precludes provisions of the Act from applying to "any person insofar as he transacts a business in securities" outside the United States. *Id.*

In *Schoenbaum v. Firstbrook*, the Second Circuit consulted the definitions section of the Securities Exchange Act—always a good idea—and concluded that section 30(b)'s reference to a person who "transacts a business in securities" refers to brokers, dealers, and banks. 405 F.2d 200, 207-08 (2d Cir. 1968). Specifically, section 3(4) of the Securities Exchange Act defines a broker as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). Section 3(5) defines a dealer as "any person engaged in the business of buying and selling securities ... for such person's own account." *Id.* § 78c(a)(5)(A). Critically, section 3(5) excludes from the definition of a dealer "a person that buys or sells securities ... for such person's own account ... but not as a part of a regular business." *Id.* § 78c(a)(5)(B). This distinction between persons who buy and sell securities for their own account as part of a business (dealers) and persons who buy and sell securities for their own account, but not as part of a regular business, (not dealers) makes it clear that the person who "transacts a business in securities" language in section 30(b) does not encompass ordinary investors who purchase or sell a security, such as the plaintiffs in *Morrison*. *Id.* § 78dd(b). Nor, of course, is a non-trading corporation, such as National Australia Bank, which files misleading financial reports, a person who transacts a business in securities. Hence, section 30(b) does not show an intention to place all overseas purchases and sales of securities beyond the reach of the Securities Exchange Act and thus does not support the court's focus argument.

Both the definition of broker and the definition of dealer in section 3 expressly exclude banks even when banks engage in the business of making various securities transactions that would otherwise bring them within the definition of a broker or dealer. *Id.* §§ 78c(a)(4)-(5). Based upon this, *Schoenbaum* concluded that the reason section 30(b) used the person who "transacts a business in securities" language instead of just saying brokers and dealers was to include banks in the exemption from coverage under the Act when banks conduct securities operations outside the United States. *Schoenbaum*, 405 F.2d at 206-08. Interpreting section 30(b) to refer to brokers, dealers, and banks explains section 30(a). Section 30(b) creates an exemption to the Act's regulation of brokers, dealers, and banks when they conduct securities operations outside the United States. Section 30(a), in turn, authorizes the SEC to issue regulations creating exceptions to the exemption if the SEC determines that brokers or dealers are exploiting the exemption in section 30(b) to evade the Act when conducting overseas trading in securities issued by U.S. companies. Hence, the fact that section 30(a) authorizes the SEC to promulgate regulations creating liability for overseas trading by brokers and dealers does not show that Congress believed that all overseas trading was otherwise beyond the reach of the Securities Exchange Act. Indeed, had Congress believed that all overseas trading was beyond the reach of the Securities Exchange Act, it would not have felt the need to exclude the overseas activities of brokers, dealers, and banks in section 30(b). Hence, this section actually rebuts the Court's view that Congress did not intend the Act to apply to overseas sales.

sales outside the United States);<sup>114</sup> and finally to complaints in various amicus briefs filed by foreign governments and business groups about the interference with foreign securities regulation created by extending section 10(b) to transactions abroad.<sup>115</sup> As discussed in the footnotes above, these arguments ignored or misconstrued statutory language, administrative construction, or even common sense—which should be somewhat embarrassing to a Supreme Court Justice who recently coauthored a book advocating a textual approach to reading statutes.<sup>116</sup> This, however, is water under the bridge. The critical point for the future is what these arguments tell us about what the Court means when it refers to the focus of the statute for purposes of determining if a situation involves extraterritoriality.

None of these arguments really show that the sale is the focus of section 10(b) in the sense that it is somehow of greater concern to Congress than is the fraud (instead of the fraud being of greater

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114. *See Morrison*, 130 S. Ct. at 2885. The Court incorrectly asserted that the SEC limited the registration requirement only to sales in the United States—which is a misleading oversimplification of both the history and actual requirements of the SEC's interpretation of the registration requirement. *See, e.g.*, Don Berger, *Offshore Distribution of Securities: The Impact of Regulation S*, 3 *TRANSNAT'L LAW* 575, 577-82 (1990) (discussing SEC interpretations, prior to Regulation S, of the application of the Securities Act registration requirement to overseas transactions, which viewed the registration requirement as applying to some sales to Americans overseas; and detailing the requirements of Regulation S, which excludes sales of securities outside the United States from the Securities Act registration requirement depending upon elaborate tests to address possible impacts of foreign offerings on U.S. markets). Moreover, the fact that the intended application of a statute prohibiting the unregistered sale of securities might depend upon where the sale takes place does not tell us that the application of a statute prohibiting fraud in connection with the purchase or sale of securities depends upon where the purchase or sale, as opposed to the fraud, occurred.

115. *See Morrison*, 130 S. Ct. at 2885-86. This seems to contradict other portions of the Court's opinion in which it says that comity and avoiding conflicts with other nations' laws was not the issue; rather the issue was Congress's intent. *See id.* at 2877-78. The Court tried to avoid the contradiction by recasting the significance of these foreign relations concerns into an argument that Congress would have addressed such conflicts had it intended the Securities Exchange Act to reach transactions abroad—as if Congress always anticipates and addresses all the issues that arise with domestic applications of its legislation. *See id.* The Court's argument was especially problematic insofar as courts have created the private right of action for violation of section 10(b) and Rule 10(b)(5). *See id.* at 2894 (Stevens, J., concurring); *see also supra* note 61 and accompanying text. This, of course, makes it rather difficult for Congress to have anticipated how to reconcile with foreign laws the ground rules for such a later judicially created action.

116. *See generally* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

concern than is the sale). As the Court actually applied the test, the sale is the so-called focus of section 10(b) simply because it is the conduct which, according to the Court, Congress intended must occur in the United States in order to trigger the statute.<sup>117</sup> Moreover, the Court determined that this was Congress's intent using (albeit poorly) the normal tools of statutory construction, relying on the statute's language (the limitation of overseas coverage in section 30(a) and (b) argument), its purpose (the intent to regulate U.S. securities exchanges argument), and administrative interpretation (the SEC interpretation of the territorial reach of the 1933 Securities Act argument), as well as policy considerations (the clash with foreign regimes argument).<sup>118</sup> In other words, these arguments were, for the most part, simply normal statutory construction arguments trying to show that Congress did not intend to regulate overseas sales.

At first glance, one may be tempted to say that this is a sensible approach to what is, after all, an issue of statutory interpretation. The problem, however, is that if the Court can conclude that Congress did not intend to regulate overseas sales based upon statutory language, overall purpose, administrative construction, policy, or the like, what is the point of invoking the presumption against extraterritoriality? Put differently, there is not much utility in a test for determining extraterritoriality if to apply the test the Court must decide whether Congress intended the statute to reach the situation facing the Court. After all, the purpose for determining if the situation before the Court involves extraterritoriality is so that the Court can invoke the presumption against extraterritoriality as a means to decide what Congress intended. The end result is that the *Morrison* Court created a test that is entirely circular, since it requires the Court to determine whether Congress intended the statute to reach the situation in order to invoke the presumption to determine whether Congress intended the statute to reach the situation.

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117. See *Morrison*, 130 S. Ct. at 2877-78, 2884.

118. See *supra* notes 111-15 and accompanying text.

*b. The Statutory Focus Test in Other Supreme Court Opinions*

Perhaps the problem with the statutory focus test for determining extraterritoriality is not the test itself, but simply the way in which the *Morrison* Court went about identifying the statutory focus; specifically, the Court succumbed to the understandable temptation of asking whether provisions in the securities statutes showed Congress intended to penalize fraud in connection with overseas sales and forgot that the Court was trying to determine whether to trigger a presumption that would answer this question. Before concluding that the problem is simply poor execution, however, we should examine whether other Supreme Court opinions have done any better with the test.

The Court in *Morrison* claimed that the statutory focus test came from the Court's seminal *ARAMCO* decision.<sup>119</sup> It is true that *ARAMCO* refers to a statutory "focus"; but this was in responding to the plaintiff's effort to rebut the presumption against extraterritoriality when the Court said that the provisions of the Equal Employment Opportunity Act showed a domestic focus.<sup>120</sup> *ARAMCO* was not referring to the statutory "focus" as a test for determining which conduct or effects dictated whether a situation involved extraterritoriality. This is because the plaintiff in *ARAMCO* did not argue that some conduct or effect in the United States meant that his claim was not extraterritorial. The *Morrison* Court pretended otherwise when it stated that the plaintiff in *ARAMCO* was an American and was hired in the United States.<sup>121</sup> The plaintiff's nationality, however, has nothing to do with territoriality as a basis for applying a nation's law;<sup>122</sup> moreover, the plaintiff in *ARAMCO* did not claim that the location of his hiring was relevant, presumably because the hiring occurred five years before the discriminatory firing in Saudi Arabia.<sup>123</sup> Indeed, the Court in *ARAMCO* did not say what the test would be under the Equal Employment Opportunity

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119. See *Morrison*, 130 S. Ct. at 2882-83.

120. *EEOC v. Arabian Am. Oil Co. (ARAMCO)*, 499 U.S. 244, 254 (1991).

121. *Morrison*, 130 S. Ct. at 2874.

122. See *supra* note 41 and accompanying text.

123. *ARAMCO*, 499 U.S. at 247.

Act for handling situations in which potentially relevant conduct occurred both in the United States and abroad—as, for instance, if the defendant did not hire individuals in the United States who the defendant knew could not work in Saudi Arabia because of religious discrimination there, or if the defendant hired such individuals in the United States knowing they would be fired the moment they arrived in Saudi Arabia.<sup>124</sup> Nor did the Court in *ARAMCO* say what the result would be if there were discriminatory effects in the United States from discriminatory conduct overseas—as, for instance, if experience working in Saudi Arabia played a critical role in advancement prospects in corporate headquarters in the United States.

In the recent *Kiobel* decision, some of the Justices toyed with the question of determining extraterritoriality for claims under the Alien Tort Statute (ATS), even though no one suggested the situation in *Kiobel* involved any relevant conduct or effect in the United States. Chief Justice Roberts's opinion closed with the admonition that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”<sup>125</sup> If Roberts intended “sufficient force” either to clarify or to substitute for *Morrison*'s statutory focus test, it is difficult to see how this improves the situation. Moreover, it is unclear how many Justices in the fractured opinions in *Kiobel* would support determining extraterritoriality by testing whether “the claims touch and concern the territory of the United States ... with sufficient force.”<sup>126</sup> Indeed, Justices Alito and Thomas concurred separately with an effort to apply the statutory focus test to the ATS.<sup>127</sup>

Unfortunately, the Alito and Thomas concurrence simply demonstrated further the unworkable nature of the statutory focus test. Their concurring opinion equated the statutory focus of the ATS

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124. See, e.g., *Souryal v. Torres Advanced Enter. Solutions, LLC*, 847 F. Supp. 2d 835, 839-40 (E.D. Va. 2012) (noting that *ARAMCO* did not address whether the Family and Medical Leave Act of 1993 applied when the defendant's relevant decision was made in the United States but involved a workplace overseas).

125. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (citing *Morrison*, 130 S. Ct. at 2883-88).

126. *Id.*

127. *Id.* at 1669-70.

with the sort of conduct that the Supreme Court, in its earlier *Sosa v. Alvarez-Machain* opinion,<sup>128</sup> concluded Congress meant to reach in the ATS—specifically, conduct “sufficient to violate an international law norm that satisfies *Sosa*’s requirements of definiteness and acceptance among civilized nations.”<sup>129</sup> But this simply treated the statutory focus as equaling what the statute prohibits.<sup>130</sup> To return to our examples of securities fraud and shootings, section 10(b) prohibits fraud in connection with the purchase or sale of a security.<sup>131</sup> If one were to say, however, that the focus of section 10(b) is fraud in connection with the purchase or sale of a security, this would simply beg the question of whether there is extraterritoriality in a situation in which the fraudulent misrepresentation occurs inside the United States and the resulting sale occurs outside the nation, or visa versa. This is why the Court in *Morrison* had to decide that the focus of section 10(b) was the sale not the fraud.<sup>132</sup> Similarly, to say that the focus of a statute prohibiting murder is an intentional and unjustified action causing death (in other words, the definition of murder<sup>133</sup>) begs the question of whether there is extraterritoriality when a shooter stands in one nation and his victim is across the border. Applied to the ATS, the question would be what to do if (as in a typical movie plot) henchmen carried out torture abroad under orders from evil masterminds at corporate headquarters in the United States. Alito and Thomas’s definition of focus really does not answer whether this involves extraterritoriality. Presumably, Alito and Thomas did not mean to suggest that extraterritoriality exists unless all the relevant conduct and effects (or all the elements of the prohibited act) occur in the United States. This would be inconsistent with *Morrison*’s place of sale test and would create the problems discussed earlier with this “half-empty” approach to defining extraterritoriality.<sup>134</sup>

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128. 542 U.S. 692, 731-33 (2004).

129. *Kiobel*, 133 S. Ct. at 1670.

130. Or with the ATS, equating focus with the acts for which the statute provides a remedy.

131. Securities and Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j-2 (2012).

132. See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010).

133. See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 498-99 (6th ed. 2012).

134. See *supra* notes 54-56 and accompanying text.

*c. Lower Courts and the Statutory Focus Test: Herein of RICO*

After *Morrison*, lower federal courts have struggled with applying the statutory focus test to other laws: particularly the Racketeer Influenced and Corrupt Organization Act (RICO).<sup>135</sup> RICO prohibits conducting the affairs of an enterprise through a pattern of racketeering activities.<sup>136</sup> The government and private plaintiffs have attempted to apply RICO to events occurring both inside and outside the United States in situations ranging from Chinese nationals accused of illegal money transfers and immigration fraud in the United States as part of their scheme to steal money from the Bank of China,<sup>137</sup> to a primarily foreign group accused of engaging in money laundering and other acts in the United States in furtherance of a conspiracy to take over the Russian oil industry.<sup>138</sup>

Prior to *Morrison*, lower federal courts borrowed the conduct and effects test from the securities fraud cases as an approach to deal with these situations under RICO.<sup>139</sup> Recognizing that *Morrison* invalidated this approach, lower federal courts turned to asking

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135. 18 U.S.C. §§ 1961-1968 (2012). Beyond RICO, a federal district court, in *SIPC v. Bernard L. Madoff Investment Securities Inc.*, applied the statutory focus test to determine whether the Bankruptcy Code provision (section 550), which enables the bankruptcy trustee to set aside preferential pre-bankruptcy transfers, applied to transfers outside the United States. 513 B.R. 222, 225 (Bankr. S.D.N.Y. 2014). In this case, the trustee sought return of funds transferred from Bernie Madoff's infamous ponzi scheme fund in the United States to so-called foreign feeder funds and, in turn, transferred from the foreign feeder funds on their liquidation to their investors overseas. The court held that the focus of the bankruptcy code provision recapturing preferential transfers was the transfer, rather than the administration of the bankruptcy estate (or, as argued by the Trustee administering the Madoff fund under the Securities Investors Protection Act, the regulation of brokers). *Id.* at 226. While at first glance the court's result seems intuitively correct, *Morrison's* logic might have suggested a different conclusion: just as fraud does not violate Rule 10b-5 without the sale, a transfer does not become voidable without the bankruptcy. In fact, the district court's decision appears to display the same sort of circularity as *Morrison*. The court relied on pre-*Morrison* decisions, which, without applying the focus test, had held that the bankruptcy statute did not reach overseas transfers, and the court was highly concerned about avoiding conflicts with other nations' laws. *Id.* at 229-31. Although precedent and policy arguments suggesting that a statute should not apply to overseas events are sensible tools in interpreting a statute's reach, neither actually goes to whether the event occurring overseas was the statute's focus.

136. 18 U.S.C. § 1962(c).

137. *United States v. Chao Fan Xu*, 706 F.3d 965, 974, 979 (9th Cir. 2013) (holding RICO applied).

138. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 32-33 (2d Cir. 2010) (holding RICO did not apply).

139. *See, e.g., Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663 (9th Cir. 2004).

whether the events constituting the statutory focus of RICO occurred in the United States, which, in turn, forced the courts to question RICO's statutory focus.<sup>140</sup> Much as *Morrison* had to ask whether the focus of the prohibition on securities fraud is the fraud or the purchase or sale of securities, lower federal courts have had to ask whether the focus of RICO's prohibition on conducting the affairs of an enterprise through a pattern of racketeering activities is the enterprise or the pattern of racketeering activities.

Not surprisingly, lower federal courts have split between those finding RICO's focus is the enterprise,<sup>141</sup> those finding RICO's focus is the pattern of racketeering activities,<sup>142</sup> and at least one court seemingly suggesting it could be either.<sup>143</sup> Interestingly, with rare exception,<sup>144</sup> neither side has followed *Morrison's* approach to determining the statutory focus by asking which events Congress intended must occur in the United States and working backwards to treat that as the statutory focus. This is both good and bad. On the positive side, these courts have avoided the circularity of *Morrison's* approach. The downside, however, is to create an abstract exercise divorced from considerations of congressional intent or, indeed, from any particular reason for presuming the statute should not apply to the event in question when it occurs outside the nation.

Lower federal courts have invoked a number of rationales when holding that the statutory focus of RICO is on the enterprise. The first is that RICO does not prohibit racketeering activities, or even a pattern of racketeering activities; rather, it prohibits conducting

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140. *E.g.*, *In re Le-Nature's, Inc.*, No. 9-1445, 2011 WL 2112533, at \*2 n.5 (W.D. Pa. May 26, 2011).

141. *E.g.*, *Mitsui O.S.K. Lines, Ltd. v. Seamount Logistics, Inc.*, 871 F. Supp. 2d 933, 938-40 (N.D. Cal. 2012); *Sorota v. Sosa*, 842 F. Supp. 2d 1345, 1350 (S.D. Fla. 2012); *European Cmty. v. RJR Nabisco, Inc.*, 2011 WL 843957, at \*5 (E.D.N.Y. Mar. 8, 2011); *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 914 (C.D. Cal. 2011); *Cedeno v. Intech Group, Inc.*, 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010).

142. *E.g.*, *Chao Fan Xu*, 706 F.3d at 977-78; *Hourani v. Mirtchev*, 943 F. Supp. 2d 159, 166 (D.D.C. 2013); *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 245 (S.D.N.Y. 2012); *CGC Holding Co. v. Hutchens*, 824 F. Supp. 2d 1193, 1209 (D. Colo. 2011).

143. *In re Le-Nature's, Inc.*, 2011 WL 2112533, at \*3 n.7.

144. *See Donziger*, 871 F. Supp. 2d at 242 (noting, using the example of Sicilian Mafia activities in the United States, that foreign enterprises have been at the heart of precisely the sort of activities committed in the United States that Congress enacted RICO to eradicate, in rejecting the enterprise as the focus of RICO).

the affairs of an enterprise through a pattern of racketeering activities.<sup>145</sup> This parallels *Morrison's* argument that section 10(b) does not prohibit fraud; it prohibits fraud in connection with the purchase or sale of a security.<sup>146</sup> As such, this rationale suffers the same logical fallacy: although RICO does not prohibit a pattern of racketeering activities when this pattern does not involve the conduct of an enterprise, it also does not prohibit conducting the affairs of an enterprise unless done through a pattern of racketeering activities. Hence, this does not really tell us which is the focus. The same problem exists in the argument that RICO's name (which includes the term "organization") and Congress's concerns with illegal activities by enterprises show that the enterprise is the focus of RICO. The first word in RICO's title is "racketeer," not enterprise, and Congress was concerned, in enacting RICO, with racketeering (not bad management) by enterprises. Nor is this problem avoided by those opinions<sup>147</sup> that note that other statutes already prohibit the activities (such as securities fraud) defined as racketeering activities under RICO, and from this argue that the enterprise must be RICO's statutory focus. Conducting the affairs of the enterprise is not the only added element distinguishing RICO violations from the individual acts of racketeering in violation of other statutes; there must also be a pattern of racketeering activities, which is not a required element under the statutes prohibiting the individual acts defined as racketeering activities under RICO.<sup>148</sup>

On the other side, the lower federal courts holding that the pattern of racketeering activities is the statutory focus of RICO have not done much better. They have based their holdings on *ipsi*

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145. *E.g.*, *Sorota*, 842 F. Supp. 2d at 1350; *RJR Nabisco, Inc.*, 2011 WL 843957, at \*4.

146. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010).

147. *See Sorota*, 842 F. Supp. 2d at 1350; *RJR Nabisco*, 2011 WL 843957, at \*4.

148. This problem is not unique to RICO, but would confound efforts to equate the statutory focus with the additional element distinguishing the statute at issue from lesser crimes also committed. For example, since death distinguishes murder from criminal battery, see Dressler, *supra* note 133, at 498, one may argue that death is the focus of a statute prohibiting murder, and only the nation in which the victim actually dies can prosecute for murder without extraterritoriality. Yet, malice aforethought distinguishes murder from manslaughter, *id.*, suggesting that specific intent is the focus of the statute against murder, and that only the nation in which the defendant formed the intent can prosecute without acting extraterritorially.

*dixit*,<sup>149</sup> invoked RICO's language and purpose to show the statute's concern with racketeering activities (while ignoring the enterprise language, just like the enterprise focus cases invoked language and purpose about enterprises while ignoring the racketeering language),<sup>150</sup> or have pointed to potentially poor results and administrative inconvenience presented by the difficulties of locating the enterprise<sup>151</sup> (which has nothing to do with the statute's focus). Hence, perhaps the ultimate lesson from the experience of lower federal courts in trying to figure out the focus of RICO is found in the lament by one district court:

Reflexive reference to the term "focus" is unhelpful, as a statute could be described as concentrated on the activities it criminalizes—here, racketeering activities—or on the entity or person it seeks to protect, or on a blend of both, and all three options may be accurate depending on context.<sup>152</sup>

### III. DETERMINING EXTRATERRITORIALITY BY THE REASONS BEHIND THE PRESUMPTION

A better approach for determining whether a claim involves extraterritoriality might start by asking what justifies the presumption against extraterritoriality. Then, one can determine whether the presumption applies based upon whether the situation triggers the rationale(s) behind the presumption. Although scholars have suggested at least a half dozen reasons for the presumption,<sup>153</sup>

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149. *CGC Holding Co. v. Hutchens*, 824 F. Supp. 2d at 1193, 1209 (D. Colo. 2011).

150. *E.g.*, *United States v. Chao Fan Xu*, 706 F.3d 965, 978 (9th Cir. 2013).

151. *Id.* at 976. On the other hand, locating the pattern of racketeering activities raises its own difficulties. For example, if some of the racketeering activities involve events both inside and outside the United States, a court might need to identify the "focus" of various statutes prohibiting the predicate acts defined by RICO to constitute racketeering activities in order to determine which events are the relevant ones as far as deciding if the pattern of racketeering activities occurred in the United States. *See European Cmty. v. RJR Nabisco, Inc.*, 2014 WL 1613878, at \*4 (2d Cir. Apr. 23, 2014) (holding that RICO can apply extraterritorially if the specific statute prohibiting the relevant predicate act involved in the case applies extraterritorially).

152. *In re Le-Nature's, Inc.*, 2011 WL 2112533, at \*2 n.3 (W.D. Pa. May 26, 2011).

153. *E.g.*, *Dodge*, *supra* note 27, at 112-13 (identifying six ostensible purposes asserted on behalf of the presumption against extraterritoriality: (1) avoiding violation of international law; (2) promoting consistency with a territorial view in choice of law; (3) avoiding conflicts with foreign laws; (4) reflecting Congressional concern with domestic rather than foreign

examining Supreme Court opinions reduces this number to essentially three: (1) the observational rationale that the Court has observed that Congress, whether based upon tradition or for whatever reason, intends most statutes to apply within only the United States, and so, in the absence of evidence of contrary intent one can assume that Congress intends any given statute to apply only within the United States; (2) the legislative purpose rationale that Congress does not care about what goes on outside the United States and therefore does not intend statutes to address what goes on outside the United States; and (3) the international relations rationale that applying U.S. law to events outside the United States can upset other countries, which is a risk courts should interpret statutes to avoid absent evidence that Congress really wants to take this risk. Although all three of these rationales can justify invoking the presumption against extraterritoriality in the easy cases in which no conduct or effect occurs within the United States, it turns out that only the third rationale can provide any sort of useful guideline for determining whether to invoke the presumption in the situation in which some conduct or effect occurs inside and some outside the United States.

#### *A. The Observational Rationale*

In *Morrison*, the Court explained that the presumption against extraterritoriality “rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters.”<sup>154</sup> One interpretation of this phrase is what I will label the observational rationale for the presumption—the Court has observed that Congress does not intend most statutes to apply extraterritorially and so, in the absence of evidence to the contrary, one would assume that any given statute does not apply extraterritorially. Of course, this raises a question as to how the Court knew that Congress does not intend most statutes to apply extraterritorially. If, in fact, statutes are generally silent on their territorial reach, then the Court might have engaged in a circular exercise in which it used the

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conditions; (5) keeping courts out of matters impacting foreign affairs; and (6) providing a rule against which Congress can legislate).

154. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010).

presumption in order to make the observation that justifies the presumption.<sup>155</sup> If statutes sometimes speak to their territorial reach,<sup>156</sup> then this creates an interesting question as to what this should tell us about the meaning of statutes which are silent on the topic.<sup>157</sup>

In any event, the problem with this observational rationale is that it does not tell us how much territorial connection avoids the presumption. Specifically, the observational rationale tells us that Congress ordinarily does not intend to apply the various non-territorial principles<sup>158</sup> in establishing the reach of its legislation. Accordingly, a court would logically demand evidence in the language or purpose of the statute before concluding that the statute applies in a situation in which there is no territorial connection at all to the United States. Once we pass this minimal threshold, however, the observational rationale cannot tell us whether a given situation should trigger the presumption against extraterritoriality without some extensive observations about what Congress normally demands in terms of a territorial connection in order for its legislation to apply. Given the common silence of statutes,<sup>159</sup> the uncertain implications of those statutes that speak to the topic regarding the meaning of those that do not,<sup>160</sup> and the

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155. If territoriality is part of the legal tradition in a country, there is still a certain degree of circularity because legal tradition reinforces itself; but at least the Court would not be using a judicially created presumption to establish the basis for the very presumption. One might argue that this circularity, in fact, is the whole point of the exercise in that a presumption known to Congress provides background allowing Congress to legislate differently if Congress does not wish the presumption to apply. *E.g.*, WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 277 (1994) (explaining this function of rules of interpretation, but concluding that the presumption against extraterritoriality does not meet the criteria for a suitable background rule).

156. *E.g.*, Meyer, *supra* note 29, at 127-28 nn.67-68 (listing statutes that expressly limit their territorial reach only to the United States and other statutes that expressly provide for extraterritorial application).

157. If statutes sometimes state that they only apply domestically, is this evidence that Congress normally intends statutes to apply only domestically, or does one take the negative implication and assume Congress meant silent statutes to apply extraterritorially? Does the answer to such a question change if statutes sometimes state that they apply extraterritorially? Since statutes do both, what does this say?

158. *See supra* notes 40-43 and accompanying text.

159. *E.g.*, Meyer, *supra* note 29, at 128 (noting that most federal statutes say nothing about their territorial reach).

160. For example, the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2012), amended the Sherman Act to provide that the Sherman Act would not apply to non-import

often *sui generis* territorial connections that might exist in different types of statutes,<sup>161</sup> it seems implausible that courts could credibly claim sufficient observational experience in order to figure out what is the norm. Hence, the observational rationale only gets us to the “half-full” viewpoint of extraterritoriality—extraterritoriality exists if there is absolutely no territorial contact—but not to any middle ground.

### *B. The Legislative Purpose Rationale*

In *ARAMCO*—which marked the increased affinity of the Supreme Court for the presumption against extraterritoriality<sup>162</sup>—the Court identified two other purposes behind the presumption. First, it “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”<sup>163</sup> I will label this the international relations rationale. Second, it reflects the notion that, in legislating, Congress “is primarily concerned with domestic conditions.”<sup>164</sup> I will label this the legislative purpose (or “not our problem”) rationale. These rationales, while very different, are not mutually exclusive. The legislative purpose rationale asserts a lack of reason for applying U.S. law abroad,<sup>165</sup> whereas the international relations rationale asserts reasons for not applying U.S. law abroad. Hence, in a situation in which there may be some marginal legislative purpose served by applying U.S. law abroad, concern over international

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trade unless there is a “direct, substantial and reasonably foreseeable effect” in the United States. Does this mean that Congress ordinarily thinks that a direct, substantial and reasonably foreseeable effect is sufficient (or necessary) to establish territoriality (at least if focusing on effects rather than conduct as the basis for territoriality)?

161. For example, the Supreme Court’s location of the purchase or sale of the securities test may make sense for the reach of a prohibition on fraud in connection with the purchase or sale of securities, but if section 10(b) read this way, it could tell us little regarding what Congress intended for the reach of the Sherman Act’s prohibition on combinations in restraint of trade or monopolization. Conversely, the test for application of the Sherman Act in the Foreign Trade Antitrust Improvements Act, which looks to effects on import or export trade, would make no sense applied to fraud in connection with the purchase or sale of a security.

162. See *supra* notes 26-28 and accompanying text.

163. *EEOC v. Arabian Am. Oil Co. (ARAMCO)*, 499 U.S. 244, 248 (1991).

164. *Id.*

165. Implicit within the lack of a reason is the notion that it is therefore not worth the judicial and enforcement resources it would take to do so.

relations might tip the balance against doing so; whereas in a situation in which there may be some marginal impact on international relations, the lack of a strong impact on advancing the legislative purpose could tip the balance. On the other hand, the analysis of what is or is not an extraterritorial application of law sufficient to invoke the presumption against extraterritoriality may be quite different under these two rationales.

William Dodge has attempted to turn lemons into lemonade by claiming that *Morrison*'s focus test is an effort to apply the legislative purpose rationale.<sup>166</sup> He argues that statutory “focus” means basing the presumption against extraterritoriality upon where the effect occurred that motivated the legislation; specifically, situations in which the motivating effect occurs inside the United States do not trigger the presumption against extraterritoriality, whereas situations in which the motivating effect occurs outside the United States trigger the presumption.<sup>167</sup> This builds on Professor Dodge's earlier work in which he argues that basing the presumption against extraterritoriality upon where the relevant effects occur is not only sensible—because Congress enacts laws to prevent undesired effects and generally cares only about such effects in the United States—but also reconciles various Supreme Court opinions dealing with potentially extraterritorial applications of law.<sup>168</sup>

The Court's opinion in *Morrison* provides support for Professor Dodge's thesis. Following the statement that the presumption is based upon the perception that Congress ordinarily legislates about domestic matters—from which one might draw the observational rationale for the presumption—the *Morrison* opinion quotes *ARAMCO*'s statement that Congress is “primarily concerned with domestic conditions” and explains that the presumption exists regardless of conflict with foreign laws.<sup>169</sup> This may suggest the Court believed that the territoriality observed in congressional statutes stems from a limited legislative purpose rather than an international relations concern, or simply an unthinking application of legal tradition. Moreover, as discussed above, if one conceptualizes

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166. Dodge, *supra* note 99, at 687.

167. *Id.* at 690.

168. Dodge, *supra* note 27, at 90.

169. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877-78 (2010) (quoting *ARAMCO*, 499 U.S. at 248 (1991)).

*Morrison's* location of the purchase or sale test in terms of conduct and effects, the test looks to the location of one effect (the purchase or sale at a price impacted by fraud) rather than the location of the defendant's wrongful conduct (the fraudulent misrepresentation).<sup>170</sup>

In the end, however, Professor Dodge's "effects" interpretation of *Morrison* faces the same problem as *Morrison's* focus test without this interpretation. To see why, return again to the classic cross-border shooting example. The general view of this example is that the conduct occurs where the shooter pulls the trigger and the effect occurs where the bullet fatally impacts the victim.<sup>171</sup> Following the logic of Professor Dodge's location of the effects argument, Congress is presumably concerned about the fatality. Hence, applying U.S. law to the situation in which the victim is standing on the U.S. side of the border would not trigger the presumption against extraterritoriality, whereas applying U.S. law when the shooter stands in the United States and the victim is across the border would trigger the presumption.<sup>172</sup> Incidentally, the same analysis should apply to a shooting across state borders in the United States. Under Professor Dodge's analysis, the legislature of the state in which the victim was standing would wish to prosecute, whereas the legislature of the state in which the shooter stood would be unconcerned.

Although this analysis might reflect a certain cold calculation, it is unlikely to reflect the intent of a legislature confronted with a cross-border shooting in which the shooter stood within its territory. We can say this with some confidence because the law in every state makes shooting at someone with intent to kill a crime—attempted murder—even if the shooter missed,<sup>173</sup> meaning that all the elements of at least some crime took place within the nation in which the shooter stood. This, in turn, forces us to ask why legislatures, in

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170. See *supra* notes 97-99 and accompanying text.

171. See *supra* note 45 and accompanying text.

172. To say that applying U.S. law is extraterritorial when the shooter is here and the victim on the other side of the border, but applying U.S. law is not extraterritorial when the victim is here and the shooter is on the other side of the border, is obviously such a counterintuitive use of the term extraterritorial that Professor Dodge prefers to talk about what triggers the presumption against extraterritoriality, rather than what is or is not an extraterritorial application of a statute. Dodge, *supra* note 27, at 88 n.25. In correspondence with the author, Professor Dodge retreated a bit from looking solely to the location of the effect and agreed that a legislature would wish to prohibit shooting at people on the other side of the border.

173. See, e.g., DRESSLER, *supra* note 133, at 374.

the case of crimes complete upon the attempt at harmful consequences (attempt crimes), punish conduct seemingly without any effect (in any territory) and what this tells us about legislative purposes and cross-border misconduct.

The rationales for punishing attempt crimes include: (1) deterring the underlying crime, (2) allowing police to intervene before successful completion of the underlying crime, and (3) removing the danger of a future crime by incarcerating someone who has shown him or herself willing to act on criminal intent.<sup>174</sup> Under Professor Dodge's analysis, presumably the legislature of the territory in which the shooter stood would be no more interested in punishing the attempt in order to deter the murder than it would be in punishing the murder when the target is across the border. One might say the same thing about allowing police to intervene before successful completion of the underlying crime when the target is across the border, except for one critical point: presumably, the nation in which the shooter stood would not wish police from across the border to enter its territory in order to prevent the shooting, but would want police from across the border to prevent a shooting at someone on its side. Hence, the nation in which the shooter stood would have an interest in allowing its police to act against the attempt because of the impact on relations with its neighbor. We shall return to this point later in discussing why the presumption against extraterritoriality should have two sides. Finally, the rationale of incarcerating a dangerous individual (which, by the way, would apply with the successful murder as well as the unsuccessful one) would seem apropos to the nation's legislature where the shooter stands—unless there is a reason to believe the shooter will never turn his sights to targets within the territory. This last rationale shows that there is an effect (more precisely a risk of a future effect) calling for punishing the conduct in the nation in which the shooter stood. All told, this discussion shows that deciding whether to trigger the presumption against extraterritoriality by the location of the effects which motivated the legislation is not simple in the simple cross-border shooting case.

Matters become even more complicated when one turns from shootings to economic crime, such as securities fraud. Securities

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174. *Id.* at 381-82.

fraud may impact investors, companies (both those who commit the fraud<sup>175</sup> and those who do not<sup>176</sup>), securities markets,<sup>177</sup> and the broader economy.<sup>178</sup> Under these circumstances, it is hardly straightforward to specify which effects in the United States from securities fraud reaching beyond the country would be of a nature and magnitude to concern Congress.<sup>179</sup>

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175. Some scholars argue that securities fraud hurts the companies whose managers engage in such fraud by preventing the existing shareholders and the broader market from receiving accurate information about the companies' performance so that the existing shareholders or hostile acquirers may replace poor managers. This increases the agency costs (losses due to dishonest or incompetent management) incurred by public corporations. *E.g.*, Merritt B. Fox, *Fraud-on-the-Market Class Actions Against Foreign Issuers* 19-24 (Columbia Law Sch. Ctr. for Law & Econ. Studies, Paper No. 400, 2011), available at <http://perma.cc/ZVT-35W8>.

176. Economists commonly assert that securities fraud hurts honest companies by forcing them to compete in a "lemons market" in which investors discount the shares of all companies because of the risk of fraud perpetrated by some companies. This raises the cost of capital for honest companies. *E.g.*, Samuel W. Buell, *What is Securities Fraud?*, 61 DUKE L.J. 511, 570-71 (2011).

177. The willingness of investors to trade in a market may depend upon whether investors fear that fraudulent misrepresentations are impacting the prices the investors pay and receive. *See, e.g.*, Securities and Exchange Commission, *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, <http://www.sec.gov/about/whatwedo.shtml> [<http://perma.cc/KU8Q-MTDH>] ("When the stock market crashed in October 1929, public confidence in the markets plummeted.").

178. Conventional wisdom when Congress enacted the securities laws (as reflected in congressional hearings) believed that the 1929 stock market crash, triggering the Great Depression, represented the collapse of a market bubble created in large part by fraud. *E.g.*, H.R. Rep. No. 73-85, at 2 (1933).

179. If the purpose of section 10(b) is to protect investors, then one might argue that Congress would want to protect U.S. investors even if they trade overseas and not protect foreign investors even if they trade in the United States. If the purpose is to limit agency costs incurred by firms whose managers preserve their positions and compensation through fraud, then presumably the key factor is whether managers of U.S. firms or foreign firms are committing the fraud. On the other hand, if the purpose is to protect honest firms facing a "lemons market" problem, then the nationality of the honest firms, rather than of the firms committing fraud, seemingly becomes the relevant factor. Before assuming this argues in favor of applying section 10(b) to fraud anywhere in the world, one must ask whether investors will discount shares in U.S. firms because of fraud in foreign firms, or whether instead, investors will differentiate firms depending upon the applicable securities laws. If the purpose is to prevent economic dislocations caused by stock market bubbles and busts, then one must ask how insulated is the U.S. economy from bubbles and busts on non-U.S. securities exchanges in an increasingly global economy. Hence, the only effect that seems to provide a straightforward correlation between territory and purpose is if the rationale is to promote trading in U.S. stock markets by providing those trading on such markets with protection against fraud.

All of this is not to say that courts should ignore the effects that motivated the legislation in deciding if Congress intended the legislation to apply to a cross-border situation. On the contrary, this line of inquiry is entirely sensible. Indeed, it is simply a common-sense and commonplace application of the principle of statutory construction that asks whether applying a statute in a given situation would or would not advance the purposes for which the legislature acted.<sup>180</sup> The problem, as with *Morrison's* determination of statutory focus, is how to figure out what the presumption against extraterritoriality does in all this. In other words, if the court must first figure out whether it would advance the statute's purposes to apply the statute to the case at hand, the court has already resolved the issue of whether the statute should apply before the court has ever invoked the presumption.<sup>181</sup>

Perhaps one might argue that the presumption regarding extraterritoriality is useful in separating the effects that count (those in the United States) from those that do not (those outside the United States) in searching for congressional purpose behind a statute. Admittedly, Congress generally acts because of some impact on its constituents in the United States. Still, this often may not tell us anything useful. To understand why, consider a statute that would impose sanctions on those committing genocide abroad—which seems clearly extraterritorial. One suspects that the motive, however, would be to avoid the pangs of guilt those in the United States feel if we stand by idly. Hence, one can find domestic effects in virtually all congressional legislation. It is therefore necessary to figure out the purpose of the legislation and whether applying the legislation to a situation in which some conduct or effect occurs abroad, while some conduct or effect occurs domestically, will

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180. See Legal Information Institute, *Statutory Construction*, [http://www.law.cornell.edu/wex/statutory\\_construction](http://www.law.cornell.edu/wex/statutory_construction) [<http://perma.cc/PR82-UVUD>].

181. Of course, under normal statutory interpretation, the court must also consider the statute's language and not just the legislative purpose in deciding if the statute applies in a given situation. Yet, the court still must examine the statutory language even if the court applies the presumption against extraterritoriality, because the court must then check whether the statute's language rebuts the presumption. Although one might argue that applying the presumption against extraterritoriality casts the statutory language into a subordinate role, it is unlikely in any context that courts will find a statute applies, absent compelling statutory language, when applying the statute does not advance the legislative purpose.

advance this purpose. As the examples of both cross-border shootings and cross-border securities fraud show, the presumption against extraterritoriality can add little to this analysis.

As of this point, the presumption against extraterritoriality seems only to establish that Congress probably did not intend its legislation to apply in the absence of any conduct or effect in the United States. This is not to say that the presence of any territorial connection means the statute applies. The statute's language or the fact that applying the statute will not advance the purpose behind the legislation may convince a court that Congress did not intend the statute to apply to a cross-border situation—just as the statute's language or purpose may convince a court that the statute does not apply to all sorts of situations. The concept of territoriality raises the issue of whether Congress intended the legislation to apply in the cross-border situation; but the presumption against extraterritoriality is useless—unless one takes the half-empty viewpoint that any conduct or effect outside the country triggers the presumption—because it does not tell a court to presume that Congress viewed the situation at hand to involve extraterritoriality.<sup>182</sup>

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182. One might argue that the presumption against extraterritoriality has utility, even under a test that determines extraterritoriality by asking whether Congress would want the statute to apply to the situation facing the court, because it provides a hook for the court to ask about the impact of conduct or effect outside the United States on whether the statute should apply. Such a hook is not needed for most issues of statutory interpretation (for example, whether the prohibition on fraud in connection with the sale of a security applies to contributions to a union pension plan, see *Int'l. Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979)) because the statute's language triggers the inquiry—whether a union pension plan is a “security.” By contrast, such a hook is needed for an inquiry prompted by conduct or effect outside the United States in order to trigger an inquiry into whether the statute applies despite the lack of any language in the statute saying it should not, and, at the same time, to distinguish this issue from other issues (for example, whether a prohibited action occurs on a Wednesday rather than on a Tuesday), which we can quickly say Congress does not care about. In this sense, the presumption is simply that Congress cares about the territorial reach of its statutes, even though it did not say so, and even though one cannot presume what this specifically means as far as Congress's intended reach for the particular statute.

The problem with using the presumption against extraterritoriality in this manner is that it conflicts with the normal understanding of presumptions regarding legislative intent generally and the impact of the presumption against extraterritoriality particularly, and as such can confuse a court. For example, in *Morrison*, 130 S. Ct. 2869 (2010), the Supreme Court criticized the Second Circuit for ignoring the presumption against extraterritoriality, which makes no sense if the presumption against extraterritoriality, simply means the court should ask whether Congress meant the statute to address the claim given its connection to nations beyond our own. After all, in its conduct and effects test, the Second Circuit did not ignore the question. Moreover, under this interpretation of the so-called presumption against

### *C. The International Relations Rationale*

#### *1. Why This Works*

Before concluding that we cannot find a reasonable test for triggering the presumption against extraterritoriality when some conduct or effect occurs both inside and outside the nation, we must examine whether the international relations rationale might provide a useful guidepost. In fact, the Second Circuit attempted this in the conduct and effects test that the Supreme Court rejected in *Morrison*. In developing the conduct and effects test, the Second Circuit stated that it presumed Congress would not wish to apply the Securities Exchange Act in a manner that would offend what the Second Circuit referred to as foreign relations law<sup>183</sup>—by which the court meant the principles laid out in the *Restatement* of this title.<sup>184</sup>

A presumption based upon the international relations rationale avoids the circularity problem found with *Morrison*'s focus test or its cousin that asks whether applying the statute to the situation would advance the legislative purpose. Looking at the impact on international relations from applying the statute does not force the Court to determine Congress's intent regarding the particular statute as a predicate for invoking a presumption to determine Congress's intent. In the language of statistics, one must introduce an independent variable to break the circularity. A negative impact

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extraterritoriality, the only relevant rebuttal is evidence that Congress did not care about territorial connections at all (for example, it intended to follow universal jurisdiction). Accordingly, courts must resist the strong temptation to judge arguments about what sort of territorial connection Congress intended against any sort of presumption that the statute should not apply. Again, it appears *Morrison* succumbed to the temptation and seemed to be employing a presumption against application in weighing arguments about whether there was extraterritoriality and the merits of the conduct and effects test. To avoid this problem, it is better terminology to refer to the concept of territoriality or the territorial reach of statutes, rather than refer to a presumption against extraterritoriality, to embody the idea that application of statutes in a situation in which some events occur overseas is an issue that might matter.

183. *E.g.*, *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972) (“[A]bsent the clearest language, Congress will not be assumed to have meant to go beyond the limits recognized by foreign relations law.”).

184. *Eur. and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 129 (2d Cir. 1998) (applying the THIRD RESTATEMENT OF FOREIGN RELATIONS LAW reasonableness criteria); *Leasco*, 468 F.2d at 1334 (looking to sufficient conduct in the United States under the examples set out in the SECOND RESTATEMENT OF FOREIGN RELATIONS LAW).

on international relations serves as such a variable. It allows the court to divide situations into two camps before the Court evaluates Congress's intent regarding the specific statute: (1) situations in which the proposed application will trigger problems with international relations, in which the court demands greater evidence that Congress intended the statute to apply; and (2) situations in which the proposed application does not trigger problems with international relations. In the latter scenario, the Court simply asks whether, based upon the language or purpose of the statute, Congress intended the statute to apply despite some aspects occurring outside the United States, just as the Court would in any other case involving statutory interpretation and without prejudging the answer one way or the other.

This, in turn, raises the question as to why international relations problems should trigger a presumption against applying the statute. The answer lies in the consequences of an erroneous interpretation of the statute. Every case of statutory interpretation involves a risk that the court will get it wrong—in the sense that the court's interpretation differs from what the legislature would have said had the legislature recognized the ambiguity and voted on its resolution. As the congressional reactions to both *Morrison*<sup>185</sup> and *ARAMCO*<sup>186</sup> show, Congress can and does rectify such errors.<sup>187</sup> Hence, putting aside problems of political paralysis or general inertia,<sup>188</sup> the impact of the judicial error can be limited to the parties before the court, as well as similarly situated parties who have already acted. This, of

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185. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 929(Y)(a)(2), 124 Stat. 1376 (granting jurisdiction to U.S. courts over government prosecutions of securities frauds in which conduct constituting a significant step in the furtherance of the fraud occurs in the United States or conduct outside the United States has a foreseeable substantial effect in the United States). The reference to “jurisdiction,” rather than to whether the acts violate section 10(b), seems to be a mistake resulting from the quick drafting necessary to respond to *Morrison* if the provision was to make it into the Dodd-Frank Act. See, e.g., Marc I. Steinberg & Kelly Flanagan, *Transnational Dealings—Morrison Continues to Make Waves*, 46 INT'L LAW. 829, 842 (2012).

186. 42 U.S.C. §§ 2000e(f), 2000e-1(b) to (c) (2012) (covering employment of U.S. citizens in foreign countries).

187. Congress legislatively overturned perhaps the first Supreme Court opinion in the area, which had limited the coverage of the anti-pirate law of 1790. E.g., Knox, *supra* note 21, at 363.

188. E.g., ESKRIDGE, *supra* note 155, at 279 (explaining that the burden of inertia means that presumptions have allocational consequences).

course, is unfortunate, but is only one of many sources of potential error in litigation. Thus, there is really little reason to put a thumb on the scale to avoid either applying a statute when this goes beyond what Congress had in mind or not applying a statute to a situation that Congress did have in mind. Instead, the court must simply do the best it can to determine Congress's intent. Once we introduce international relations concerns, however, this analysis changes. In this case, applying the statute carries the risk of causing diplomatic discord.<sup>189</sup> If Congress feels that achieving its objectives are worth such discord, this is Congress's prerogative. On the other hand, the Court may wish to make sure that this, in fact, is what Congress really intended before causing discord that Congress may not fully dissipate by later amending the law. Hence, a presumption that demands some greater level of confidence that Congress intended a statute to apply in such a way as to negatively impact international relations makes sense.<sup>190</sup>

## 2. Refining the Test

We still face the question of what constitutes an international relations concern sufficient to trigger the presumption against extraterritoriality. The answer to this question is challenging because there are different degrees of international relations concerns—just as there are different degrees of territorial connection. At one extreme is the attempt to apply U.S. law when such application would violate international law. Equating the presumption against extraterritoriality with this level of international relations concern would reduce the presumption against extraterritoriality to

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189. *E.g.*, Born, *supra* note 103, (describing controversy and retaliation caused by application of U.S. antitrust laws to foreign conduct under the effects test); Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 292-305 (2006) (outlining sources of conflict in application of U.S. laws to conduct outside the United States); Meyer, *supra* note 29, at 116-17 (describing possible responses of foreign governments to extraterritorial application of U.S. laws).

190. There are other statutory presumptions one can view as reflecting a similar philosophy of dealing with the consequences of erroneous interpretations of legislative intent by requiring greater certainty before interpreting the statute in a manner that imposes serious negative consequences. *See, e.g.*, DRESSLER, *supra* note 133, at 47-48 (discussing the rule of lenity under which courts strictly construe criminal statutes).

a subset of the presumption that Congress does not intend its statutes to violate international law (the *Charming Betsy* doctrine).<sup>191</sup>

At the other extreme, one could find an international relations concern whenever any nation objects to the application of U.S. law.<sup>192</sup> In fact, the *Morrison* opinion's citation of amicus briefs from foreign governments suggested a bit of this approach. The advantage of this approach is that it seems fairly objective insofar as the trigger to extraterritoriality is evidence of actual diplomatic discord. On the other hand, one may worry that this approach gives undue control to foreign governments to influence the reach of U.S. law by objections that might reflect simply political expediency at a particular instant rather than a longstanding principled position. Accordingly, once again a court might seek a reasonable middle ground.

The Second Circuit found such a middle ground by looking to the *Restatement of Foreign Relations Law*.<sup>193</sup> The *Restatement* lists the five bases discussed earlier<sup>194</sup> under which nations may apply their laws (so-called prescriptive jurisdiction): territoriality, nationality (of the defendant), passive personality (nationality of the victim), protective (of some particular governmental interest) and universal.<sup>195</sup> *The Third Restatement of Foreign Relations Law*, however, qualifies the ability of a nation to apply its law based upon the

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191. *Murray v. Schooner Charming Betsy*, 2 U.S. (1 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”). There is nothing necessarily wrong with this result insofar as it would return the presumption against extraterritoriality to its roots. *E.g.*, DAVID L. SLOSS ET AL., *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 37-39 (2011).

192. Such objections might come directly or through expressions of concern from the executive branch. In this regard, it is worth noting that paying attention to expressions of concern from the executive branch in deciding whether hostile foreign reaction will arise from applying a statute is not the same as simply letting the executive branch decide whether or not the statute should apply in the situation at hand. Rather, the court would be drawing on the executive branch's expertise in asking the factual question of whether a proposed application of U.S. law would trigger hostile foreign reactions such that the court should be more certain that this is what Congress really had in mind.

193. *See supra* notes 183-84 and accompanying text.

194. *See supra* notes 39-43 and accompanying text.

195. 3D RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 39, §§ 402, 404. Reflecting some traditional opposition in U.S. jurisprudence to passive personality (protection of nationals hurt outside the nation) as a basis for prescriptive jurisdiction, the *Restatement* only lists this basis for prescriptive jurisdiction in the comments, rather than the black letter. *Id.* § 402 cmt. g.

presence of some conduct or effect in the nation's territory. First, the conduct must occur at least "in substantial part" in the nation, or else must have (or be intended to have) at least a "substantial effect" in the nation,<sup>196</sup> thereby excluding application of the nation's law based only on some slight conduct or effect occurring in the nation. Finding this approach not to be sufficiently sensitive on its own, the *Third Restatement* goes on in section 403 to state that a nation should not apply its law despite any of the five bases for doing so when the application would be unreasonable in the particular situation.<sup>197</sup> In deciding whether applying the nation's law would be unreasonable, section 403 lists a number of factors, such as the degree to which the act occurs in or affects the nation, the nation's connections to the person responsible for the regulated acts, the importance and generally recognized desirability of the regulation, justified expectations, the interests of other nations, and conflict with the laws of other nations.<sup>198</sup>

In evaluating these or other possible tests for when the impact on international relations is sufficient to invoke the presumption against extraterritoriality, a good place to start is by asking whether we could just have stopped with international law. Not only does compliance with international law invoke its own presumption, but also foreign government protests often argue that there is a violation of international law and the drafters of the *Restatement of Foreign Relations Law* suggested that their sections on prescriptive jurisdiction stated international law<sup>199</sup>—thereby suggesting that international law might subsume the other possible benchmarks. On the other hand, daily experience shows that nations regularly decry the actions of other nations in situations that do not arise to the level of violations of international law. Moreover, it is highly doubtful that section 403 of the *Third Restatement* in fact restates the customary international law regarding when it is permissible for a nation to apply its law.<sup>200</sup>

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196. *Id.* § 402(1)(a), (c).

197. *Id.* § 403(1).

198. *Id.* § 403(2)(a)-(d), (g)-(h).

199. *See id.* § 403 cmt. a & reporters' note 10.

200. *E.g.*, Cecil J. Olmstead, *Jurisdiction*, 14 *YALE J. INT'L L.* 468, 472 (1989) ("[I]t seems implausible that section 403 rises to the level of ... 'a principle of international law.'").

Still, there are those who argue that international law provides all the guidance necessary in deciding when to trigger a presumption against applying a statute to events outside the nation. For example, John Knox has constructed a sliding scale presumption based upon the assumption that international law not only prohibits some efforts by nations to apply their laws beyond their borders, but also assigns primary jurisdiction to some nations and permissible concurrent jurisdiction to other nations when it comes to applying their laws in other situations.<sup>201</sup> This, in turn, allows Professor Knox to suggest no presumption when the United States has primary jurisdiction, a soft presumption against application when international law simply allows the United States concurrent jurisdiction, and a strong presumption against application when international law prohibits U.S. jurisdiction.<sup>202</sup>

One problem with this approach, however, is that it assumes international law provides more definition in this area than may be the case. Staying with the examples of cross-border shootings and securities fraud, it is far from certain that international law significantly differentiates the rights of either the nation in which the shooter stands or the fraudulent misrepresentation occurs versus the nation in which the victim is struck or the securities sale takes place to proscribe the conduct.<sup>203</sup> To the extent that these

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201. See Knox, *supra* note 21, at 355-61.

202. See *id.*

203. While Professor Knox asserts that international law gives primary jurisdiction to the nation where the conduct rather than the effects occur, *id.* at 358-59, it is debatable whether international law, in fact, draws a significant distinction in this regard. Even a narrow interpretation of the all-important *S.S. Lotus* opinion, (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), on the international law governing nations' rights to proscribe conduct occurring outside their borders would not support such a contention. As Professor Knox points out in his attempt to limit the "what is not prohibited is allowed" reading of *Lotus*, the narrow reading is that Turkey had the right to apply its law based upon the impact in Turkish territory (the death on the Turkish ship) of conduct in French territory (the negligence of the officer on the French ship in causing the collision). *Id.* at 60 ("No argument has come to the knowledge of the Court from which it could be deduced that States recognize themselves to be under an obligation towards each other only to have regard to the place where the author of the offence happens to be at the time of the offence. On the contrary, it is certain 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 one of the constituent elements of the offence, and more especially its effects, have taken place there."). In any event, Professor Knox's theory still leaves a problem in instances in which the conduct occurs in more than one nation.

cases fall into the realm in which international law favors neither nation over the other in applying its law, then, if both nations apply even a soft presumption against extraterritoriality—and Professor Knox hopes other nations will adopt his approach and thereby avoid conflict<sup>204</sup>—we may well end up with a situation in which neither nation addresses the cross-border misconduct. Moreover, as the experience with F-cubed securities fraud cases demonstrates, the degree of discord resulting from applying a nation's laws depends upon a lot more than just where the conduct occurs (which seems to provide the basis for primary jurisdiction under Professor Knox's view of international law).

Moving beyond international law, we might consider whether conflict of laws principles—so-called private international law—can provide useful guidance.<sup>205</sup> To start with, if one assumes that the discord from extraterritorial application of law results from the conflict between U.S. and foreign law, then one might trigger the presumption against extraterritoriality based upon the existence of an actual conflict between U.S. law and the law of another nation in which some conduct or effect also occurred. This fits with Jeffery Meyer's dual illegality proposal,<sup>206</sup> under which the presumption against extraterritoriality would not trigger if both nations whose law might be applicable prohibited the conduct. This, however, misses possible conflict in remedies and procedure, which can be extremely important to the actual impact of the prohibition<sup>207</sup> and which have been the source of contention in the securities fraud area.<sup>208</sup> Pointing to this difficulty, Justice Breyer's opinion in

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204. Knox, *supra* note 21, at 383.

205. *See, e.g.*, Buxbaum, *supra* note 29 (comparing approaches in the United States, where courts have imported conflict of laws principles into deciding whether to apply U.S. regulatory statutes based upon effects in the United States, with the approach in Germany, where courts looked to international law limits in deciding whether to apply German regulatory statutes based upon effects in Germany); William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 121 (1998) (noting that different approaches to determining the extraterritorial scope of regulatory statutes are based upon different conflict-of-laws theories).

206. Meyer, *supra* note 29.

207. *E.g.*, Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801 (2010).

208. *See supra* note 74 and accompanying text; Buxbaum, *see also supra* note 189, at 261-64.

*F. Hoffmann-LaRoche Ltd. v. Empagran S.A.* rejected the “no substantive law conflict/no problem” argument in the antitrust area.<sup>209</sup>

On the other side of the equation, it may be too timid of the risk of international relations consequences to assume that other nations would be legitimately upset and expect the United States to back away from applying our law in every situation in which our law conflicts with theirs. On the other hand, a court might presume that other nations would be legitimately upset in situations in which laws conflict and conflict of laws principles (putting aside for the moment differences regarding the appropriate principles) call for the other nation’s law to apply.

In fact, this sort of thinking is embedded into the *Third Restatement of Foreign Relations Law* and, for a time, influenced some U.S. Courts of Appeals in dealing with the application of U.S. antitrust laws to events abroad. Specifically, the multifactor reasonableness approach of section 403 of the *Third Restatement of Foreign Relations Law* draws at least in part from the multifactor approach of the *Second Conflict of Laws Restatement*.<sup>210</sup> In the 1970s and 1980s, some circuit courts,<sup>211</sup> starting with the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America*,<sup>212</sup> began importing this sort of multifactor approach into cases dealing with the application of the Sherman Act to anticompetitive activities outside the United States.<sup>213</sup> Ultimately, however, this approach faded from the antitrust scene in the face of congressional action to clarify the reach of

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209. 542 U.S. 155, 167-68 (2004).

210. 3D RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 39, § 403 reporters’ note 10.

211. *E.g.*, *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864, 869-70 (10th Cir. 1981); *Nat’l Bank of Can. v. Interbank Card Ass’n*, 666 F.2d 6, 8 (2d Cir. 1981); *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1255-56 (7th Cir. 1980); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979).

212. 549 F.2d 597, 614 & n.31 (9th Cir. 1976).

213. Among the factors these courts weighed were: (1) the degree of conflict between U.S. and foreign law or policy; (2) the nationality of the parties; (3) the relative significance of effects in the United States as opposed to elsewhere; (4) whether the defendant intended to affect U.S. commerce or, if not, whether the effect was foreseeable; (5) the extent of any activity within the United States; (6) the enforceability of any remedy ordered; (7) the availability of a remedy abroad; (8) the effect of exercising jurisdiction on foreign relations; (9) the U.S. reaction if the roles were reversed; (10) whether the relief demanded will subject the defendant to conflicting requirements under U.S. and foreign law; and (11) the impact of any relevant treaties. *E.g.*, *Mannington Mills, Inc.*, 595 F.2d at 1297-98; *Timberlane Lumber Co.*, 549 F.2d at 614.

the Sherman Act,<sup>214</sup> and Supreme Court opinions dealing with the reach of the Sherman Act,<sup>215</sup> which, for the most part, did not employ this approach.<sup>216</sup>

Assuming conflict of laws principles can aid courts in determining whether a situation is likely to produce the sort of negative foreign government reactions that should trigger the presumption against extraterritoriality, we still have the question of which conflict of laws approach to use. As stated above, the *Third Restatement of Foreign Relations Law* borrowed from the multifactor approach of the *Second Conflict of Laws Restatement*<sup>217</sup> and, in turn, influenced both the *Timberlane* line of cases in antitrust as well as the Second Circuit's conduct and effects test for securities fraud.<sup>218</sup> By contrast, *Morrison*'s end result actually parallels the rules-based approach in the *First Conflict of Laws Restatement* under which, in the event of a conflict, the law of the jurisdiction in which the injury occurs governs a claim for recovery in tort.<sup>219</sup> Indeed, in many ways, *Morrison* represented a victory for the bright line virtues of the rules approach to conflicts represented by the *First Conflict of Laws Restatement* over the nuanced multifactor approach of the *Second*

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214. Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2012).

215. See *F. Hoffmann-La Roche v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 794-99 (1993).

216. The legislative history of the Foreign Trade Antitrust Improvements Act indicated that Congress did not intend to preclude courts from also continuing to limit coverage of the Sherman Act based upon a multifactor approach, so long as the courts, at the very least, limited coverage of the Sherman Act to the direct, substantial and reasonably foreseeable effects specified in the amendment. H.R. Rep. No. 97-686 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2498. While Justice Scalia's dissenting opinion in *Hartford Fire Insurance* invoked the approach of section 403 and *Timberlane* in considering the reach of the Sherman Act, 509 U.S. at 817-19, the majority ignored it. The majority of the Supreme Court in *Empagran* invoked the reasonableness idea of section 403 of the Restatement in considering the reach of the Sherman Act, but, in the end, did not find much effect in the United States and so never got into balancing interests by using the various factors listed in section 403 and applied in the *Timberlane* line of cases. *Empagran* 542 U.S. 155; e.g., Buxbaum, *supra* note 29, at 652.

217. See Buxbaum, *supra* note 29, at 647-48, 650.

218. E.g., *Eur. and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 129 (2d Cir. 1998) (applying *Restatement of Foreign Relations Law* reasonableness criteria).

219. RESTATEMENT OF CONFLICT OF LAWS §§ 377-78, 384 (1934) [hereinafter FIRST CONFLICT OF LAWS RESTATEMENT]. In fact, the *First Conflict of Laws Restatement* specifically treats the place of reliance, rather than the place of the misrepresentation, as the place of the wrong for purposes of providing the governing law in the case of a conflict between the laws potentially governing a tort claim for fraud. *Id.* § 377 illus. 5 & 6.

*Conflict of Laws Restatement*.<sup>220</sup> On the other hand, if the idea is to figure out when application of U.S. law will trigger principled opposition by foreign governments, maybe courts should look at conflict of laws rules followed in other nations.

In the end, the lack of consensus on either international law limits to applying a nation's law beyond its borders or on the appropriate approach to resolving conflict of laws may suggest a more pragmatic approach. To begin with, there does not need to be a single trigger point for determining extraterritoriality under the international relations rationale. Instead, a court could trigger the presumption in various situations suggesting international relations problems, but as suggested by Professor Knox,<sup>221</sup> with different degrees of strength. This follows from the rationale for the presumption as a tool to deal with the risk of collateral consequences from an erroneous interpretation of congressional intent. Therefore, the greater the consequences, the stronger the presumption should be. So, if the risk were a violation of international law, there would be a strong presumption against extraterritoriality to the point of justifying a clear statement rule.<sup>222</sup> To the extent that the risk is simply to face objection from some foreign governments, then a court might require relatively little to overcome the presumption.<sup>223</sup> If the risk is something in between, then courts can require an intermediate level of rebuttal.

Moreover, as one test of likely negative foreign reaction, courts might follow a golden rule approach; we can presume that foreign

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220. Before assuming that the *First Conflict of Laws Restatement* commands the result in *Morrison*, it is important to keep in mind that this rule is triggered by the presence of a conflict between the laws otherwise applicable based upon the explicit premise that each state along the chain of conduct and effect has the right to apply its law. *Id.* § 377. Indeed, the *Second Restatement of Foreign Relations Law* in 1965 (before the conflicts and effects test) explicitly provided that a nation in which a misrepresentation occurs has jurisdiction to apply its criminal law even though the transaction in reliance on the misrepresentation occurs in another nation. 2D RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 4, § 17 illus. 2.

221. See *supra* notes 201-02 and accompanying text.

222. *E.g.*, *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 21-22 (1963).

223. Following this sort of approach, the *Morrison* majority may have been right to trigger some presumption against extraterritoriality based upon the amicus briefs from foreign governments. Such a slight presumption, however, should not have outweighed forty years of congressional acquiescence in, and the SEC's support for, the Second Circuit's conduct and effects test, especially given the negative implications of section 30(b).

governments will legitimately object to applying U.S. laws in situations in which we in the United States would object if the shoe was on the other foot and a foreign government was the one applying its statute to actions having a U.S. nexus. Actual examples of objections by the United States could provide evidence of U.S. attitudes, as might the *Restatement of Foreign Relations Law*. After all, whether the provisions of the Restatement reflect international law, they reflect the attitude of an influential body of legal thinkers within the United States and, hence, in the absence of a better source, they provide a reasonably proxy for when application of law by another country would upset us in the United States. In addition, the *Restatement's* multifactor reasonableness approach appears to provide a fairly comprehensive list of all the sort of facts one might wish to examine in asking whether to legitimately expect complaints from foreign governments if the United States were to apply its laws to events at least partially outside its borders.

### 3. *The Wrong Presumption?*

Determining extraterritoriality by the presence of international relations concerns raises the possible objection, which I label “the wrong box,” that we have shifted into a different presumption. The Supreme Court cases dealing with the overseas reach of the Sherman Act in the post-*ARAMCO* era illuminate the issue.

This taxonomy begins with Justice Scalia’s dissenting opinion in *Hartford Fire Insurance Co. v. California*.<sup>224</sup> In *Hartford*, the Supreme Court upheld the application of the Sherman Act to conduct that had an anticompetitive effect in California, but was legal in England where the conduct occurred.<sup>225</sup> Because of prior decisions applying the Sherman Act to overseas conduct, the presumption against extraterritoriality did not bother either the majority of the court in *Hartford* (who did not even explicitly mention the presumption) or Justice Scalia in his dissent. However, Justice Scalia viewed the conflict between the prohibition under U.S. law versus the legality of the defendants’ conduct under English law as triggering the rule that courts should construe statutes to avoid violating

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224. 509 U.S. 764, 816-22 (1993) (Scalia, J. dissenting).

225. See *id.* at 794-99 (majority opinion).

international law; into which Justice Scalia threw the reasonableness approach of section 403 of the *Restatement of Foreign Relations Law* and notions of “prescriptive comity”<sup>226</sup> (as in the *Timberlane* line of circuit court decisions<sup>227</sup>). This demarcation between the presumption against extraterritoriality and construing statutes ostensibly to avoid violating international law is consistent with Justice Scalia’s opinion for the Court in *Morrison*, in which he wrote that the presumption against extraterritoriality is not based on comity or conflict with other nations’ laws.<sup>228</sup>

In *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, Justice Breyer imported Justice Scalia’s taxonomy from a dissent into the opinion for the Court.<sup>229</sup> In many ways, Justice Breyer’s opinion supports some of the approach recommended in this article. In *Empagran*, foreign plaintiffs sought recovery for damages they suffered by the implementation outside the United States of an international price fixing conspiracy among producers of vitamins.<sup>230</sup> Reacting to foreign government displeasure at the remedy (rather than the prohibition),<sup>231</sup> the Court invoked the reasonableness standard in section 403 of the *Restatement of Foreign Relations Law* (in gestalt if not in detail insofar as the Court rejected the multiple factor approach) to tip the balance against applying the Sherman Act.<sup>232</sup> However, the opinion did not express reliance on the presumption against extraterritoriality. Instead, the Court stated that it was looking to a rule under which courts construe statutes to avoid unreasonable interference with the sovereign authority of other nations, which the court, citing Justice Scalia’s dissent in *Hartford*, treated as part of the rule calling for construing statutes to avoid violation of international law.<sup>233</sup>

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226. *Id.* at 817-19 (Scalia, J., dissenting).

227. *See supra* notes 211-13 and accompanying text.

228. *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869, 2877-78 (2010).

229. 542 U.S. 155, 167-68 (2004).

230. *Id.* at 159.

231. Not surprisingly, the displeasure came from the home countries of the defendant corporations rather than of the plaintiff consumers. Ralf Michaels, *Empagran’s Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 542 (David L. Sloss et al. eds., 2011).

232. *See Empagran*, 542 U.S. at 165-66.

233. *Id.* at 164.

To assess this taxonomy, it helps to think in terms of three boxes. One box represents application of U.S. law to events outside the United States in which this would violate clearly established international law. The second box represents applications of U.S. law when no conduct or effect occurs within the United States. The third box represents application of U.S. law to events outside the United States where this would produce international discord. These boxes overlap—for example, applications of U.S. law in situations that would violate international law are a subset of applications that create international discord, as are some applications of U.S. law when no conduct or effect occurs within the United States—but it is unnecessary for our purposes to sort all this out. The rule that construes statutes to avoid violations of international law handles the box in which application of U.S. law to events beyond our border would violate clearly established international law. A presumption against extraterritoriality justified solely upon the observational rationale that Congress does not normally think in terms of the non-territorial principles in conceiving of the reach of its legislation handles the box in which no conduct or effect occurs in the United States. The question is what to do about situations in which application of U.S. law to events beyond our borders would produce international discord (the third box), but applying U.S. law would not violate clearly established international law and when some conduct or some effect occurs in the United States (so as not to come within the other two boxes).

Justice Scalia's solution in *Hartford* is to expand the violation of international law box by viewing international law as encompassing prescriptive comity and the reasonableness approach of the *Restatement of Foreign Relations Law* when dealing with conflict between U.S. and foreign laws.<sup>234</sup> The problem with this solution, is that customary international law probably does not require such comity or reasonableness.<sup>235</sup> At times in *Empagran*, Justice Breyer followed Justice Scalia's view of the limits imposed by international law on a nation's ability to apply its law to events beyond its borders.<sup>236</sup> At

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234. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818-19 (1993) (Scalia, J., dissenting).

235. E.g., Phillip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT'L L. 53, 54 (1995); see *supra* note 200 and accompanying text.

236. *Empagran*, 542 U.S. at 164.

other times, however, Justice Breyer seemed to invoke a new rule of construction—under which the Court construes statutes to avoid unreasonable interference with the sovereign authority of other nations (which I will call the “good neighbor presumption”) even if the Court cannot cite any authority showing such interference violates customary international law.<sup>237</sup> Showing some resistance to the proliferation of presumptions, this different presumption seems not to have caught on in any later opinion. Finally, by invoking international relations concerns as a rationale for the presumption against extraterritoriality, the Supreme Court, in opinions ranging from *ARAMCO* to its recent decision in *Kiobel*, has suggested, as argued in this Article, that the presumption against extraterritoriality is the home for cases in which application of U.S. law to events occurring at least in part outside the United States will upset other nations, even without violating international law.<sup>238</sup>

In the end, so long as everyone understands what is going on, this sort of terminological debate can be left to the purists. None of the three taxonomies is free from the potential for misunderstanding. Stretching the term “international law” may be good for law school brochures but can create controversy over what, in fact, is the customary international law in the area. Creating a third presumption might clarify or might get things more confused.<sup>239</sup> So, we are left with using the presumption against extraterritoriality and making the best of it.

#### 4. A Two-Sided Presumption

An important corollary follows from the international relations rationale for the presumption against extraterritoriality: international relations concerns can cut both ways. It may be that the failure to apply U.S. law in the situation at hand would place the United States in violation of international law, elicit objections from foreign governments, or elicit objection in the United States if a foreign government were similarly to restrict the application of its

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237. *Id.*

238. See discussion *supra* Part III.C.2.

239. Professor Knox argues that there should be no presumption against extraterritoriality; rather, there should be a presumption against extrajurisdictionality. Knox, *supra* note 21, at 353.

law. If so, then to avoid the risk of unjustified collateral consequences from an erroneous interpretation of congressional intent, the court should follow a presumption in favor of applying the statute.

A situation in which the failure to apply a U.S. statute may have put the United States in violation of international law occurred in *Sale v. Haitian Centers Council, Inc.*<sup>240</sup> There, the Supreme Court refused to apply a statute, which prohibited the return of aliens to a country where they faced persecution, to the Coast Guard's intercepting Haitian vessels in international waters. Although the Supreme Court invoked the presumption against extraterritoriality in reaching this result,<sup>241</sup> the dissent<sup>242</sup> and others<sup>243</sup> claim that this result put the United States in violation of its treaty obligations. Regardless of whether the failure to apply the statute in *Sale* placed the United States in violation of treaty obligations,<sup>244</sup> it is clear that in other contexts, the failure to apply U.S. laws to situations in which conduct or effects occur outside the country could place the United States in violation of international law.<sup>245</sup>

In this sort of situation, the doctrine that courts should construe statutes to avoid violations of international law comes into play without talking about presumptions regarding extraterritoriality. On the other hand, determining extraterritoriality in a way in which the presumption against extraterritoriality could apply to this sort of situation creates a conflict between presumptions—the presumption that Congress intends its statutes to apply in a way consistent with international law conflicting with the presumption against extraterritoriality. Determining extraterritoriality by the presence of negative international relations consequences from applying the statute to the situation at hand can remove the conflict, because

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240. 509 U.S. 155 (1993).

241. *Id.* at 173-74. It is open to debate whether the situation in *Sale* involved extraterritoriality, because, on the one hand, the seizures occurred on international waters, but, on the other hand, the case involved actions by crew on U.S. government vessels.

242. *Id.* at 190-98 (Blackmun, J., dissenting).

243. *E.g.*, JEAN-MARIE HENCKAERTS, MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE 103 (1995).

244. The majority, not surprisingly, argued that it did not. *Sale* 509 U.S. at 177-87 (majority opinion).

245. *E.g.*, Knox, *supra* note 21, at 380-81 (giving examples).

foreign relations consequences now, in fact, push for application of the statute.<sup>246</sup>

Another situation in which failure to apply a nation's law could violate international law brings us back to the cross-border shooting example. Suppose a nation, as a matter of policy, refuses to prevent or remedy the conduct of persons in its territory who shoot at persons on the other side of the border—say, for instance, by failing to act against groups who fire rockets at towns in a neighboring nation. Such inaction could violate international law.<sup>247</sup> Accordingly, it would seem counter to the international relations rationale behind the presumption against extraterritoriality for courts to invoke the presumption as a reason to hold that the nation's laws do not apply in such a case.

It seems less clear when international law imposes upon a state the duty to protect against economic crimes, such as securities fraud, launched from within its borders against victims in other nations. Still, a nation that allows itself to become the hub from which dishonest persons send fraudulent investment solicitations to prospective victims in other nations is likely to provoke negative reactions from the nations into which the solicitations find their way. Indeed, efforts by the U.S. Securities and Exchange Commission to encourage other nations to enforce their laws against securities fraud<sup>248</sup> illustrate that the United States would not be pleased if other nations made no effort prevent securities fraud launched from their territory against investors in the United States.<sup>249</sup>

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246. See, e.g., Colangelo, *supra* note 29, at 1023 (“The tension vanishes, however, in light of the presumption’s original motivation: to avoid unintended discord with foreign nations.” (citations omitted)).

247. E.g., Trail Smelter Arbitration (U.S. v. Can.) (1938/1941) 3 R.I.A.A. 1905; U.N. Fact-Finding Mission on the Gaza Conflict, Rep. on Human Rights in Palestine and Other Occupied Territories, U.N. Doc. A/HRC/12/48, para. 1960-61 (Sept. 25, 2009).

248. E.g., Securities Exchange Commission, Office of International Affairs, <http://www.sec.gov/oia/Article/about.html> [<http://perma.cc/X4LX-3CM5>] (last modified Mar. 4, 2014) (“The [SEC] Office of International Affairs (OIA) promotes investor protection ... by advancing international regulatory and enforcement cooperation, promoting the adoption of high regulatory standards worldwide, and formulating technical assistance programs to strengthen the regulatory infrastructure in global financial markets.... To this end, OIA works with a global network of securities regulators and law enforcement authorities to facilitate cross-border regulatory compliance and help ensure that international borders are not used to escape detection and prosecution of fraudulent securities activities.”).

249. E.g., *IIT v. Vencap Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) (“This country would surely look askance if one of our neighbors stood by silently and permitted misrepresented

In this instance, invoking the rule construing statutes to comply with international law might not help. On the other hand, locating the purpose for the presumption against extraterritoriality in a rationale that construes statutes to avoid negative international relations consequences suggests that there should be a presumption in such cases; specifically, courts should presume that statutes apply to cross-border misconduct when failure to apply the statute risks negative international relations consequences—either because other nations object to the lack of enforcement or if we in this country would object if the shoe were on the other foot and other nations did not enforce their laws against such cross-border misconduct.

This analysis, in turn, brings us to the Solicitor General's argument in *Morrison* that applying section 10(b) to fraudulent conduct in the United States was justified in order to prevent the United States from becoming "the Barbary Coast for those perpetrating frauds on foreign securities markets."<sup>250</sup> In fact, this argument has been a principal rationale by those arguing for applying section 10(b) in F-cubed cases in which conduct in the United States leads to losses by foreign investors buying stock in foreign issuers on foreign markets.<sup>251</sup> The Supreme Court in *Morrison* rejected this argument.<sup>252</sup> Insofar as the Court based its rejection upon skepticism as to whether the United States is becoming a hub for transnational securities fraud,<sup>253</sup> then this simply presents an empirical issue. Insofar, however, as the Supreme Court rejected this contention as just a policy argument that lacked sufficient support in the statutory text to overcome the presumption against extraterritoriality, then the Court missed the broader point. By invoking the Barbary Coast metaphor, the argument reminds us that the failure to police misconduct within a nation that produces a negative impact for those beyond its borders can produce international discord. To the extent that the underlying purpose for the presumption against extraterritoriality is to avoid

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securities to be poured into the United States.”).

250. 130 S. Ct. 2869, 2886 (2010).

251. *E.g.*, SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977).

252. *Morrison*, 130 S. Ct. At 2886.

253. *Id.*

discord, then courts should presume the law applies to cases in which cross-border misconduct risks such a reaction.<sup>254</sup>

### 5. *Conflicts with Legislative Purpose*

The earlier introductory discussion of the legislative purpose and international relations rationales<sup>255</sup> pointed out that these rationales can be complimentary—the lack of much reason for applying U.S. law abroad can combine with negative international repercussions from doing so, to lead to the conclusion that U.S. law should not apply. In such cases, triggering the presumption against extraterritoriality based upon the presence of international relations concerns increases analytic clarity by avoiding a test that turns into circular reasoning, but might not actually change many results. On the other hand, in numerous cases—especially when dealing with economic regulations in a global economy—these two rationales can point in opposite directions.<sup>256</sup> Here is where a test that determines extraterritoriality based upon the presence of international relations concerns can produce appropriately different results than a test based upon legislative purpose.

Securities law provides good examples. Start by assuming, admittedly inaccurately, that the only legislative purpose for penalizing securities fraud is to protect investors victimized by the fraud and that Congress is concerned only about its constituents. In such a case, applying the prohibition consistent with the legislative purpose suggests it should reach fraudulent transactions that victimize U.S. investors anywhere in the world and should not reach fraudulent transactions victimizing foreign investors, even if those take place in the United States. Putting aside constitutional considerations, the reason for not following such an approach comes from international relations concerns—the conflict with foreign regimes created by attempting to apply U.S. law to transactions by

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254. This is not to say that an F-cubed case should be treated as territorial. After all, foreign governments objected to applying U.S. law to F-cubed cases. Hence, there was no reason for a presumption in favor of territoriality in order to avoid upsetting foreign governments because of a lack of enforcement. Indeed, insofar as the principal (if not the only good) reason for applying U.S. law to F-cubed cases would be to maintain good relations, this foreign reaction suggests U.S. law should not have applied.

255. See *supra* notes 201-04 and accompanying text.

256. See *supra* notes 232-34 and accompanying text.

U.S. investors anywhere in the world and the probable retaliation by other nations refusing to protect U.S. investors if we refuse to protect their investors.

Of course, this illustration does not accurately reflect the policies behind the prohibition on securities fraud.<sup>257</sup> To give an obvious example, the United States would wish to protect foreign investors trading in the United States in order to encourage foreign investors to trade here. On the other hand, with global securities trading where what happens on stock markets in London, Frankfurt, Hong Kong, and Tokyo impacts what happens on the New York Stock Exchange, and in a global economy in which a crisis in Greece can slow the recovery in the U.S. economy, it is difficult to say that applying the antifraud provision to transactions outside the United States would in no way further the legislative purpose behind the securities laws.<sup>258</sup> Hence, the principal reason a court might question whether Congress would wish to apply the securities fraud prohibition to some situations outside the United States is the international relations concern.

Now we start to see a critical practical advantage of using the presence of international relations concerns as the measuring point for determining extraterritoriality. A test that determines extraterritoriality by legislative purpose—as, for example, Professor Dodge’s lack of effects in the United States test—simply misses the key issue: so long as it would advance the legislative purpose to apply the statute, then under this approach, the court does so<sup>259</sup> even though the negative international relations consequences might have been sufficient to persuade Congress that the statute should not have applied. The statutory focus test, as *Morrison* actually applied the test, avoided this trap—but that was only because the statutory focus test, as applied in *Morrison*, really is not about the focus of the statute. In fact, the only decent argument in the *Morrison* opinion’s discussion of so-called focus was to raise the

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257. See *supra* notes 175-79 and accompanying text.

258. *E.g.*, MARC I. STEINBERG ET AL., GLOBAL ISSUES IN SECURITIES LAW, at iii (2013) (“Turn on the CNBC or Bloomberg cable channels during the middle of the night in the United States and one quickly realizes that securities markets are global and that what goes on in European or Asian markets spills over into the United States.”); Buxbaum, *supra* note 189, at 282 (explaining that the interconnectedness of global securities markets makes territorial approaches too limiting).

259. Or, at least, is not cautioned against doing so by the risk of negative repercussions.

objections by foreign governments, which has nothing to do with the focus of the statute.

A possible objection to determining extraterritoriality by the presence of international relations concerns, as opposed to the absence of advancing the legislative purpose, is that this privileges international relations concerns over Congress's objectives in passing the statute.<sup>260</sup> This, however, misunderstands what is at stake in the determination. The point of defining extraterritoriality is to invoke some degree of presumption against application of the statute. This could be as weak as simply saying that if the court cannot figure out whether Congress intended the statute to apply, then the statute will not apply, or as strong as demanding a clear statement of contrary intent—depending upon the degree of international relations concerns implicated. In any situation in which there is not a clear statement rule, in other words, in any case other than a violation of international law, then legislative purpose should fit in the rebuttal analysis one tool in the toolbox for determining whether Congress wished the statute to apply despite international relations concerns.<sup>261</sup> Hence, using international relations concerns as the measure of extraterritoriality does not make those concerns trump legislative purpose—it simply introduces those concerns into the analysis of whether the statute applies and tilts the scale to some degree in favor of nonapplication in order to take into account the asymmetric risk that courts face in deciding if the Congress intended the statute to apply (including trying to figure out how much this advances the purpose of the statute).

Incidentally, it is worth noting that, just as there are degrees of territoriality and of international relations concerns, there are also degrees of advancing the legislative purpose by applying the statute to a cross-border situation. This can range from situations in which it would completely frustrate the purpose of the statute for the court not to apply it,<sup>262</sup> to situations in which plaintiffs advance an imag-

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260. See, e.g., Born, *supra* note 103, at 76 (arguing that the presumption against extraterritoriality “unduly elevates Congress’s presumed desire to avoid conflicts with foreign law over other important legislative goals”).

261. See, e.g., *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 177 (1993) (looking at “all available evidence about the meaning of” the statute to determine if it applied extraterritorially).

262. So, for example, refusing to enforce an antipiracy (in the traditional Jolly Roger sense, as opposed to the intellectual property appropriation sense) statute upon the high seas would

inative argument as to how it might, by some Rube Goldberg line of reasoning, marginally advance the statute's purpose to apply the statute to the case at hand.<sup>263</sup>

This, in turn, suggests that courts may face the need to balance legislative goals versus international repercussions in determining Congress's intent when it comes to applying U.S. law to cross-border situations. One may object to the lack of certainty in such an approach<sup>264</sup> or question the competence of courts to weigh foreign versus domestic considerations.<sup>265</sup> Given, however, that Congress needs to weigh domestic goals versus international relations concerns in deciding how its laws should impact cross-border situations, it is difficult for courts to realistically attempt to reconstruct Congress's intent without engaging at all in the exercise. The presumption against extraterritoriality tempers this balancing by putting a thumb on the scale against application of the statute depending upon the degree of international discord risked by an erroneous judicial determination of the balance Congress would reach.

#### CONCLUSION

In the end, the statutory focus test is useless if the presumption against extraterritoriality is to serve any real function in cross-border situations in which some conduct or effect exists both within and outside the nation. Instead, courts should determine whether to trigger the presumption against extraterritoriality by examining if the situation presents problems for international relations.

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defeat the point of an antipiracy statute.

263. One might wonder whether the argument that prosecuting F-cubed securities frauds promotes honest markets in the United States fits here.

264. See, e.g., Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281 (1982) (referring to court decisions declining to apply U.S. law based upon comity considerations as an "amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith") (citations omitted).

265. E.g., Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 514-15 (1997) (defending the presumption against extraterritoriality on the basis of a lack of judicial competence to address policy issues involved with applying statutes abroad); Dodge, *supra* note 27, at 120 (agreeing with Bradley that courts are institutionally ill-equipped to trade off legislative goals against international relations concerns, but arguing that the answer is to look only to legislative goals).

