THE PRESUMPTION AGAINST EXTRATERRITORIALITY: RECONCILING CANONS OF STATUTORY INTERPRETATION WITH TEXTUALISM

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U.S. courts have relied on the presumption against extraterritoriality to limit the application of federal law beyond U.S. borders for more than two centuries. While courts have fairly consistently concluded that federal statutes lacking any express territorial limitations should not be construed to apply worldwide, the doctrinal tests and justifications for the presumption against extraterritoriality have varied significantly over time. U.S. courts have variously interpreted federal law to apply only within U.S. borders, to conduct abroad that produced effects in U.S. territory, where reasonable pursuant to a balancing test, and—most recently, under *Morrison v. National Australia Bank Ltd.*—where the "focus" of the statute at issue was in the United States. In some cases, the presumption against extraterritoriality has been applied to override the most plausible reading of statutory language.

This Article considers whether the presumption against extraterritoriality is consistent with modern textualism. Textualism instructs courts to focus primarily on implementing statutory text, read in context. As a consequence, textualists reject substantive canons of statutory interpretation that displace the best reading of the statutory text unless a canon is so ingrained that it forms part of the legal background against which Congress legislates. This Article concludes that none of the various doctrinal variations of the presumption against extraterritoriality has been invoked consistently enough to qualify as such a background convention. Proponents of textualism should therefore no longer apply the

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presumption to supplant the most plausible interpretation of a statute. Nonetheless, courts' consistent reliance on different iterations of the presumption to limit statutes that are phrased universally (referring, for example, to "any seaman," or "every contract") and that contain no express territorial limitations gives rise to a narrower canon that conforms with textualist tenets: Courts may interpret such universally worded statutes to have some limits consistently with textualism. This Article further contends that textualism should be understood to require a consistent standard for addressing the extraterritorial applicability of universally worded or ambiguous statutes in order to further objectives of consistency and predictability. The Article suggests that an international law presumption is the most plausible approach and is preferable to the analysis set forth in *Morrison*. Finally, the Article concludes more broadly that textualists should consider adopting substantive canons to resolve ambiguity in other statutes that present recurring issues of statutory interpretation, just as statutes that are ambiguous as to their geographic scope present a recurring interpretive issue.

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INTRODUCTION

The presumption against extraterritoriality has evolved substantially since its inception in the early nineteenth century. While U.S. courts have fairly uniformly concluded that, absent statutory text to the contrary, federal statutes should be construed as containing some territorial limits, the doctrinal tests and justifications for the presumption have varied significantly. During the nineteenth century, U.S. courts interpreted federal law consistently with prevailing international law limits on the exercise of legislative jurisdiction, which at that time generally required construing statutes to apply only territorially. In the twentieth century, courts applied U.S. law abroad more frequently pursuant to a variety of new doctrinal tests that were neither consistently applied nor reconciled. While courts still sometimes invoked a strictly territorial presumption, they also repeatedly applied U.S. statutes to conduct abroad that produced effects in U.S. territory or when doing so would be reasonable according to a multi-factor balancing test. Beginning in 1991, the Supreme Court cited the presumption more frequently and often, but not invariably, applied a strictly territorial iteration of the presumption. As a consequence, by 2010, there was general agreement that judicial application of the presumption against extraterritoriality was incoherent and unpredictable.[1]

Responding to these concerns, the Supreme Court in 2010 introduced a new two-part analysis in *Morrison v. National Australia Bank Ltd.*[2] Under *Morrison*, courts first determine whether a federal statute applies extraterritorially by assessing whether Congress has provided a "clear" or "affirmative" indication that it should.[3] If not, courts then determine whether application of the statute in a given case would be impermissibly extraterritorial by identifying the statute's "focus" and assessing whether that focus occurred outside the United States. The *Morrison* analysis was a significant change from prior iterations of the presumption against extraterritoriality.

Against this history, modern textualists must assess whether the presumption against extraterritoriality is consistent with textualism and, if not, whether textualism provides an alternate means of

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[1] Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1028 (2011).

[2] 561 U.S. 247 (2010).

[3] *Id.* at 265.

assessing statutes' territorial reach. Most fundamentally, textualism instructs judges to give effect to the statutory text enacted by the legislature,[4] and textualists focus primarily on how a reasonable reader would understand the statutory language "placed alongside the remainder of the *corpus juris*."[5] Textualists accordingly embrace linguistic canons, which help courts discern the meaning of statutory text. By contrast, substantive canons that displace the best or most plausible reading of the text contradict the textualist principle "that a faithful agent must adhere to the product of the legislative process."[6] Textualism therefore recognizes the legitimacy of only those substantive canons that resolve statutory ambiguity (rather than displacing the best reading of statutory text), or that have been applied so consistently that they form part of the background against which Congress legislates.[7]

The presumption against extraterritoriality is a substantive canon because it requires courts to restrict the territorial reach of federal law and thus implement a substantive policy external to the statute at issue. As a consequence, unless it forms part of the background against which Congress legislates, the presumption is incompatible with textualism insofar as it is applied to displace the best reading of the statutory text. Despite the presumption's early nineteenth century roots, its application has varied so frequently and significantly that no single doctrinal standard qualifies as such a background convention. Judges seeking to comply with textualism should therefore no longer apply the presumption against extraterritoriality to displace the best reading of statutory text. The *Morrison* analysis is particularly problematic for textualists in this regard, notwithstanding the fact that it was articulated by Justice Scalia, one of textualism's staunchest proponents. *Morrison* requires Congress to make its intent for a statute to apply extraterritorially "clear"[8] or "unmistakable,"[9] supplanting the most plausible reading of statutory text unless Congress legislates with

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[4] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003).

[5] John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 16 (2001) (quoting ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 17 (Amy Gutmann ed., 1997)).

[6] Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 124 (2010).

[7] Manning, *supra* note 4, at 2474.

[8] *Morrison*, 561 U.S. at 265.

[9] RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090, 2102 (2016).

heightened clarity in direct contravention of textualists' basic directive that courts should function as Congress's faithful agents.

While U.S. courts have not consistently applied any single doctrinal test for the presumption against extraterritoriality, they have fairly uniformly recognized that universally worded statutes (referring to "any seaman," for example) should be construed to have some territorial limits. Consistent judicial reliance on different iterations of the presumption in those circumstances gives rise to a narrower background convention that accords with textualism: Universally worded statutes that lack any express territorial limitations should not be construed to apply throughout the world, and courts may therefore read territorial limits into such statutes consistently with textualist principles.

Textualism permits, and should be understood to require, adopting a uniform test to interpret statutes that are universally worded or are otherwise ambiguous as to their extraterritorial applicability. Textualists recognize that judges have substantial discretion to resolve statutory ambiguity and gaps, but simply acknowledging that courts have discretion to construe universally worded and ambiguous statutes pursuant to any of the iterations of the presumption (and potentially even their own policy preferences) is not a satisfactory outcome for textualist analysis. Applying a consistent standard would better achieve textualist objectives of consistency and predictability, and serve textualism's "simple ambition . . . to require legislators to accept responsibility for their legislative acts."[10]

Determining statutes' extraterritorial reach is often difficult and can implicate multiple States' regulatory interests, international law, fair notice for the regulated, and questions about the feasibility of applying U.S. law abroad. Many approaches to the issue have strengths and weaknesses, and none will be completely satisfactory in all cases. Nonetheless, courts should not adopt the two-part *Morrison* analysis. *Morrison*'s "focus" test, which determines whether a statute is applied extraterritorially by reference to the location of its "focus," bears little relation to the question whether a statute *should* apply in a given case as a matter of congressional intent or policy. There is also little to suggest that the "focus" test takes into account the considerations that underpin the presumption against extraterritoriality, including international law, U.S. and

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[10] John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 738 (1997).

foreign sovereign interests, fairness, and comity. In addition, the "focus" test is difficult to administer coherently, because identifying a statute's "focus" is inherently imprecise and uncertain and because locating that "focus" in a specific case presents special concerns for complex transnational cases.

It is beyond the scope of this Article to determine the precise contours of a new, uniformly applied substantive canon, but the most promising approach appears to be a presumption that Congress intends to legislate up to public and private international law limits on legislative jurisdiction, at least with respect to civil law. That approach would ensure that U.S. law governs where the United States has substantial regulatory interests while avoiding international conflicts that can arise when U.S. law is applied in violation of international law limitations on legislative jurisdiction. In addition, this approach best accords with textualist principles because U.S. courts have long (albeit inconsistently) looked to international law in applying the presumption against extraterritoriality.

The conclusion that textualism should be understood to require adopting a consistent approach for determining the extraterritorial reach of universally worded and ambiguous statutes suggests a broader insight. Where numerous statutes present a recurring question of statutory interpretation that cannot be resolved by reference to the usual tools of textualist statutory construction (just as statutes are often ambiguous as to their geographic scope), textualists should adopt a consistent substantive canon for resolving that ambiguity. The judicial discretion that ambiguous statutes necessarily entail can be harnessed to formulate new substantive canons that permit courts to apply such statutes consistently and predictably. That approach not only gives regulated parties fair notice of the law, but also allows them to hold Congress accountable for the predictable results of its legislation.

This Article proceeds in four parts. Part 1 provides an overview of the presumption against extraterritoriality and its application over the past two centuries. Part 2 then examines the core tenets of textualism and demonstrates that the presumption against extraterritoriality, as it is currently applied, cannot properly be classified as a canon of statutory interpretation that accords with textualism. Part 3 contends that textualist judges should no longer rely on the presumption against extraterritoriality to displace the best reading of the statutory text. For truly ambiguous statutes and universally worded statutes that must be construed to have some

limits, textualism should require a single consistent approach. Part 4 concludes that textualists should consider developing new substantive canons whenever numerous statutes present a recurring question of statutory interpretation that cannot be resolved using the existing tools of textualist statutory construction.

1. THE PRESUMPTION AGAINST EXTRATERRITORIALITY

U.S. courts have recognized for over 200 years that a statute without any clear definition of its territorial reach should not be construed to apply universally throughout the world.[11] While the presumption against extraterritoriality generally instructs courts to avoid giving U.S. statutes extraterritorial effect,[12] it has evolved substantially, and sometimes dramatically, over time and has not been applied consistently.[13] Over the past decade (2010 through 2020), the Supreme Court has sought to restore order with a new two-part analysis announced in *Morrison v. National Australia Bank Ltd.*[14] The *Morrison* analysis marked a significant change from previous iterations of the presumption against extraterritoriality,

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[11] *See* United States v. Palmer, 16 U.S. (3 Wheat.) 610, 631 (1818).

[12] *See, e.g.*, Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."); EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949))). *See generally* Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 181.

[13] *See, e.g.*, Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 128-29 (2010); Colangelo, *supra* note 1, at 1028 ("[T]he only thing courts and scholars seem to agree on is that the law in this area is a mess."); Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1460-61 (2008) ("Condemned as incoherent and convoluted, a patchwork of incompatible rules presently governs legislative jurisdiction. Some scholars go so far as to describe the Court's extraterritoriality decisions as patently inconsistent, if not hopelessly confused."); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2235 (2002) (The presumption against extraterritoriality "has been strongly critiqued both normatively and for its inconsistent application."); Lauritzen v. Larsen, 345 U.S. 571, 582 (1953) (Justice Jackson, discussing the extraterritorial application of shipping laws, admitted that "[i]t would not be candid to claim that our courts have arrived at satisfactory standards or apply those that they profess with perfect consistency.").

[14] 561 U.S. 247 (2010).

and it is not yet clear whether and how the new analysis will be applied over the long term.

This section analyzes this evolution of the doctrinal tests and rationales for the presumption against extraterritoriality over the past 200 years in four parts: Before 1909, U.S. courts usually construed U.S. law to apply only territorially in line with then-prevailing international law limits on legislative jurisdiction. Between 1909 and 1991, U.S. courts applied U.S. law abroad more often, developing a variety of different doctrinal tests and rationales. Between 1991 and 2010, the Supreme Court frequently relied on the presumption against extraterritoriality and often, but not exclusively, interpreted it to require a strictly territorial construction of U.S. law. Finally, over the past decade, the Supreme Court has generally applied *Morrison*'s two-part analysis and has sought to reconcile the varying rationales for the presumption.

1.1. Constitutional Background and Development of the Presumption Against Extraterritoriality Between 1804 and 1909

In order to conclude that a U.S. statute applies extraterritorially,[15] courts must determine both that Congress has legislative jurisdiction (or the constitutional authority to legislate extraterritorially),[16] and that Congress exercised that authority.[17] The Supreme Court has repeatedly held that Congress has the constitutional power to enact extraterritorial legislation, ruling that "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."[18] While federal appellate courts

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[15] Traditionally statutes were generally understood to apply "extraterritorially" when they regulated conduct occurring beyond U.S. borders. Parrish, *supra* note 13, at 1462 ("When a state uses its legislative jurisdiction to regulate the conduct of those outside its borders, the law has been applied extraterritorially."); Kramer, *supra* note 12, at 181.

[16] Legislative jurisdiction, Congress's power to make law, is distinct from the executive branch's enforcement jurisdiction or the judiciary's adjudicative jurisdiction. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (AM. LAW. INST. 1987); Parrish, *supra* note 13, at 1462.

[17] *See* United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 443 (2d Cir. 1945) ("[T]he only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so.").

[18] EEOC v. Aramco, 499 U.S. 244, 248 (1991). The Court was likely referring to Congress's authority to prescribe law, not literally to enforce it. The Constitution

have interpreted the Due Process Clause of the Fifth Amendment to the U.S. Constitution to limit the extraterritorial applicability of federal law (and particularly criminal law), they have very rarely sustained due process challenges,[19] and the Supreme Court has not yet considered whether the Due Process Clause imposes any such limits.[20] It is generally accepted that Congress's constitutional authority to legislate extraterritorially is not diminished when applying U.S. law abroad violates or may violate international law,[21] although some federal appellate courts have looked to international law in determining when the Due Process Clause prohibits extraterritorial application of U.S. law.[22] In sum, it is well-settled that the Constitution does not categorically prohibit Congress from enacting statutes that apply beyond U.S. borders and, on the contrary, imposes few restrictions on Congress's power to enact such laws.

Given Congress's broad constitutional authority, U.S. courts need ordinarily conclude only that Congress in fact legislated extraterritorially as "a matter of statutory construction" in order to

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permits Congress to "regulate Commerce with foreign Nations," U.S. CONST. art. I, § 8, cl. 3, to effectuate treaties under the Necessary and Proper Clause, *see id.* cl. 18, and to "define and punish . . . Offences against the Law of Nations," *id.* cl. 10. *See generally* Colangelo, *supra* note 1, at 1030-31. Courts and commentators have for the most part devoted relatively little attention to defining or elaborating these potential sources of constitutional authority for Congress to legislate extraterritorially. *See Baston v. United States*, 137 S. Ct. 850, 851 (2017) (Thomas, J., dissenting from the denial of certiorari) (noting that "this Court has never thoroughly explored the scope of the Foreign Commerce Clause" (internal quotation marks omitted)); Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 951-52 (2010) (explaining that the Foreign Commerce Clause "remains an incredibly under-analyzed source of congressional power"); Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149, 150 (2009) (describing the impact of the Define and Punish Clause on Congress's power to legislate extraterritorially as "a serious and previously unexplored question").

[19] Julie Rose O'Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 GEO. L.J. 1021, 1080 (2018).

[20] Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 HASTINGS INT'L & COMP. L. REV. 323, 347 (2012).

[21] Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 L. & POL'Y INT'L BUS. 1, 5 (1992); Meyer, *supra* note 13, at 125.

[22] *See* cases cited *infra* note 358.

apply a statute abroad.[23] U.S. courts developed the presumption against extraterritoriality for interpretive guidance because many U.S. statutes are silent, ambiguous, or implausibly expansive as to their extraterritorial reach.[24] Applying such statutes without any territorial limitations was regarded by courts as an absurd result that Congress would not have intended, and which would have created the potential for conflicts of law and friction with other nations. For instance, in 1818, the Supreme Court held in *United States v. Palmer*[25] that a reference to "any person or persons" in a statute penalizing certain crimes committed "upon the high seas" was "broad enough to comprehend every human being," and must instead be limited according to the "intent of the legislature."[26] Similarly, in 1953 in *Lauritzen v. Larsen*,[27] the Court noted that the Jones Act by its terms applied to "any seaman,"[28] and, "read literally," provided recourse in U.S. courts under U.S. law "to all alien seafaring men injured anywhere in the world in service of watercraft of every foreign nation."[29] Rejecting this literal reading as implausible, the Court concluded that such generally worded statutes must be construed to have some geographic limits.[30]

U.S. courts developed the presumption against extraterritoriality in part by reference to rules of public international law that prevailed early in the nineteenth century. The presumption originated as an application of the *Charming Betsy* canon,[31] which required courts to construe U.S. statutes so as not to violate international law unless no "other possible construction remains."[32]

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[23] *See, e.g.*, *Aramco*, 499 U.S. at 248 ("Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. Whether Congress has in fact exercised that authority . . . is a matter of statutory construction." (citation omitted)); Foley Bros. v. Filardo, 336 U.S. 281, 284-85 (1949).

[24] *See* Meyer, *supra* note 13, at 184-86 (providing extensive list of criminal laws without any territorial limitation); Born, *supra* note 21, at 7 ("[I]n the overwhelming majority of cases . . . federal statutes are couched in the most general terms and suggest no meaningful geographic limits.").

[25] 16 U.S. (3 Wheat.) 610 (1818).

[26] *Id.* at 631-32.

[27] 345 U.S. 571 (1953).

[28] *Id.* at 576-77 (citing Jones Act, 46 U.S.C. § 688 (1952) (current version at 46 U.S.C. § 30104)).

[29] *Id.*

[30] *Id.* at 592-93.

[31] Colangelo, *supra* note 1, at 1058-60.

[32] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); *see* Colangelo, *supra* note 1, at 1060.

Specifically, the *Charming Betsy* canon instructed courts to determine the extraterritorial reach of U.S. statutes by construing them not to violate international law limitations on the United States' legislative jurisdiction.

During the nineteenth century, the *Charming Betsy* canon and its doctrinal offshoot, the presumption against extraterritoriality, required the strictly territorial construction of U.S. law due to corresponding international law limits on prescriptive jurisdiction.[33] Under nineteenth century conceptions of international law, nation-states' legislative jurisdiction was largely limited to their territorial boundaries.[34] Consequently, when U.S. courts applied the *Charming Betsy* canon, they construed statutes to apply strictly territorially to avoid violating those international law limits on legislative jurisdiction.[35] Narrow exceptions, such as nation-states' rights to assert legislative jurisdiction over their nationals abroad, were acknowledged, but rarely invoked.[36]

For example, in 1824, the Supreme Court in *The Apollon*[37] construed a federal statute to apply only within U.S. territory, based on the principle that U.S. law should be interpreted not to violate international law.[38] In an opinion by Justice Story, the Court held that U.S. customs law was not applicable to the French ship "*Apollon*" while outside U.S. territory.[39] Relying on "the general principles of the law of nations," the Court held that "[t]he laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens."[40] Thus, it concluded that "general and

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33 Born, *supra* note 21, at 8-21.

34 *Id.* at 8-19 ("Most public international law authorities vigorously embraced the territoriality doctrine" and "Joseph Story's classic Commentaries on the Conflict of Laws . . . adopted a strictly territorial approach to choice of law . . . . Story's territoriality principle dominated conflict of laws thinking, in the United States and elsewhere, during the nineteenth century.").

35 *Id.* at 10 ("During the nineteenth century, a common application of the Charming Betsy presumption was to incorporate the American understanding that international law forbids the extraterritorial application of national laws." (citing Rose v. Himely, 8 U.S. (4 Cranch) 241, 279 (1808); United States v. Palmer, 16 U.S. (3 Wheat.) 610, 631 (1818); The Apollon, 22 U.S. (9 Wheat.) 362, 370-71 (1824); United States v. Flores, 289 U.S. 137, 155 (1933))).

36 *Id.* at 13-14.

37 22 U.S. (9 Wheat.) 362 (1824).

38 *Id.* at 369-70.

39 *Id.* at 368-72. The Court held that the Apollon was located in U.S. territory under U.S. law, but not under international law, and consequently treated the Apollon as though it were outside of U.S. borders. *Id.* at 368-69.

40 *Id.* at 369-70.

comprehensive" provisions in U.S. law "must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction."[41]

Almost a century later, in *American Banana Co. v. United Fruit Co.*,[42] the Supreme Court reaffirmed this strict version of the presumption against extraterritoriality. The plaintiff, a U.S. corporation, sued the defendant, also a U.S. corporation, for anticompetitive behavior that had taken place abroad.[43] In an opinion authored by Justice Holmes, the Court held that the Sherman Act did not apply,[44] citing both conflict of laws (private international law) and public international law principles. Applying the then-prevailing "vested rights" conflict of laws doctrine under which an act is governed by the law of the state in which it occurred,[45] the Court held that "[a]ll legislation is prima facie territorial."[46] The Court also held that the extraterritorial application of municipal law "would be unjust" and "an interference with the authority of another sovereign, contrary to the comity of nations."[47] Therefore, "in case of doubt," statutes containing general or universal language should be interpreted "as intended to be confined in [their] operation and effect to the territorial limits over which the lawmaker has general and legitimate power."[48]

1.2. 1909-1991: Inconsistent Erosion of the Presumption Against Extraterritoriality

In the twentieth century, U.S. courts changed their approach to interpreting the extraterritorial reach of U.S. statutes in several

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41 *Id.* at 370.

42 213 U.S. 347 (1909).

43 *Id.* at 354-55.

44 *Id.* at 357.

45 *Id.* at 356. *See generally* William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 121-23 (1998); Kramer, *supra* note 12, at 186-87.

46 213 U.S. at 357. Justice Holmes provided that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done," *id.* at 356, recognizing the potential for certain narrow exceptions, *id.* at 355-56.

47 *Id.* at 356.

48 *Id.* at 357.

important ways. First, U.S. courts weakened the presumption against extraterritoriality to permit applying U.S. statutes abroad more frequently, adopting an array of doctrinal tests and rationales that were neither consistently applied nor reconciled.[49] U.S. courts at times continued to apply a strictly territorial version of the presumption, but also construed statutes to apply extraterritorially where the case had a sufficient nexus to the United States or the conduct in question had produced effects in the United States.

Second, U.S. courts began to develop a presumption against extraterritoriality that was independent of the *Charming Betsy* canon and its reference to international law.[50] At the same time, however, courts also continued to cite international law and comity to justify and give content to the presumption against extraterritoriality;[51] they also occasionally invoked the *Charming Betsy* canon as a separate hurdle to applying a statute extraterritorially.[52]

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[49] Discerning unifying themes in U.S. courts' use of the presumption against extraterritoriality and the *Charming Betsy* canon during the twentieth century is difficult, but some commentators have nonetheless attempted to do so. *See, e.g.*, Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT'L & COMP. L. REV. 297, 304 (1996) ("U.S. law has been applied extraterritorially when that has served the national interest of the United States or its corporate actors, and it has been given a territorial application when a restrictive interpretation would serve those same ends."); Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 601 (1990) ("[C]ourts appear to be using outcome-determinative tests to consistently grant or deny extraterritorial claims according to the type of statute involved in the dispute. They consistently grant extraterritorial relief under 'market statutes,' like the antitrust and securities laws . . . . In contrast, 'nonmarket statutes' providing employment or environmental protections are consistently denied extraterritorial applications.").

[50] *See, e.g.*, Foley Bros. v. Filardo, 336 U.S. 281, 284-85 (1949) (making no reference to international law limits on legislative jurisdiction or to international comity, and instead justifying the presumption based on Congress's presumed focus on domestic concerns).

[51] *See* Lauritzen v. Larsen, 345 U.S. 571, 577-82 (1953) (turning to international law to determine extraterritorial applicability of the Jones Act); EEOC v. Aramco, 499 U.S. 244, 248 (1991) (holding that the presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord"); F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164-67 (2004) (holding that U.S. law is construed to comport with international law and comity, which the Court "must assume[] Congress ordinarily seeks to follow"); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613-15 (9th Cir. 1976) (inquiring whether "[a]s a matter of international comity and fairness" the Sherman Act should apply).

[52] Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 489-90 (1998)

Finally, as international law and state practice, frequently led by the United States, moved away from a strictly territorial conception of legislative jurisdiction in the twentieth century, U.S. courts relying on international law and comity in construing U.S. statutes did so as well.[53] Citing international law and state practice as they had in the previous century, U.S. courts applied different tests and reached different outcomes than they had previously.

1.2.1. Continued Application of a Strictly Territorial Version of the Presumption Against Extraterritoriality

The Supreme Court continued to apply a strictly territorial version of the presumption against extraterritoriality in some cases between 1909 and 1991. In *Foley Bros. v. Filardo*,[54] for example, the Court held that the Eight Hour Law, requiring overtime payments, did not extend to a U.S. citizen employed in Iraq and Iran by private contractors building public works for the U.S. government.[55] The Court held that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of

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("[C]ourts often invoke the *Charming Betsy* canon as a reason for construing ambiguous statutes as not having extraterritorial effect. Indeed, the Supreme Court has created a separate but related canon of construction for this issue, the 'presumption against extraterritoriality.' This presumption is designed, among other things, to avoid constructions of statutes that would violate customary international law. The *Charming Betsy* canon also is invoked as a justification for limiting the reach of statutes that are found to overcome the presumption against extraterritoriality." (footnotes omitted)).

[53] *See* Born, *supra* note 21 at 21-29, 67-71 ("The U.S. position on extraterritoriality has ultimately won a substantial measure of acceptance in the international community. . . . These changes in state practice inevitably altered customary international law limits on national legislative jurisdiction."); Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 844-56 (2009) ("[O]ther countries have followed the American extraterritorial example . . . . Over time, the United States' broad application of its own law extraterritorially has created a precedent . . . in other countries."). An illustrative example of the erosion of territorial notions of legislative jurisdiction in international law is the opinion of the Permanent Court of International Justice in *The Case of the S.S. Lotus*. The court explicitly rejected the notion that the legislative jurisdiction of states was limited to their territories and held instead that "national regulatory efforts are presumptively valid and states claiming that assertions of national jurisdiction violate international law have the burden of establishing this." Born, *supra* note 21, at 24-26 (citing The Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10.).

[54] 336 U.S. 281.

[55] *Id.* at 282-85.

the United States."[56] The Court then determined that the Eight Hour Law did not extend beyond U.S. territory because its language and legislative history provided no affirmative indication that it did.[57] This strictly territorial application of the presumption against extraterritoriality was justified as "a valid approach whereby unexpressed congressional intent may be ascertained . . . based on the assumption that Congress is primarily concerned with domestic conditions."[58]

1.2.2. The Effects Test

During the same period (1909-1991), U.S. courts also employed an effects test, which generally permits applying U.S. law to extraterritorial conduct as long as it produces effects within the United States. For instance, in *Ford v. United States*,[59] foreign defendants had participated in a conspiracy to import alcohol into the United States in violation of the National Prohibition Act (NPA), but had not entered U.S. territory.[60] The Court held that the NPA applied extraterritorially to the defendants based on "[t]he principle that a man, who outside of a country willfully puts in motion a force to take effect in it, is answerable at the place where the evil is done."[61]

Similarly, in *United States v. Aluminum Co. of America* (*Alcoa*),[62] the Second Circuit employed an effects test to determine the extraterritorial applicability of the Sherman Act.[63] Judge Learned Hand wrote for the Second Circuit, which sat as the court of last resort in unusual procedural circumstances.[64] *Alcoa* held that courts must construe statutes not to violate public international law or the "limitations customarily observed by nations upon the exercise of their powers," which it ruled "generally correspond to those fixed

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56 *Id.* at 285.

57 *Id.* at 285-91.

58 *Id.* at 285.

59 273 U.S. 593 (1927).

60 *Id.* at 600-01, 623.

61 *Id.* at 619-24.

62 148 F.2d 416 (2d Cir. 1945).

63 *Id.* at 443-44.

64 Dodge, *supra* note 45, at 124 ("Because the Supreme Court was unable to muster a quorum of six Justices, [*Alcoa*] was referred to the Second Circuit, which sat as the court of last resort.").

by the 'Conflict of Laws,'" or private international law.[65] The Second Circuit thus looked to conflicts of law principles and public international law, just as the Supreme Court had done in *American Banana*.[66] While the Supreme Court in *American Banana* had formulated a strictly territorial presumption against extraterritoriality when applying these principles,[67] the Second Circuit instead adopted an effects test.[68] The court held that the Sherman Act applied extraterritorially to conduct abroad that was intended to and did in fact have effects within the United States.[69] The Second Circuit interpreted conflict of laws principles and public international law to mandate a very different analysis than the Supreme Court had 35 years earlier in *American Banana*, due in significant part to perceived changes in public international law, conflict of laws principles, and state practice.[70]

1.2.3. The Rule of Reason or Multi-Factor Analysis Derived From Conflict of Laws Principles

Between 1909 and 1991, U.S. courts also cited conflict of laws principles in adopting a rule of reason or multi-factor analysis for the presumption against extraterritoriality. Conflict of laws thinking evolved after *American Banana* was decided from the vested rights theory to include a multi-factor analysis, sometimes termed the "rule of reason."[71] U.S. courts that cited conflict of laws rules to define the presumption against extraterritoriality adjusted the doctrine accordingly. Under the rule of reason, courts determining which state's law should govern a case "choose from among the interested states the one state with the 'most significant relationship' to the case."[72] Courts adapting the rule of reason to the presumption against extraterritoriality used the same multi-factor analysis to

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65 148 F.2d at 443 ("[W]e are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.'").

66 213 U.S. 347, 356-57 (1909).

67 *Id.*

68 *Alcoa*, 148 F.2d at 443.

69 *Id.* at 443-44.

70 Born, *supra* note 21, at 31-32.

71 Dodge, *supra* note 45, at 121.

72 *Id.* at 127-34.

determine whether to interpret U.S. law to apply to conduct or effects occurring partly outside U.S. borders.[73]

For instance, the Supreme Court adopted a "connecting factor" test derived partly from conflict of laws principles to determine the extraterritorial applicability of the Jones Act in *Lauritzen v. Larsen*.[74] A Danish sailor had been hired by a Danish citizen to work aboard a Danish vessel while temporarily in the United States, and was allegedly injured while aboard that ship in a Cuban harbor.[75] The Court first held, "in accord" with the *Charming Betsy* canon, that "usage as old as the Nation" required interpreting U.S. shipping law to apply extraterritorially only if the "international or maritime law" on choice of law would provide for the application of U.S. law.[76] International and maritime choice of law rules, the Court held, mandated weighing the "connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority" in order to resolve the conflict between Danish and U.S. law.[77] The Court concluded that the relevant factors under that conflict of laws analysis, such as the place of the wrongful act and the nationalities of the ship and plaintiff, counseled against applying the Jones Act extraterritorially,[78] and therefore construed the Act not to apply to the sailor's injury.[79]

Similarly, the Ninth Circuit combined an effects test with a rule of reason analysis derived from conflict of laws rules to determine the Sherman Act's extraterritorial applicability in *Timberlane Lumber Co. v. Bank of America*.[80] The court reasoned that an effect on U.S. commerce was "necessary to the exercise of jurisdiction under the antitrust laws," but not "a sufficient basis on which to determine whether American authority should be asserted in a given case as a matter of international comity and fairness."[81] The court therefore adopted a "jurisdictional rule of reason" that required weighing numerous factors to assess the conflict of laws and determine whether "in the face of it the contacts and interests of the United

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[73] Lauritzen v. Larsen, 345 U.S. 571, 577-78 (1953); Dodge, *supra* note 45, at 127-34.

[74] 345 U.S. at 582.

[75] *Id.* at 573.

[76] *Id.* at 576-82.

[77] *Id.* at 582.

[78] *Id.* at 583-91.

[79] *Id.* at 592-93.

[80] 549 F.2d 597, 613-15 (9th Cir. 1976).

[81] *Id.* at 613.

States are sufficient to support the exercise of extraterritorial jurisdiction."[82] These factors included the degree of conflict with foreign law or policy, the effects of the extraterritorial conduct on the United States as compared to any effects on other states, and the nationality or location of the parties.[83] The Ninth Circuit's approach in *Timberlane* proved influential, at least for a time, with numerous lower courts following its reasoning and the *Restatement (Third) of Foreign Relations Law* later adopting a version of its multi-factor analysis in Section 403.[84]

1.2.4. The "Nature of the Offense" Analysis

Between 1909 and 1991, U.S. courts also occasionally considered whether Congress intended federal criminal law to apply extraterritorially by reference to the "nature of the offense" being regulated. In *United States v. Bowman*,[85] the Supreme Court held that extraterritorial applicability of U.S. criminal law depended on "the purpose of Congress as evinced by the description and nature of the crime" along with "territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations."[86] The Court distinguished between statutes punishing crimes committed against private individuals, which do not apply abroad unless Congress "say[s] so in the statute,"[87] and statutes that "are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated."[88] For crimes against the government, Congress's intent regarding extraterritorial

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[82] *Id.* at 614-15.

[83] *Id.* at 614. The entire, but explicitly non-exhaustive, list of factors is "the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of businesses or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad." *Id.*

[84] *See generally* Born, *supra* note 21, at 35-39; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (AM. LAW. INST. 1987).

[85] 260 U.S. 94 (1922).

[86] *Id.* at 97-98.

[87] *Id.* at 98.

[88] *Id.*

applicability may "be inferred from the nature of the offense" being regulated.[89] Courts may infer that a statute applies extraterritorially for offenses that "are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home."[90]

1.3. 1991-2010: Increased Application of the Presumption Against Extraterritoriality

Between 1991 and 2010, the Supreme Court frequently relied on the presumption against extraterritoriality and often, but not invariably, reverted to a strictly territorial version of the canon. The rationales for the presumption against extraterritoriality shifted away from international law towards Congress's assumed domestic focus and, to a lesser extent, separation of powers concerns. The Court rarely cited international law and while it still asserted that the presumption serves to prevent unintended conflicts of law, it also repeatedly held that the presumption applies even absent any such potential conflicts. During this period, the presumption against extraterritoriality thus became almost entirely distinct from the *Charming Betsy* canon and its direction that U.S. courts interpret statutes not to violate international law.

In 1991, the Supreme Court in *EEOC v. Arabian American Oil Co.* (*Aramco*),[91] reaffirmed a strictly territorial approach to the application of U.S. law, similar to that of *American Banana*. The Court held that federal law "is meant to apply only within the territorial jurisdiction of the United States" "unless a contrary intent appears" for two reasons.[92] First, a strictly territorial presumption was said to implement "unexpressed congressional intent,"[93] because the Court assumes that Congress "is primarily concerned with domestic conditions" and "that Congress legislates against the backdrop of the presumption."[94] Second, the presumption prevents

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89 *Id.*

90 *Id.*

91 499 U.S. 244 (1991).

92 *Id.* at 248.

93 *Id.*

94 *Id.*

"unintended clashes between our laws and those of other nations."[95] Applying this strictly territorial version of the presumption, the Court held that Title VII of the Civil Rights Act of 1964 did not apply to a U.S. citizen hired in the United States by a U.S. company to perform work in Saudi Arabia. The Court concluded that there was no evidence of "the affirmative congressional intent required to extend the protections of Title VII beyond our territorial borders."[96]

Two years later, the Supreme Court issued two decisions—*Smith v. United States*[97] and *Sale v. Haitian Centers Council, Inc.*[98]—articulating a strictly territorial presumption against extraterritoriality that applied even though there were no potential conflicts of law.[99] In *Smith*, the Court ruled that the Federal Tort Claims Act (FTCA) did not apply to a construction contractor for a U.S. agency who died in Antarctica. The Court noted that Antarctica "has no recognized government,"[100] which made it unlikely that another state would assert legislative jurisdiction over Smith's death there in conflict with the FTCA. The Court nonetheless held that the presumption against extraterritoriality was applicable, reasoning that the canon serves not only to avoid conflicts with other nations' laws, but also reflects "the commonsense notion that Congress generally legislates with domestic concerns in mind."[101]

Shortly thereafter, in *Sale*, the Supreme Court similarly held that the protections of the Immigration and Nationality Act of 1952 (INA) did not extend to a group of Haitian migrants detained outside of U.S. territory by the U.S. Coast Guard.[102] The Court of Appeals had ruled that the presumption against extraterritoriality was inapplicable because there was no risk that the relevant

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95 *Id.*

96 *Id.* at 250-59.

97 507 U.S. 197 (1993).

98 509 U.S. 155 (1993).

99 In both cases the Court purported to apply the presumption against extraterritoriality only to bolster conclusions it had already reached by reference to other tools of statutory interpretation. *Smith*, 507 U.S. at 203-05 (ruling that the Federal Tort Claims Act did not apply extraterritorially largely due to the statute's text and structure, and relying on the presumption against extraterritoriality to resolve "any lingering doubt"); *Sale*, 509 U.S. at 171-77 (holding that the Immigration and Nationality Act of 1952 (INA) did not apply to certain Haitian migrants outside of U.S. territory based mainly on the text, structure, and history of the INA, and relying on the presumption against extraterritoriality to bolster this conclusion).

100 507 U.S. at 201.

101 *Id.* at 204 n.5.

102 509 U.S. at 158-60, 171-77, 188.

provision of the INA, which was enforceable "only in United States courts against the United States Attorney General, would conflict with the laws of other nations."[103] The Supreme Court rejected that conclusion and held that the presumption was applicable because it "has a foundation broader than the desire to avoid conflict with the laws of other nations."[104] The Court instead alluded briefly to the separation of powers as an alternate rationale, holding that the "presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility."[105]

In other decisions issued between 1991 and 2010, however, the Supreme Court did not apply a strictly territorial version of the presumption against extraterritoriality, as it had in *Aramco*, *Smith*, and *Sale*. In *Hartford Fire Insurance Co. v. California*,[106] decided just a week after *Sale*, the Court did not invoke the presumption to restrict the application of the Sherman Act. The Court cited precedent specific to the Sherman Act holding that the Act "applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States,"[107] and concluded that the Sherman Act applied to foreign defendants' actions in London reinsurance markets that affected (and were intended to affect) the U.S. insurance market.[108] The Court left open whether U.S. courts should refrain from applying the Sherman Act extraterritorially, on the basis of principles of international comity, where there is a conflict between U.S. and foreign law (holding in *Hartford Fire* there was no need to do so because there was no conflict between British and U.S. antitrust law).[109]

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103 *Id.* at 173-74.

104 *Id.* at 174, 188.

105 *Id.* at 188. The Court did not rely on the assumption that Congress legislates with "domestic concerns in mind" because the INA explicitly addressed immigrants. *See id*. at 206-07 (Blackmun, J., dissenting); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 97 (1998).

106 509 U.S. 764 (1993).

107 *Id.* at 795-96 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 n.6 (1986); United States v. Alcoa, 148 F.2d 416, 444 (2d Cir. 1945)).

108 *Id.* at 796-99.

109 *Id.* at 797-99. The Court ruled there was no such conflict even though the London reinsurers claimed their conduct was consistent with British law because they could have complied with both British and U.S. law. *Id.* at 798-99 ("No conflict exists, for these purposes, 'where a person subject to regulation by two states can comply with the laws of both.'" (citing RESTATEMENT (THIRD) OF THE FOREIGN

In *F. Hoffmann-La Roche v. Empagran*,[110] the Supreme Court once more justified the presumption against extraterritoriality by reference to international law and comity, and applied a new and relatively ill-defined reasonableness test for construing statutes to comply with those principles.[111] There, foreign plaintiffs alleged violations of the Sherman Act by conduct occurring almost entirely abroad, harming the plaintiffs outside of the United States, but also causing independent, additional harm to others within the United States.[112] The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) specifically addressed the extraterritorial applicability of the Sherman Act and provided that the Act applied to conduct involving trade or commerce with foreign nations only "where (roughly speaking) that conduct significantly harms imports, domestic commerce, or American exporters."[113] The Court construed the FTAIA to exclude the foreign plaintiffs' claims from the reach of the Sherman Act despite their allegation that the defendants' foreign conduct had impacted domestic commerce, reasoning that the alleged domestic impact was independent of the foreign harm for which the plaintiffs sought redress.[114]

In construing the FTAIA to exclude such claims, the Court cited principles of international law and comity (including the multifactor conflict-of-laws standard of the *Restatement (Third) of Foreign Relations Law*), which it held Congress presumptively seeks to follow under the *Charming Betsy* canon.[115] The Court distilled those principles into the mandate that statutes should ordinarily be construed to "avoid unreasonable interference with the sovereign authority of other nations."[116] The Court then concluded that

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RELATIONS LAW OF THE UNITED STATES § 403, cmt. e (AM. LAW. INST. 1987))). The Court in *Hartford Fire* thus "embraced a highly restrictive vision of comity and interests balancing in general." Meyer, *supra* note 13, at 140; *see also Hartford Fire Ins. Co.*, 509 U.S. at 820-21 (Scalia, J., dissenting) (concluding that "there is clearly a conflict in this litigation," because "[w]here applicable foreign and domestic law provide different substantive rules of decision to govern the parties' dispute, a conflict-of-laws analysis is necessary").

110 542 U.S. 155 (2004).

111 *Id.* at 164-67.

112 *Id.* at 158-59, 164.

113 *Id.* at 158 (citing Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a).

114 *Id.* at 164.

115 *Id.* (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (AM. LAW. INST. 1987)).

116 *Id.*

applying U.S. antitrust law to foreign conduct and thereby interfering "with a foreign nation's ability independently to regulate its own commercial affairs" is reasonable insofar as the law seeks to redress domestic injury.[117] The Court held such interference would not be reasonable to redress only foreign harm, as the plaintiffs requested in *Empagran*, because "the justification for that interference seems insubstantial."[118]

1.4. 2010-2020: The Morrison *Analysis*

By 2010, there was a general consensus that the presumption against extraterritoriality was incoherent and unpredictable, and that U.S. courts' application of various different tests had led to doctrinal confusion.[119] Over the course of the next decade, the Supreme Court sought to develop one generally applicable test for the presumption against extraterritoriality and to reconcile the varying rationales for the canon.[120] That new test, a two-part analysis announced in *Morrison v. National Australia Bank Ltd.*[121] and refined in *RJR Nabisco, Inc. v. European Community*,[122] marked a

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117 *Id.* at 165.

118 *Id.*

119 John H. Knox, *The Unpredictable Presumption Against Extraterritoriality*, 40 SW. L. REV. 635, 636 (2011) ("[T]he confusion has worsened since the Court purported to adopt a strict version of the presumption in the early 1990s."); Colangelo, *supra* note 1, at 1028 ("[T]he only thing courts and scholars seem to agree on is that the law in this area is a mess."); Parrish, *supra* note 13, at 1460-61 ("Condemned as incoherent and convoluted, a patchwork of incompatible rules presently governs legislative jurisdiction."); Elhauge, *supra* note 13, at 2235 (The presumption against extraterritoriality "has been strongly critiqued both normatively and for its inconsistent application.").

120 The Supreme Court acknowledged that there "are several reasons for" the presumption against extraterritoriality and sought to explain how the different rationales fit together. *See* RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090, 2100 (2016). The Court provided that the presumption is applied "across the board," "regardless of whether there is a risk of conflict between the American statute and a foreign law," because the presumption serves not only "to avoid . . . international discord," but also "reflects the more prosaic 'commonsense notion that Congress generally legislates with domestic concerns in mind.'" *Id.* at 2100 (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010); and then quoting Smith v. United States, 507 U.S. 197, 204 n.5 (1993)). The Court also held that while a risk of conflicts of law "is not a prerequisite for applying the presumption against extraterritoriality, where such a risk is evident, the need to enforce the presumption is at its apex." *Id.* at 2107 (citation omitted).

121 561 U.S. 247.

122 136 S. Ct. 2090.

significant change in U.S. courts' interpretation of federal statutes' extraterritorial reach and likely curtailed the number of federal statutes that will be applied extraterritorially.[123]

In *Morrison*, the Supreme Court substantially altered earlier formulations of the presumption against extraterritoriality. In an opinion authored by Justice Scalia, the Court adopted a two-part analysis to determine (1) whether a statute applies extraterritorially and, if not, (2) whether application of the statute would be impermissibly extraterritorial pursuant to a new "focus" test.[124] Australian plaintiffs owned shares in an Australian company, National Australia Bank Limited (National), that were traded on an Australian stock exchange.[125] Plaintiffs alleged that National, along with a U.S. company owned by National, engaged in deceptive behavior in Florida that impacted the value of their National shares in violation of § 10(b) of the Securities Exchange Act of 1934 (Exchange Act).[126] At the first step of the analysis, the Court determined that § 10(b) did not apply extraterritorially because there was no "clear" or "affirmative indication in the Exchange Act" that it should apply extraterritorially.[127]

The Supreme Court then adopted a "focus" test to determine whether applying § 10(b) to the facts presented in *Morrison* would involve an extraterritorial application of the legislation and thus be precluded by the presumption against extraterritoriality. The Court reasoned that the presumption is "not self-evidently dispositive" in cases like *Morrison*, where material facts arise both within the United States and abroad.[128] In these circumstances, ruling that a statute like § 10(b) does not apply extraterritorially sheds no light on whether its application is extraterritorial or domestic. In order to

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123 *See* Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. REV. 1, 7 (2014) ("Although the Supreme Court insists the presumption is not a clear statement rule, recent cases have approached this bright-line requirement.").

124 561 U.S. at 266-70.

125 *Id.* at 251-52.

126 *Id.* at 251-53.

127 *Id.* at 265. The Court rejected the suggestion that this standard amounted to a "clear statement rule" because "context can be consulted as well," *id.*, but that strict articulation of the presumption against extraterritoriality will permit few statutes to be applied abroad that do not explicitly provide for such application, Lea Brilmayer, *The New Extraterritoriality:* Morrison v. National Australia Bank, *Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. L. REV. 655, 660 (2011).

128 *Morrison*, 561 U.S. at 266.

resolve that question, the Court examined whether the statute's "focus," or the "objects of [its] solicitude," occurred abroad such that application of the statute in particular circumstances would qualify as extraterritorial.[129] The Court held that the focus of § 10(b) was "upon purchases and sales of securities in the United States," and "not upon the place where the deception originated."[130] The Court therefore concluded that applying § 10(b) to the deception in Florida would be impermissibly extraterritorial because the purchases and sales of the securities—the objects of the statute's solicitude—occurred on an Australian exchange.

Morrison significantly changed the presumption against extraterritoriality in several ways. First, the Supreme Court assessed separately whether § 10(b) of the Exchange Act applied extraterritorially and whether its application in *Morrison* was domestic or extraterritorial. Prior cases had not explicitly bifurcated the analysis in that way, and had instead generally simply determined whether a statute applied to the facts presented.[131] Second, and relatedly, the "focus" test that the Court adopted at step two of the analysis in order to assess whether a statute is applied extraterritorially in a given case is new.[132] That new "focus" test is a significant change to the presumption because it permits courts to define a statute's application as territorial (and therefore permissible) or extraterritorial (and therefore frequently impermissible) by reference to the statutory "focus" discerned by the court.[133] Third, the Court opined in dicta that the first step of the

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[129] *Id.* at 266-67.

[130] *Id.* at 266.

[131] *See, e.g.*, Lauritzen v. Larsen, 345 U.S. 571 (1953); F. Hoffmann-La Roche v. Empagran, 542 U.S. 155 (2004); *see generally* Brilmayer, *supra* note 127, at 664 ("The traditional one-step approach accommodated the same result without a second step . . . .").

[132] The Court in *Morrison*, 561 U.S. at 266, cited *EEOC v. Aramco*, 499 U.S. 244 (1991), which used the term "focus," but did not apply a focus test. In *Aramco*, the Court concluded that Title VII of the Civil Rights Act had "a purely domestic focus." 499 U.S. at 255. The Court did not assess the regulatory focus of Title VII and then examine whether the object of that focus had occurred in the United States in order to determine whether application of the statute would be extraterritorial, as the Court did in *Morrison*. *See generally* O'Sullivan, *supra* note 19, at 1059 ("[T]he *Morrison* Court chose to create its own 'focus' test, which had no precedential support."); Knox, *supra* note 119, at 645.

[133] The focus test permits courts to hold statutes inapplicable even where most of the cause of action occurs within the United States by holding that the statute's focus is an element located outside of the United States. Conversely, when a statute's focus is a domestic element of a case, the focus analysis requires courts to

Morrison analysis determines only whether a statute applies extraterritorially or not.[134] That strict dichotomy appears to preclude courts from determining at step one that a statute applies extraterritorially where conduct abroad has domestic effects,[135] or the United States has the most significant relationship to the case pursuant to a multifactor test,[136] as courts had previously done.

The Supreme Court's next decision applying the presumption against extraterritoriality, *Kiobel v. Royal Dutch Petroleum Co.*,[137] did not cite the "focus" test of *Morrison*. It instead held that the Alien Tort Statute (ATS) applies to "claims" that "touch and concern the territory of the United States . . . with sufficient force."[138] Nigerian nationals had filed suit against Dutch, British, and Nigerian companies under the ATS,[139] which grants U.S. district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations."[140] Plaintiffs contended that the defendant companies "aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria" and that the ATS therefore gave the district court jurisdiction to hear the case and grant relief under international law.[141]

The Court first concluded that it was constrained by the principles underlying the presumption against extraterritoriality in exercising the jurisdiction conferred by the ATS to recognize as federal common law causes of action under international law.[142] The substantive law applied pursuant to the ATS—international law that is applied as a matter of federal common law—is not statutory and is therefore not subject to limitation by a canon of statutory interpretation. The Court acknowledged that it "typically appl[ies] the presumption to discern whether an Act of Congress regulating

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treat the statute as if it has no extraterritorial effect, even if a substantial part of the cause of action occurs abroad.

134 The Court explained that "[i]f § 10(b) did apply abroad, we would not need to determine which transnational frauds it applied to; it would apply to all of them (barring some other limitation)." 561 U.S. at 267 n.9.

135 United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945).

136 *Lauritzen*, 345 U.S. 571.

137 569 U.S. 108 (2013).

138 *Id.* at 124-25.

139 *Id.* at 111-12.

140 Alien Tort Statute, 28 U.S.C. § 1350.

141 569 U.S. at 112-14.

142 *Id.* at 117, 124.

conduct applies abroad" and that the ATS is "strictly jurisdictional," but nonetheless concluded that "[t]he principles underlying the presumption against extraterritoriality" "similarly constrain courts . . . exercising their power under the ATS."[143] The Court cited the purpose of the presumption against extraterritoriality to "help[] ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches."[144]

After examining the text, historical background, and contemporaneous application of the ATS, the Court concluded "that nothing in the statute rebuts" the presumption against extraterritoriality.[145] The Court then asserted that in *Kiobel* "all the relevant conduct took place outside the United States," and held 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."[146] The Court concluded that the defendants' corporate presence in the United States did not suffice.[147] Although the Court did not elaborate on what would satisfy the "touch and concern" test, its analysis seemed to permit applying the ATS abroad when a cause of action has significant connections to U.S. territory. The Supreme Court did not mention *Morrison*'s focus test, which would instead require courts to apply the ATS only if the "focus" of the Act occurred in the United States, regardless whether the claims "touch and concern" U.S. territory. *Kiobel* thus called into question whether and how the analysis set forth in *Morrison* would be applied outside the context of the Exchange Act.

However, in two decisions on the presumption against extraterritoriality since *Kiobel*, the Supreme Court has twice applied the two-step *Morrison* analysis and has characterized *Kiobel* as

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143 *Id.* at 115-17.

144 *Id.* at 116-17.

145 *Id.* at 124.

146 *Id.* at 124-25. The Second Circuit ruled that the "touch and concern" part of the Supreme Court's opinion was dicta because its holding that "all the relevant conduct took place outside the United States" was dispositive. Balintulo v. Daimler AG, 727 F.3d 174, 190-91 & n.25 (2d Cir. 2013). The Supreme Court's opinion in *Kiobel* went on to say, however, that "mere corporate presence" does not suffice to "touch and concern the territory of the United States . . . with sufficient force." 569 U.S. at 124-25. While the Court's opinion is not entirely clear, the better reading is that the "touch and concern" test is not dicta because the Court applied it to the facts in *Kiobel*.

147 569 U.S. at 125.

applying that analysis as well.[148] In *RJR Nabisco*, the Court applied *Morrison*'s "two-step framework for analyzing extraterritoriality issues"[149] to the Racketeer Influenced and Corrupt Organizations Act (RICO).[150] RICO enumerates certain state and federal crimes (predicates) that implicate RICO when they form "part of a 'pattern of racketeering activity'—a series of related predicates that together demonstrate the existence or threat of continued criminal activity."[151] RICO imposes "prohibitions aimed at different ways in which a pattern of racketeering activity may be used to infiltrate, control, or operate" certain enterprises.[152] RICO prescribes criminal liability for violations of these prohibitions and creates a private right of action on the same basis for "[a]ny person injured in his business or property."[153] At issue in *RJR Nabisco* were claims by the European Community and 26 of its Member States against RJR Nabisco and related entities pursuant to that private right of action.[154]

The Court in *RJR Nabisco* held that the *Morrison* analysis applies "regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction."[155] The Court therefore

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148 In *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016), the Supreme Court held that both *Kiobel* and *Morrison* "reflect a two-step framework for analyzing extraterritoriality issues." *Id.* at 2101. The Court explained that in *Kiobel* it "did not need to determine, as [it] did in *Morrison*, the statute's 'focus'" because all relevant conduct occurred abroad. *Id.* at 2100-01. That mischaracterizes *Kiobel*. Instead of applying the "focus" test, the Court in *Kiobel* held that claims under the ATS could "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application," but that the *Kiobel* defendants' corporate presence in the United States did not suffice. 569 U.S. at 124-25. A concurrence by two Justices in *Kiobel* had applied *Morrison*'s "focus" test to the ATS, but the majority did not adopt that reasoning or refer to the focus test. *Id.* at 126-27 (Alito, J., concurring) (suggesting that *Morrison*'s "focus" test permits applying the ATS only where "the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations").

149 136 S. Ct. at 2101. The Supreme Court ruled that a court must first assess "whether the presumption against extraterritoriality has been rebutted" by a clear indication that it applies abroad, and second "determine whether the case involves a domestic application of the statute . . . by looking to the statute's 'focus.'" *Id.*

150 18 U.S.C. §§ 1961-1968.

151 *RJR Nabisco, Inc.*, 136 S. Ct. at 2096-97 (citing § 1961).

152 *Id.* at 2097 (citing § 1962).

153 *Id.* (citing §§ 1963(a), 1964(c)).

154 *Id.* at 2098.

155 *Id.* at 2101. This requirement for Congress to "reiterate its extraterritorial intent in every provision of a statute, whether jurisdictional, substantive, or

applied the *Morrison* analysis separately to RICO's substantive prohibitions and its private right of action. The Court first held that RICO's substantive prohibitions[156] applied extraterritorially insofar as the statutes defining its predicate offenses "manifest[] an unmistakable congressional intent to apply extraterritorially."[157] The Court assumed that the alleged predicate offenses in *RJR Nabisco* were committed in the United States or "in violation of a predicate statute that applies extraterritorially" because RJR Nabisco did not challenge the Second Circuit's ruling to that effect.[158]

The Court next turned to RICO's private right of action for "[a]ny person injured in his business or property by reason of a violation of" RICO's substantive prohibitions.[159] The Court concluded that there was no clear indication that RICO's private right of action applied extraterritorially, and that "[a] private RICO plaintiff therefore must allege and prove a *domestic* injury to its business or property."[160] The Court's opinion did not address the separate steps of the *Morrison* analysis, but its holding implies that the "focus" of RICO's private right of action is the plaintiff's injury, so the injury must occur in the United States in order for the statute's application to be domestic. The Court ruled that the plaintiffs' claims failed because the plaintiffs had "waiv[ed] their damages claims for domestic injuries."[161]

The Court's next ruling on the presumption against extraterritoriality—*WesternGeco LLC v. ION Geophysical Corp.*[162]—appeared to retreat from the requirement announced in *RJR Nabisco* to apply the presumption separately to every statutory provision. The Court in *WesternGeco* applied the *Morrison* test to a provision of

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remedial," is new, and it erects yet another hurdle to applying U.S. law abroad. Maggie Gardner, RJR Nabisco *and the Runaway Canon*, 102 VA. L. REV. ONLINE 134, 141-42 (2016).

156 The Court reserved judgment on the extraterritorial application of two of RICO's substantive prohibitions, § 1962(a), (d), upon which the parties had not focused in their briefing. 136 S. Ct. at 2103.

157 136 S. Ct. at 2102. The Court's requirement for "unmistakable congressional intent" further increased the clarity with which statutes must indicate extraterritorial applicability from *Morrison*'s requirement for a "clear" or "affirmative indication." 561 U.S. at 265.

158 136 S. Ct. at 2105.

159 *Id.* at 2106 (quoting § 1964(c)).

160 *Id.* at 2106-08.

161 *Id.* at 2111.

162 138 S. Ct. 2129 (2018).

the Patent Act permitting patent owners to recover damages for the export of components of infringing products from the United States.[163] Section 271(f)(2) of the Patent Act provided for liability for such infringement,[164] while Section 284 authorized "damages adequate to compensate for the infringement."[165] The question presented was whether these provisions allowed the plaintiff to recover lost profits incurred abroad.[166]

The Court started with step two of the *Morrison* analysis to avoid "resolving difficult questions that do not change the outcome of the case, but could have far-reaching effects in future cases."[167] Specifically, the Court declined to decide whether "the presumption against extraterritoriality should never apply to statutes . . . that merely provide a general damages remedy for conduct that Congress has declared unlawful."[168] The Court thus appeared to retreat from its unqualified ruling in *RJR Nabisco* that the presumption applies "regardless of whether the statute in question regulates conduct [or] affords relief."[169]

The Court then concluded that the focus of Section 284, which provides for "damages adequate to compensate for the infringement,"[170] was generally "the infringement" and in any particular case was determined by the provision imposing substantive liability for infringement.[171] The Court explained that the focus of Section 271(f)(2) was on "the domestic act" of supplying infringing components "in or from the United States."[172] Recovery of foreign lost profits was therefore a permissible domestic application of Section 284, as long as the components at issue were supplied from the United States in violation of Section 271(f)(2).[173]

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163 35 U.S.C. § 284.

164 *WesternGeco LLC*, 138 S. Ct at 2134-35 (citing 35 U.S.C. § 271(f)(2)).

165 *Id.* at 2135 (quoting § 284).

166 *Id.* at 2134.

167 *Id.* at 2136 (internal quotation marks omitted).

168 *Id.*

169 RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090, 2101 (2016).

170 *WesternGeco LLC*, 138 S. Ct. at 2137 (quoting § 284).

171 *Id.* at 2137-38.

172 *Id.* at 2138.

173 *Id.* at 2137-38.

1.5 The Presumption Against Extraterritoriality in 2020

Over the past decade (2010-2020), the Supreme Court has twice affirmed *Morrison* and has, it appears, firmly established its two-step analysis as the new presumption against extraterritoriality. The *Morrison* analysis has nonetheless been the subject of substantial scholarly criticism,[174] and it is not yet clear whether that analysis will or should govern in the long term.

It appears clear that *Morrison* is difficult to administer coherently in practice. For instance, as other critics have observed, the concept of a statute's "focus" is undefined and ambiguous, and the Court's instruction that "the object of the statute's solicitude . . . can turn on the conduct, parties, or interests that it regulates or protects"[175] provides lower courts with little meaningful guidance in assessing which aspects of a statute should be deemed the "focus" for purposes of determining extraterritoriality.[176] The "focus" test also gives rise to uncertainty in complex transnational disputes when courts seek to determine where the object of a statute's solicitude is located in a particular case.[177]

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[174] *See, e.g.*, Brilmayer, *supra* note 127, at 656 (concluding that *Morrison*'s "reworking of the presumption against extraterritorial application of American federal statutes is peddled as an antidote to federal judges run amok," but that the "new approach provides considerably greater opportunity for creative judging than the method it replaces"); O'Sullivan, *supra* note 19, at 1060 ("Although *Morrison*'s focus test was designed to promote predictability and clear jurisdictional line-drawing, it is unlikely to serve those ends."); Franklin A. Gevurtz, *Determining Extraterritoriality*, 56 WM. & MARY L. REV. 341, 342 (2014) (criticizing *Morrison*'s "focus" test as "entirely circular").

[175] *WesternGeco LLC*, 138 S. Ct. at 2138 (internal quotation marks and alterations omitted).

[176] *See, e.g.*, O'Sullivan, *supra* note 19, at 1060 ("The test is difficult to apply because Congress does not normally identify a statutory focus. Commentators are rightly concerned that it is therefore manipulable and subjective." (footnote omitted)); Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 NOTRE DAME L. REV. 1673, 1700 (2012) ("[E]ncouraging courts to . . . engage in a 'focus' analysis contributes little but obfuscation to the legislative jurisdiction analysis. . . . Presently, the test is so unformed that lower courts have almost no guidance on how to proceed in a principled way.").

[177] Aaron D. Simowitz, *The Extraterritoriality Formalisms*, 51 CONN. L. REV. 375, 379 (2019); *see* Jennifer Daskal, *The Un-Territoriality of Data*, 125 YALE L.J. 326, 326 (2015) ("Territoriality . . . depends on the ability to define the relevant 'here' and 'there,' and it presumes that the 'here' and 'there' have normative significance. The ease and speed with which data travels across borders, the seemingly arbitrary paths it takes, and the physical disconnect between where data is stored and where it is accessed critically test these foundational premises.").

In addition, the Court has left unanswered two significant questions about when the *Morrison* analysis applies. First, *RJR Nabisco* and *WesternGeco* do not provide lower courts clear direction as to which statutory provisions must separately be examined pursuant to the presumption against extraterritoriality. In *RJR Nabisco*, the Court held that the presumption applies regardless whether a statute "regulates conduct [or] affords relief,"[178] but two years later, in *WesternGeco*, the Court declined to decide whether the presumption "should never apply" to "general damages remed[ies]."[179] Similarly, *RJR Nabisco* implied that the focus of RICO's private right of action was on the plaintiff's injury and was thus independent from the focus of the liability provisions,[180] while *WesternGeco* assessed the focus of the Patent Act's damages remedy by reference to the provisions establishing liability.[181] The Court in *WesternGeco* sought to distinguish *RJR Nabisco* on the grounds that the private right of action at issue there involved "a substantive element of a cause of action, not a remedial damages provision,"[182] but the Court did not explain why that distinction is either relevant or decisive. It also left open whether the presumption against extraterritoriality applies separately to each element of a cause of action, to each element that is set forth in a separate statutory provision, or to some other subset of elements and provisions.[183]

Second, although the Supreme Court held in *RJR Nabisco* that the presumption against extraterritoriality applies "regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction,"[184] there is reason to doubt that the Court will apply the presumption separately to most jurisdictional

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178 RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090, 2101 (2016). The Court therefore applied the presumption separately to RICO's private cause of action and provisions imposing liability. *Id.* at 2106.

179 138 S. Ct. at 2136.

180 136 S. Ct. at 2111.

181 138 S. Ct. at 2137-38.

182 *Id.* at 2138.

183 *Cf.* Carlos M. Vázquez, *Out-Beale-Ing Beale*, 110 AJIL UNBOUND 68, 70-71 (2016) (observing that the Supreme Court in *RJR Nabisco* "did not explain why it singled out the place of injury instead of [the] other elements of the cause of action" created by Section 1964(c) of RICO); Franklin A. Gevurtz, *Building A Wall Against Private Actions for Overseas Injuries: The Impact of* RJR Nabisco v. European Community, 23 U.C. DAVIS J. INT'L L. & POL'Y 1, 23-27 (2016).

184 136 S. Ct. at 2101.

provisions.[185] The Court in *RJR Nabisco* cited *Kiobel* to justify its conclusion that the presumption applies separately to related statutory provisions, reasoning that the Alien Tort Statute at issue in *Kiobel* was "strictly jurisdictional."[186] That citation was inapposite. *Kiobel* was an unusual case because there was no substantive U.S. statute to which the Court could have separately applied the presumption against extraterritoriality; the ATS grants courts jurisdiction to recognize as federal common law causes of action under international law.[187] *Kiobel* therefore cannot stand for the proposition that other jurisdictional provisions must separately pass muster under the presumption against extraterritoriality.[188]

In addition, as numerous commentators have explained, applying the presumption separately to jurisdictional provisions is "ill-advised" and "irreconcilable with the Court's reasoning in other recent cases—including other portions of *RJR Nabisco*."[189] Congress generally does not specify extraterritorial applicability in jurisdictional statutes, and even in *RJR Nabisco* the Court did not separately apply the presumption to the general federal question statute.[190]

2. THE PRESUMPTION AGAINST EXTRATERRITORIALITY IS INCOMPATIBLE WITH TEXTUALISM

With this background on the presumption against extraterritoriality we can assess whether the canon complies with textualist tenets. Textualism instructs courts to give effect to the statutory text, read in context and against the remainder of the *corpus juris*. Textualists therefore embrace linguistic canons that help discern the meaning of statutory text. Substantive canons that

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185 William S. Dodge, *The Presumption Against Extraterritoriality Still Does Not Apply to Jurisdictional Statutes*, OPINIO JURIS (July 1, 2016), http://opiniojuris.org/2016/07/01/32658/ [https://perma.cc/5XJH-ZTEL].

186 136 S. Ct. at 2106 (citing Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 116 (2013)).

187 569 U.S. at 116. The Court acknowledged that it "typically appl[ies] the presumption to discern whether an Act of Congress regulating conduct applies abroad," and concluded that the "principles underlying the presumption against extraterritoriality" "similarly constrain . . . courts exercising their power under the ATS" to recognize causes of action. *Id.* at 116-17.

188 Dodge, *supra* note 185.

189 Gardner, *supra* note 155, at 142; *see also* Dodge, *supra* note 185.

190 Dodge, *supra* note 185 (citing 28 U.S.C. § 1331).

instruct courts to displace the best reading of a statute on the basis of an extrinsic policy are, by contrast, contrary to the textualist principle "that a faithful agent must adhere to the product of the legislative process."[191] Textualists therefore endorse only the subset of such substantive canons that have been applied so consistently that they form part of the background against which Congress legislates. Substantive canons that function only as tiebreakers to help courts choose among equally plausible interpretations are also permissible under textualism because they do not supplant Congress's instructions.

The presumption against extraterritoriality is a substantive canon because, generally speaking, it instructs courts to further the policy of limiting U.S. law to U.S. territory. The presumption may therefore be applied to displace the best reading of statutory text consistently with textualism only if the presumption forms part of the longstanding background conventions against which Congress legislates. Despite the presumption's roots in the early nineteenth century, U.S. courts' application of the canon has varied so frequently and dramatically that no single doctrinal standard forms part of the background against which Congress legislates. Courts' consistent reliance on the presumption against extraterritoriality in one form or another to restrict the applicability of universally worded statutes (referring to "any seaman,"[192] for example) has, however, given rise to a narrower background convention that complies with textualist tenets: Such universally worded statutes that contain no express territorial limitations should not be construed to apply throughout the world. As a consequence, courts may construe such statutes to have territorial limits consistently with textualism; importantly, however, in discerning what these territorial limits are, textualism requires one uniformly-applied test, which has thus far been badly lacking.

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191 Coney Barrett, *supra* note 6, at 124.

192 Lauritzen v. Larsen, 345 U.S. 571, 576-77 (1953) (citing Jones Act, 46 U.S.C. § 688 (1952) (current version at 46 U.S.C. § 30104)).

2.1. Textualism and Canons of Statutory Interpretation

Modern textualism was developed in the late twentieth century, in large part by Justice Scalia and Judge Easterbrook.[193] Most fundamentally, textualism requires judges to give effect to the statutory text enacted by the legislature.[194] Textualists conceive of U.S. courts as the "faithful agents" of Congress,[195] and maintain that the best way for judges to respect legislative supremacy is to focus on the meaning of the statutory text in context.[196] Textualism maintains that "courts must enforce a clearly worded statutory text even when its semantic import does not fully capture the statute's apparent purpose,"[197] and reject the notion that courts should separately seek to divine and implement Congress's "true intentions."[198]

Textualists ascribe primary importance to the statutory text for two main reasons. First, only statutes—"not legislative history, not legislative purpose, not legislative 'intent'—have gone through the constitutionally specified procedures for the enactment of law."[199] Second, textualists maintain that "multi-member legislatures do not have an actual but unexpressed 'intent' on any materially contested interpretive point."[200] Specifically, textualists contend that

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193 John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419-20 (2005) [hereinafter Manning, *Textualism and Legislative Intent*]; John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 73 (2006) [hereinafter Manning, *What Divides Textualists From Purposivists*]. Textualism has been evolving since its inception in the 1980s. *See generally* John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1292 (2010) [hereinafter Manning, *Second-Generation*]. I focus on the currently prevalent "second-generation" textualism. *Id.* at 1289-90.

194 Manning, *supra* note 4, at 2390.

195 Manning, *Textualism and Legislative Intent*, *supra* note 193, at 424, 430.

196 Manning, *supra* note 4, at 2456-58.

197 Manning, *Second-Generation*, *supra* note 193, at 1304. Textualism was conceived in part as a reaction to and refutation of purposivism. *See* Manning, *What Divides Textualists From Purposivists*, *supra* note 193, at 71-73; Manning, *Second-Generation*, *supra* note 193, at 1291-92. Purposivists traditionally maintained that judges should discern and implement Congress's true intentions, including by reference to legislative history, even if the statutory text fails to capture or even contradicts that true intent. *See* Manning, *What Divides Textualists From Purposivists*, *supra* note 193, at 71-72.

198 Manning, *Textualism and Legislative Intent*, *supra* note 193, at 420-21.

199 Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 416 (1989).

200 Manning, *Textualism and Legislative Intent*, *supra* note 193, at 420.

legislators instead have individual "desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate."[201] Textualists also claim "that the (often unseen) complexities of the legislative process make it meaningless to speak of 'legislative intent' as distinct from the meaning conveyed by a clearly expressed statutory command."[202] Finally, textualists maintain that legislation is "often the product of compromise" so that "judges cannot reliably use idealized background legislative intent as a ground for deviating from a clear and specific statute."[203]

Textualism instead instructs judges to determine "how 'a skilled, objectively reasonable user of words' would have understood the statutory text."[204] Rather than looking for actual congressional intent, textualists "focus primarily on '"objectified" intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.'"[205] Textualists thus do not limit statutory interpretation to the "four corners" of a statute, and they "believe that statutory language, like all language, conveys meaning only because a linguistic community attaches common understandings to words and phrases, and relies on shared conventions for deciphering those words and phrases in particular contexts."[206] Textualists accordingly consult dictionaries and "pay attention to the glosses often put on language (even in ordinary usage) [and] the specialized connotations of established terms of art."[207]

Textualists also apply canons of statutory interpretation.[208] Canons are generally divided into linguistic and substantive

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201 Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983).

202 Manning, *supra* note 4, at 2390.

203 *Id.* at 2410; *see also* Manning, *Second-Generation*, *supra* note 193, at 1304 (Textualists recognize that "legislation often represents unknowable compromise, that compromise often requires legislators to embrace means that do not fully effectuate the ends that inspired the law's enactment, and that judges who pursue a statute's background purposes at the expense of its implemental detail therefore risk undermining rather than furthering the legislative design.").

204 Manning, *Textualism and Legislative Intent*, *supra* note 193, at 434 (quoting Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988)).

205 Manning, *supra* note 5, at 16 (quoting SCALIA, *supra* note 5, at 17).

206 *Id.* at 108-09.

207 *Id.* at 109-10.

208 Coney Barrett, *supra* note 6, at 121. Canons are rules of thumb or "interpretive principle[s] that judges have customarily used" to aid them in

canons,[209] although commentators have adopted different terms for grouping the canons.[210] Textualists embrace linguistic canons, which set forth rules on how language in general and statutes in particular communicate meaning, and often deal with grammar or statutory structure.[211] For instance, the *expressio unius* canon provides that "[t]he expression of one thing" in a statutory provision "implies the exclusion of others."[212] Textualists favor the use of linguistic canons because they "deem it essential to foster clear and predictable linguistic and syntactic rules to permit legislators and interpreters to decode enacted texts."[213] Linguistic canons align with textualists' focus on the statutory text in context because their "very purpose is to decipher the legislature's intent."[214]

Substantive canons instruct courts to construe statutes to further policies extrinsic to the statute at issue.[215] Some substantive canons "serve simply as tie breakers between two equally plausible interpretations of a statute," while others require courts to "forgo the most plausible interpretation of a statute in favor of one in better accord with some policy objective."[216] Textualist judges often apply substantive canons,[217] but they are difficult to reconcile with

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interpreting and applying statutes. Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 543 (1997-1998).

209 Coney Barrett, *supra* note 6, at 117 (Canons are "traditionally classified as either linguistic or substantive.").

210 *See id.* at 117 n.27; Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992) (distinguishing between "descriptive" and "normative" canons).

211 *See* Coney Barrett, *supra* note 6, at 117, 121; ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 51 (2012) ("In whatever age or culture, human intelligence follows certain principles of expression that are as universal as principles of logic. . . . [These canons] are not 'rules' of interpretation in any strict sense but presumptions about what an intelligently produced text conveys.").

212 SCALIA & GARNER, *supra* note 211, at 107-11.

213 John F. Manning, *Legal Realism & the Canons' Revival*, 5 GREEN BAG 2d 283, 291-92 (2002).

214 Coney Barrett, *supra* note 6, at 117.

215 *Id.* at 117-18; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595-96 (1992).

216 Coney Barrett, *supra* note 6, at 117-18.

217 *Id.* at 122-23 (citing Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 345-46 (1998) (Thomas, J.), and Almendarez-Torres v. United States, 523 U.S. 224, 270 (1998) (Scalia, J., dissenting), for the constitutional avoidance canon; citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814-21 (1993) (Scalia, J., dissenting),

textualism unless they function merely as tiebreakers that resolve truly ambiguous statutory text.[218] Substantive canons that instruct courts to depart from the best reading of the statutory text in context are contrary to "the usual textualist practice of interpreting a statute as it is most likely to be understood by a skilled user of the language" and "the more fundamental textualist insistence that a faithful agent must adhere to the product of the legislative process, not strain its language to account for abstract intention or commonly held social values."[219] Indeed, Justice Scalia questioned "where the courts get the authority to impose" substantive canons, and "doubt[ed]" that courts can "really just decree that [they] will interpret the laws that Congress passes to mean less or more than what they fairly say."[220]

Textualists contend that some substantive canons are nonetheless compatible with their approach to statutory interpretation because they have become so ingrained that they constitute part of the background against which Congress legislates.[221] According to Justice Scalia, once canons "have been long indulged, they acquire a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its

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for the *Charming Betsy* canon; citing Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 946 (1997) (Thomas, J.), and Landgraf v. USI Film Prods., 511 U.S. 244, 286 (1994) (Scalia, J., concurring), for the presumption against retroactivity; citing Small v. United States, 544 U.S. 385, 399 (2005) (Thomas, J., dissenting), and EEOC v. Aramco, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment), for the presumption against extraterritoriality; citing United States v. Santos, 553 U.S. 507, 514 (2008) (Scalia, J.), for the rule of lenity). *See also* Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 762 (2013) ("But, in practice, even though [Justice Scalia] is one of the most vocal opponents of federal common law making, he is one of the most prolific users of both textual and policy canons.").

218 Coney Barrett, *supra* note 6, at 123-24.

219 *Id.* at 124. *See also, e.g.*, William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1542-43 (1998) ("But the problem is that the substantive, dice-loading canons risk the normative appeal of the new textualism: they are, as Scalia says, potentially undemocratic because they are judge-made presumptions and rules that Congress has a hard time trumping . . . and [they are] potentially destabilizing if judges succumb to the temptation of creating new canons or adjusting old ones to their changing tastes.").

220 SCALIA, *supra* note 5, at 28-29; *see also* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 582 (1990) ("I should think that the effort, with respect to *any* statute, should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right.").

221 *See* SCALIA, *supra* note 5, at 29 ("The rule of lenity is almost as old as the common law itself, so I suppose that [it] is validated by sheer antiquity." (footnote omitted)).

language."[222] Dean John Manning explains that "[t]his interpretive approach follows from the textualists' conception of meaning: . . . the meaning of a text depends on the shared background conventions of the relevant linguistic community," so that courts construing statutes "should consult the assumptions of a reasonable person conversant with legal conventions."[223] Because this justification depends upon canons' longstanding application, textualists "must largely accept the world as they find it, treating the existing set of background conventions as a *closed set*."[224]

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[222] Scalia, *supra* note 220, at 583. Similarly, Dean John Manning concludes that textualists employ canons of statutory construction, "including some substantive (policy-oriented) canons that have come to be accepted as background assumptions by virtue of longstanding prescription." Manning, *What Divides Textualists From Purposivists*, *supra* note 193, at 82.

[223] Manning, *supra* note 4, at 2467. Even when the substantive canons are applied so consistently that they attain the status of "shared background conventions," they do not become linguistic conventions in the sense that they form part of the way the legal community understands language. Many lawyers are likely at best superficially familiar with the most prominent substantive canons, and would need to consult treatises or precedent in order to determine how a specific substantive canon outside their regular practice applies. Distinguishing this type of shared substantive framework from linguistic conventions does not diminish the textualist claim that those substantive canons form part of the shared background between Congress and legal practitioners.

[224] *Id.* at 2474 (emphasis added). *See also* Eskridge, *supra* note 219, at 1543 (examining the compatibility of substantive canons with textualism and concluding that "[t]he longstanding substantive canons can be viewed as conventions underlying congressional deliberations," but identifying problems with this view when the Supreme Court modifies those canons or applies them inconsistently). I will treat textualists' acceptance of a "closed set" of longstanding and consistently applied substantive canons as a valid textualist tenet for purposes of this paper, but the matter is not entirely uncontroversial. For instance, Judge Barrett contends that the concept of a "closed set" cannot be justified on the basis that judicial development of substantive background norms is "a legitimate part of a legal system's evolution" but "dissipates once the legal system is mature." Coney Barrett, *supra* note 6, at 161. Furthermore, an empirical study by Professors Abbe Gluck and Lisa Schultz Bressman indicates that the congressional staffers who generally draft legislation may be unaware of some commonly-applied canons. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 945-47 (2013). Judge Barrett counters that linguistic canons at least are compatible with textualism insofar as they track common usage, regardless whether "*Congress* rejects them" because "courts are entitled to adopt a default presumption that Congress legislates in the language of the ordinary reader." Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2204-05 (2017).

2.2. The Presumption Against Extraterritoriality Is a Substantive Canon

The presumption against extraterritoriality instructs courts to construe statutes' extraterritorial reach by reference to principles and policies that are extrinsic to the statute at issue. Most fundamentally, the canon has generally required courts to interpret statutes to apply only within U.S. territory.[225] More specifically, courts applying the presumption against extraterritoriality have construed statutes' geographic scope in conformity with public international law governing prescriptive jurisdiction,[226] conflict of laws principles,[227] international comity principles,[228] an assumed congressional focus on domestic issues,[229] and separation of powers concerns.[230] Each of these iterations of the presumption requires courts to construe statutes according to an extra-statutory policy—ranging from compliance with international law or comity to the notion that U.S. law should presumptively not apply beyond U.S. borders—and none are focused on deciphering the statutory text by reference to rules about grammar or statutory structure. The presumption against extraterritoriality is therefore fairly clearly a substantive canon.[231]

Courts and commentators have at times sought to frame the presumption against extraterritoriality as linguistic, as descriptive of the way in which Congress legislates, or as a constitutionally

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[225] Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007) (describing the presumption against extraterritoriality as "[t]he presumption that United States law governs domestically but does not rule the world").

[226] *See, e.g.*, The Apollon, 22 U.S. (9 Wheat.) 362 (1824); Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (relying partly on public international law conceptions of national sovereignty in addition to conflict of laws principles); F. Hoffmann-La Roche Ltd. v. Empagran, 542 U.S. 155, 164 (2004) (holding that U.S. law is construed to comport with customary international law, which the Court "must assume[] Congress ordinarily seeks to follow").

[227] *See, e.g.*, Lauritzen v. Larsen, 345 U.S. 571, 582-93 (1953); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613-14 (9th Cir. 1976).

[228] *See, e.g.*, *Empagran*, 542 U.S. at 164-67 (applying "principles of prescriptive comity").

[229] *See, e.g.*, EEOC v. Aramco, 499 U.S. 244, 248 (1991).

[230] *See, e.g.*, Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 115-16 (2013) ("For us to run interference in . . . a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed." (alteration in original) (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957))).

[231] *See* Sunstein, *supra* note 199, at 460.

inspired clear statement rule, but these labels are inapposite. In *United States v. Delgado-Garcia*,[232] the U.S. Court of Appeals for the D.C. Circuit described the presumption against extraterritoriality as a "linguistic convention."[233] The court held that the presumption "embodies *sensible contextual linguistic* reasons for reading the plain texts of domestic statutes not to apply everywhere in the world."[234] The court reasoned that "[b]ecause Congress's primary arena of sovereignty is the territorial United States, it makes sense to presume, absent other evidence, that its commands *linguistically* apply only there."[235]

This characterization of the presumption against extraterritoriality as linguistic is unpersuasive. The presumption instructs courts to implement substantive policies and principles in construing statutes to apply (generally speaking) only within U.S. borders, and it is therefore substantive and not linguistic.[236] There is also no indication that English speakers in the United States assume that all words or proscriptions refer only to things within U.S. borders,[237] or understand all statutory language to apply only within U.S. borders.[238] Even for the linguistic community of those who draft and interpret U.S. law, the presumption against extraterritoriality is too complex and too dependent upon concepts of law and territorial sovereignty to plausibly be said to form part of

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232 374 F.3d 1337 (D.C. Cir. 2004).

233 *Id.* at 1345.

234 *Id.* at 1344 (emphasis added).

235 *Id.* (emphasis added).

236 *See supra* notes 215-16, 225-31 and accompanying text. *See also* Kramer, *supra* note 12, at 184 ("The Court's decision [in *Aramco*] thus reflects a normative judgment that it is preferable to restrict American law."); William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 682 (1999) ("Most of the substantive canons are hard if not impossible to defend on ordinary-use-of-language or this-is-what-the-legislature-would-want grounds.").

237 For instance, if a doctor instructed a patient not to run marathons, the patient would almost certainly understand that the prohibition applies both inside and outside U.S. borders.

238 Any assumptions as to whether U.S. law applies abroad are based on substantive considerations that are informed by the kind of legislation at issue. For instance, English speakers in the United States would likely not assume that federal legislation prohibiting the provision of material assistance to foreign terrorist groups, governing the conduct of U.S. soldiers, prohibiting the payment of bribes to foreign officials, or prohibiting the importation of illicit drugs or firearms into the United States applies only within U.S. borders. By contrast, English speakers in the United States may well assume that federal law governing different kinds of behavior, such as the possession of controlled substances, sale of pornography, and possession of firearms, would not apply to them overseas.

a shared understanding about the meaning of statutory text. The *Morrison* analysis, for example, requires interpreters of statutory text to apply a two-part test and consult the Court's relevant precedent; similarly, the standards in *Lauritzen*, *Timberlane*, and Section 403 of the *Restatement (Third) of Foreign Relations Law* require application of a multi-factor balancing test. Neither these nor other iterations of the presumption address or explain how Congress ordinarily uses language.

Incorrectly classifying the presumption against extraterritoriality as linguistic has serious consequences. As Judge Coney Barrett warned, "canons that ostensibly advance substantive values are sometimes rationalized as functionally linguistic," because "linguistic canons, which pose no challenge to legislative supremacy, are preferable to substantive canons, which do."[239] Defining the presumption against extraterritoriality as linguistic automatically validates the canon and obviates the need to assess whether the substantive justifications that courts and commentators have offered for the canon are valid.

The Supreme Court has at times framed the presumption against extraterritoriality as descriptive of the way Congress legislates, but that is also not a sound characterization or persuasive justification of the canon. In *Morrison*, for example, the Court held that the presumption "rests on the perception that Congress ordinarily legislates with respect to domestic . . . matters."[240] That assertion about Congress's usual focus is an unproven empirical assumption. Many statutes are silent as to their extraterritorial reach or contain no territorial limitations,[241] and it is not clear that Congress ordinarily considers or forms a view as to extraterritoriality.[242] The assumption that Congress "is primarily concerned with domestic

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239 Coney Barrett, *supra* note 6, at 120.

240 Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010). Professor Caleb Nelson has also described the presumption against extraterritoriality as a canon that "reflect[s] observations about Congress's own habits." Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 390 (2005).

241 *See, e.g.*, Meyer, *supra* note 13, at 184-86 (providing extensive list of criminal laws without any territorial limitation); Born, *supra* note 21, at 7 ("In the overwhelming majority of cases . . . federal statutes are couched in the most general terms and suggest no meaningful geographic limits.").

242 *See* Clopton, *supra* note 123, at 13 (concluding that "[i]n many circumstances, Congress may be agnostic"); Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 393 (1980) (providing that "in the vast majority of cases, legislatures *have* no actual intent on territorial reach").

conditions"[243] may nonetheless be reasonable, but this formulation of the presumption against extraterritoriality as merely descriptive risks confusing courts' enforcement of a substantive policy against extraterritorial application of U.S. law for empirical evidence of Congress's intent.[244] In addition, the assumption that Congress "primarily" legislates with respect to domestic matters provides little guidance to courts assessing whether a statute *also* applies to non-domestic, as well as domestic, matters or applies to a cause of action with some domestic and some extraterritorial elements. There are "many different ways to conceptualize domestic concern"—including a concern for domestic conduct, for extraterritorial conduct with domestic effects, and for extraterritorial conduct by U.S. nationals—and "different conceptions might make more sense for different types of legislation."[245]

The presumption against extraterritoriality is also not a constitutionally inspired clear statement rule despite the Supreme Court's occasional reference to separation of powers concerns to justify the canon. Constitutionally inspired clear statement rules are a subset of substantive canons that require Congress to state clearly that a statute impinges on a "constitutionally inspired value."[246] The Supreme Court has at times held that the presumption against extraterritoriality preserves the constitutional separation of powers because it prevents courts from making decisions with potential foreign policy consequences, which the Constitution entrusts to the

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

244 *See* EEOC v. Aramco, 499 U.S. 244, 248 (1991) (ruling that the presumption against extraterritoriality is "a valid approach whereby unexpressed congressional intent may be ascertained"); Kramer, *supra* note 12, at 184 ("[H]aving decided which course of action is generally preferable, courts assume that this is what 'reasonable' lawmakers would want.").

245 *See* Clopton, *supra* note 123, at 15.

246 *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 406-07 (2010). For example, courts have required Congress to "make its intention . . . unmistakably clear in the language of the statute" where "Congress intends to alter the usual constitutional balance between the States and the Federal Government." *Id.* at 407-10 (citing Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)). There is debate about whether constitutionally inspired clear statement rules are compatible with textualism. *See, e.g.*, *id.* at 403-05 (arguing that constitutionally inspired clear statement rules "impose something of a clarity tax upon legislative proceedings in particular areas" and impermissibly seek to enforce constitutional values in the abstract); Coney Barrett, *supra* note 6, at 111 (contending that "to the extent a canon is constitutionally inspired, its application does not necessarily conflict with the structural norms that constrain judges from engaging in broad, equitable interpretation").

political branches and which they are better suited to make.[247] In *Kiobel*, for instance, the Supreme Court held that the presumption "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches."[248] The Court explained that Congress alone "has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain."[249]

The presumption against extraterritoriality nonetheless does not qualify as a constitutionally inspired clear statement rule for two reasons. First, the separation of powers rationale applies in only a fraction of the cases involving the presumption against extraterritoriality. The Supreme Court often does not invoke the constitutional rationale for the presumption.[250] In addition, while a separation of powers rationale might arguably support a strictly territorial version of the canon, it is difficult to see how that rationale applies to various other iterations of the presumption. For example, the separation of powers rationale does not seem to support, and instead weighs against, courts assessing whether the application of U.S. law would result in "unreasonable interference with the sovereign authority of other nations,"[251] as the Supreme Court did

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247 *See, e.g.*, Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 115-16 (2013); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993) (The "presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility."); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20-22 (1963) (concluding that in the present "highly charged international circumstances," "there must be present the affirmative intention of the Congress clearly expressed" "for us to sanction the exercise of local sovereignty . . . in this delicate field of international relations." (internal quotation marks omitted)).

248 *Kiobel*, 569 U.S. at 116.

249 *Id.* (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)); *see also Aramco*, 499 U.S. at 248, 258 (emphasizing "the need to make a clear statement that a statute applies overseas" to prevent "unintended clashes between our laws and those of other nations which could result in international discord").

250 *See generally* Clopton, *supra* note 123, at 16. The primary rationales for the presumption against extraterritoriality over the past ten years instead seem to be the "basic premise of our legal system that, in general, 'United States law governs domestically but does not rule the world,'" RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090, 2100 (2016) (quoting Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)), and Congress's presumed focus on domestic concerns, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) (holding that the territoriality presumption "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign, matters").

251 F. Hoffmann-La Roche v. Empagran, 542 U.S. 155, 164 (2004).

in *Empagran*. Likewise, balancing tests that require courts to weigh the significance of factors connecting the "transaction regulated and the national interest served by the assertion of authority"[252] directly involve courts in the type of foreign policy assessments that the separation of powers rationale purportedly seeks to avoid.[253] The *Morrison* focus test also cannot be justified by reference to the separation of powers because it requires courts to apply statutes to extraterritorial conduct as long as the statute's "focus" is domestic, regardless of the potential for "foreign policy consequences not clearly intended by the political branches."[254]

Second, the presumption against extraterritoriality does not qualify as a constitutionally inspired clear statement rule because it raises as many separation of powers concerns as it allays. A default judgment against statutes' application beyond U.S. borders is itself a significant foreign policy judgment with potential consequences for the United States' foreign policy. In addition, the presumption against extraterritoriality impinges on the separation of powers by restricting Congress's power to legislate under Article I of the Constitution.[255] That is especially true where courts set a high bar for Congress to displace the presumption, as the Supreme Court has done pursuant to the *Morrison* analysis, requiring that a statute "manifest[] an unmistakable congressional intent to apply extraterritorially"[256] or a "clear" or "affirmative indication" to that effect.[257]

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252 Lauritzen v. Larsen, 345 U.S. 571, 582 (1953).

253 In *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10 (1963), the Court rejected the notion that it should balance foreign and domestic contacts to determine whether U.S. law applied to a foreign-flag ship. The Court refused to apply U.S. law extraterritorially absent clearly expressed congressional intent to the contrary, in part because the "purely ad hoc weighing of contacts" would "inevitably lead to embarrassment in foreign affairs." *Id.* at 19.

254 *Kiobel*, 569 U.S. at 116; *see* Colangelo, *supra* note 1, at 1045-46.

255 *See generally* Clopton, *supra* note 123, at 16-17. The presumption against extraterritoriality, formulated as a constitutionally inspired clear statement rule, thus raises the same concerns as other clear statement rules: By requiring Congress to formulate legislation more clearly than usual if it impedes a constitutionally inspired value protected by a clear statement rule, courts "increase[] the expense of enacting legislation" and "effectively impose[] a judicial tax upon legislation that seeks to achieve a constitutionally disfavored result." *See* Manning, *supra* note 246, at 425.

256 RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090, 2102 (2016).

257 Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 265 (2010).

2.3. Textualism and the Presumption Against Extraterritoriality

Because the presumption against extraterritoriality is a substantive canon, it is presumptively incompatible with textualism unless it is used only to choose among equally plausible interpretations of a statute.[258] Insofar as the presumption against extraterritoriality is applied to displace the most natural reading of statutory text, it accords with textualism only if its application is so longstanding and consistent that it forms part of the legal background against which Congress legislates.

Courts' variable and inconsistent application of the presumption against extraterritoriality since its inception in the early nineteenth century precludes it from forming part of the "closed set" of substantive canons that comply with textualism. Specifically, U.S. courts have interpreted the presumption to require strictly territorial construction of statutes,[259] to permit statutes to apply to extraterritorial conduct when its effects are felt within U.S. territory,[260] to mandate a multi-factor conflict of laws analysis for determining whether applying U.S. law would be reasonable,[261] and to permit the extraterritorial application of U.S. law where a statute's focus occurred in the United States.[262] Similarly, U.S. courts have justified the presumption with numerous competing, sometimes inconsistent, rationales: The Supreme Court has at different times asserted that Congress presumably intends for statutes not to violate international law,[263] and that Congress is assumed to legislate with domestic concerns in mind.[264] The Court has also held both that separation of powers concerns justify applying the presumption to prevent courts from engaging in foreign policy decision-making,[265] and that the presumption requires courts to engage in multi-factor

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258 *See supra* notes 218-19 and accompanying text.

259 *See, e.g.*, Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909); Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949).

260 *See, e.g.*, Ford v. United States, 273 U.S. 593, 620-24 (1927); United States v. Alcoa, 148 F.2d 416, 443-44 (2d Cir. 1945).

261 *See, e.g.*, Lauritzen v. Larsen, 345 U.S. 571, 582-93 (1953); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613-14 (9th Cir. 1976).

262 *Morrison*, 561 U.S. at 266-70.

263 F. Hoffmann-La Roche v. Empagran, 542 U.S. 155, 164 (2004).

264 *Foley Bros.*, 336 U.S. at 285.

265 Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 115-16 (2013).

balancing tests that inevitably involve foreign policy considerations.[266]

There is accordingly no single presumption against extraterritoriality that can form part of the "closed set" of substantive canons that are compatible with textualism by virtue of their longstanding and consistent application.[267] None of the numerous different doctrinal tests has been applied uniformly enough to form part of the "shared background conventions" of those who draft and interpret statutes.[268] Judges seeking to comply with textualism should therefore no longer apply the presumption against extraterritoriality to displace the most natural reading of statutory text.[269] Specifically, textualist judges should assess a statute's extraterritorial reach by reference to ordinary textualist tools of statutory interpretation. These include determining the statute's objectified intent, or "the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*,"[270] and referring to applicable linguistic canons and the "closed set" of longstanding substantive canons.[271] If a textualist judge can thereby determine a statute's extraterritorial reach—or the one most plausible interpretation of its extraterritorial reach where there are several possible readings—then he or she should not invoke the presumption against extraterritoriality to reach a different result.

The two-step analysis that the Supreme Court announced in *Morrison* in 2010 and has since developed in *RJR Nabisco* and *WesternGeco* was originally formulated by Justice Scalia, among the most committed proponents of textualism, but that analysis is particularly problematic for textualists. The Court's turn towards a particularly strict presumption against extraterritoriality that requires statutes to "manifest[] an unmistakable congressional

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266 *Lauritzen*, 345 U.S. at 581-93.

267 Manning, *supra* note 4, at 2474.

268 *Id.* at 2467.

269 Dean Manning has also noted that insofar as longstanding substantive canons are compatible with textualism because "the legislature presumably has them in mind when it chooses its language," "textualists should presumably attempt to identify and apply the conventions in effect at the time of a statute's enactment." *Id.* at 2474 n.318. This type of exercise would be patently absurd for the presumption against extraterritoriality, given the number of doctrinal tests that have been applied over the past two centuries and the courts' unpredictable selection among them.

270 Manning, *supra* note 5, at 16.

271 *See supra* notes 204-24 and accompanying text.

intent to apply extraterritorially,"[272] or a "clear" or "affirmative indication" to that effect,[273] is contrary to textualist tenets because it displaces the most plausible reading of statutory text unless Congress legislates with heightened clarity.[274] In addition, *Morrison*'s "focus" test is wholly new in several important respects,[275] and thus directly contradicts textualists' insistence that canons may displace the best interpretation of the statutory text only where they have been applied so consistently as to form part of a "closed set" of background conventions.[276] The *Morrison* analysis therefore also conflicts with textualists' commitment to consistency more generally,[277] realizing warnings that a textualist judge who develops the canons "common law style" "becomes just as unpredictable as, and may even come to resemble, her doppelganger the willful judge."[278]

Even though none of the doctrinal tests applied pursuant to the presumption against extraterritoriality form part of the "closed set" of longstanding substantive canons, U.S. courts' fairly consistent resort to various iterations of the canon in order to limit statutes that are worded universally and contain no explicit territorial restrictions nonetheless gives rise to a legitimate, albeit more narrow, background convention. The most straightforward interpretation of

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272 RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090, 2102 (2016).

273 Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 265 (2010).

274 *See* Brilmayer, *supra* note 127, at 657 ("In place of a less-than-perfect evidentiary showing about Congressional intentions, *Morrison* substitutes a purely judicial construct, 'focus,' that makes no pretense at all of reflecting what Congress wanted. So much for legislative supremacy." (footnote omitted)); Gardner, *supra* note 155, at 134 ("The presumption against extraterritoriality has become a means for judges (particularly Justices) to override Congress in defining the proper scope of litigation in U.S. courts.").

275 *See supra* notes 132-33 and accompanying text.

276 Manning, *supra* note 4, at 2474.

277 Scalia, *supra* note 220, at 588 ("Consistency is the very foundation of the rule of law.").

278 Eskridge, *supra* note 219, at 1545-46; *see also* Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 212 (1999) ("The creation of new canons and the manipulation of old ones provide the formalist with a safety valve—a device for avoiding textual readings that she cannot abide. When this proclivity to make law through canonical technique is combined with the neat trick of selectively relying upon some ambiguity to free the court to consider other factors, one must wonder whether the new formalism is, in practice, very formalistic at all.").

statutes that refer to "any seaman,"[279] "any court,"[280] or "every contract"[281] seems to be that they apply universally, to every seaman, court, and contract in the world. But the Supreme Court has consistently interpreted those and other universally worded statutes to apply only within the United States, or only in cases with significant connections to the United States.[282] A canon of statutory interpretation providing that such universal language does not speak to the issue of extraterritorial applicability and requires the judicial imposition of some territorial limitations has thus been applied consistently for a sufficient time to form part of the background against which Congress legislates. Courts may read territorial limitations into such statutes consistently with textualism, but in formulating those limits textualism should be understood to require that they adopt one test and apply it uniformly in order to further the textualist tenet that statutes should be interpreted predictably and consistently.[283]

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[279] Lauritzen v. Larsen, 345 U.S. 571, 576-77 (1953) (quoting Jones Act, 46 U.S.C. § 688 (1952) (current version at 46 U.S.C. § 30104)).

[280] Small v. United States, 544 U.S. 385, 387 (2005) (quoting 18 U.S.C. § 922(g)(1)).

[281] Foley Bros. v. Filardo, 336 U.S. 281, 282 (1949) (quoting Eight Hour Law, Pub. L. No. 199, § 1, 37 Stat. 137, 137 (1912) (repealed 1962)).

[282] *Lauritzen*, 345 U.S. at 576-77, 592-93 (ruling that the Jones Act did not apply to a Danish sailor who had been hired by a Danish citizen to work aboard a Danish ship while temporarily in the United States, and was allegedly injured while aboard that ship in a Cuban harbor); *Small*, 544 U.S. at 394 (concluding "that the phrase 'convicted in any court' refers only to domestic courts, not to foreign courts"); *Foley Bros.*, 336 U.S. at 290-91 (ruling that "the Eight Hour Law is inapplicable to a contract for the construction of public works in a foreign country over which the United States has no direct legislative control"); The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824) (concluding that "general and comprehensive" provisions in U.S. law "must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction"); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) ("Words having universal scope, such as 'every contract in restraint of trade,' 'every person who shall monopolize,' etc., will be taken, as a matter of course, to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch.").

[283] Scalia, *supra* note 220, at 588 ("Consistency is the very foundation of the rule of law. . . . [C]onsistency has a special role to play in judge-made law."); Manning, *supra* note 213, at 285 (Textualists "want clearly established background rules of construction to guide legislators and interpreters in decoding textual commands.").

3. A PROPOSED SOLUTION: ORDINARY STATUTORY INTERPRETATION AND A CONSISTENT PRESUMPTION AGAINST EXTRATERRITORIALITY FOR AMBIGUOUS AND UNIVERSALLY WORDED STATUTES

The extraterritorial reach of many statutes can be determined by applying ordinary tools of textualist statutory interpretation, including reading the text in context and with reference to linguistic canons. Where such simple interpretation is sufficient, courts seeking to comply with textualist tenets should no longer apply the presumption against extraterritoriality to displace the most plausible reading of statutory text. For statutes that are vague, ambiguous, or universally worded, textualism should be understood to favor adopting one consistent test rather than affording courts discretion to decide extraterritoriality on a case by case basis. Determining the precise contours of the canon is beyond the scope of this Article, but the most plausible option appears to be that adopted in the Supreme Court's early decisions on the topic—namely, construing statutes to comply with international law limits on legislative jurisdiction.

3.1. Many Cases in Which the Presumption Against Extraterritoriality Is Invoked Could and Should Be Resolved Using Ordinary Statutory Interpretation

U.S. courts often invoke the presumption against extraterritoriality where the geographic scope of a statute can be discerned by reference to ordinary tools of textualist statutory interpretation. In some such cases, courts cite the presumption in order to displace the most plausible reading of the statutory text, which, as discussed above, is contrary to textualist tenets. Judges seeking to comply with textualism should no longer rely on the presumption in those circumstances. In other cases, U.S. courts cite the presumption against extraterritoriality only to bolster the most plausible reading of statutory text. In those cases, the presumption is superfluous because courts would reach the same result without reference to the canon, but there is no real harm to invoking the presumption from a textualist perspective. Neither scenario requires the presumption against extraterritoriality to function as a tiebreaker for ambiguous statutes or to supply a narrowing

construction for universally worded statutory text; such cases are addressed in Section B.

In *Aramco*, for instance, the Court relied on the presumption against extraterritoriality to reach a result that was contrary to the most plausible reading of the statute. The question presented was whether the prohibitions on employment discrimination of Title VII of the Civil Rights Act of 1964 applied to a U.S. corporation's employment of Ali Boureslan, a U.S. citizen, in Saudi Arabia.[284] Title VII contained an "alien exemption provision," which provided that the statute "shall not apply to an employer with respect to the employment of aliens outside any State."[285] The alien exemption provision assumed that Title VII generally applies abroad by excepting certain extraterritorial matters—the employment of aliens outside the United States—from regulation.[286] The alien exemption provision thus made it relatively clear that Title VII applies to aliens employed in the United States and U.S. citizens employed both inside and outside the United States.

The Supreme Court nonetheless held that Title VII did not apply to the extraterritorial employment of U.S. citizens by U.S. corporations. The Court applied the presumption against extraterritoriality as a clear statement rule and thus searched for "the affirmative intention of the Congress clearly expressed," rather than for the best interpretation of the statutory text.[287] The Court held that the alien exemption provision did not meet that standard because interpreting Title VII to apply to U.S. employers of U.S. citizens abroad would extend the statute to *foreign* employers of U.S. citizens abroad as well.[288] The Court was "unwilling" to interpret Title VII to apply to foreign employers of U.S. citizens abroad, "which would raise difficult issues of international law," absent "clearer evidence of congressional intent to do so."[289]

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284 EEOC v. Aramco, 499 U.S. 244, 246-47 (1991).

285 *Id.* at 253 (quoting 42 U.S.C. § 2000e-1(a)). The jurisdictional provisions of Title VII were broad enough to encompass the case before the Supreme Court, as they rendered Title VII applicable to employers "engaged in an industry affecting commerce," which was in turn defined to include "trade . . . between a State and any place outside thereof." *Id.* at 249 (quoting 42 U.S.C. § 2000e(b), (g)).

286 *Id.* at 267 (Marshall, J., dissenting).

287 *Id.* at 248, 258 (majority opinion).

288 *Id.* at 255 ("[W]e see no way of distinguishing in [the alien exemption provision's] application between United States employers and foreign employers.").

289 *Id.*

The dissent in *Aramco* rightly concluded that the "available indicia of Congress' intent" established that Title VII applied extraterritorially to Boureslan's employment, and the majority had used the presumption to displace "insufficiently strong" congressional intent.[290] In addition, adopting the most plausible reading of the alien exemption provision and applying Title VII to U.S. employers of U.S. citizens abroad would not automatically extend the statute to foreign employers, as the *Aramco* majority feared. The reference to "an employer" in Title VII may be limited consistently with textualist tenets pursuant to the longstanding background convention that universal statutory language is subject to territorial limitation by the courts.[291] Courts could, for instance, construe the reference to "an employer" in Title VII consistently with international law limits on legislative jurisdiction, likely precluding the application of Title VII to foreign employers in most cases.[292]

In *Kiobel*, the Supreme Court likewise relied on the presumption against extraterritoriality to displace the most plausible interpretation of the Alien Tort Statute.[293] The ATS was enacted in 1789 and provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[294] The Court had previously in *Sosa v. Alvarez-Machain*[295] interpreted the ATS to grant federal courts jurisdiction to recognize certain

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290 *Id.* at 262, 266 (Marshall, J., dissenting) (emphasis omitted).

291 Title VII provides that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(1)(a).

292 As discussed above, courts seeking to comply with textualist tenets should uniformly apply one doctrinal test to statutes that are ambiguous or universally worded. *See supra* note 283 and accompanying text; *see also infra* notes 324-29 and accompanying text. The contents of that new substantive canon are beyond the scope of this Article, but the most plausible option appears to be construing statutes to comply with international law limits on legislative jurisdiction.

293 The Court in *Kiobel* held that "[t]he principles underlying the presumption against extraterritoriality . . . constrain courts exercising their power under the ATS." 569 U.S. 108, 117 (2013). For purposes of assessing whether U.S. courts rely on the presumption to displace the most plausible reading of statutory text, it makes no difference whether the Court's ruling is framed as an extension of the presumption against extraterritoriality to a jurisdictional statute or application of the principles underlying it.

294 Alien Tort Statute, 28 U.S.C. § 1350 (1948).

295 542 U.S. 692 (2004).

causes of action under international law.[296] The Court had determined that the ATS was drafted to address a "narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs," namely "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[297] The Court had held that the ATS therefore grants courts jurisdiction to recognize claims "based on the present-day law of nations" only where they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the [three] 18th-century paradigms."[298]

At issue in *Kiobel* was "under what circumstances courts may recognize a cause of action under the Alien Tort Statute, for violations of the law of nations occurring within the territory of a sovereign other than the United States."[299] The Supreme Court did not seek to discern the best reading of the statute, but ruled that "to rebut the presumption, the ATS would need to evince a clear indication of extraterritoriality."[300] The Court concluded that "nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach" because violations of the law of nations "affecting aliens can occur either within or outside the United States."[301] While it is true that violations of aliens' rights under international law can occur in U.S. territory, the reference in the ATS to both aliens and international law fairly clearly indicates that Congress was not primarily concerned with wholly domestic matters.[302]

The better textualist reading of the ATS is instead that it permits federal courts to recognize substantive causes of action under international law in accordance with the international law governing prescriptive jurisdiction.[303] The ATS grants U.S. courts jurisdiction to hear certain claims for violations "of the law of

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296 *Id.* at 724.

297 *Id.* at 715.

298 *Id.* at 725.

299 Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 112-13 (2013).

300 *Id.* at 118 (internal quotation marks omitted).

301 *Id.*

302 *Cf.* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) (holding that the presumption against extraterritoriality "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign, matters").

303 *See Kiobel*, 569 U.S. at 132 (Breyer, J., concurring).

nations or a treaty of the United States."[304] The substantive international law that federal courts may recognize pursuant to the ATS is subject to no territorial limitation, but international law restricts states' exercise of legislative jurisdiction. The ATS's grant of jurisdiction to recognize as federal common law (and thus U.S. domestic law) causes of action under international law should be understood to incorporate those international law limits on states' prescriptive jurisdiction as well. In the absence of any statutory provision addressing the extraterritorial reach of the ATS, that reading best approximates the statute's objectified intent, or the "intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."[305]

In addition, the historical context in which the ATS was enacted indicates that its grant of jurisdiction is not limited to causes of action that arise in or touch and concern U.S. territory, as the Supreme Court held.[306] Piracy was one of the three paradigmatic 18th-century offenses that the *Sosa* Court concluded "was probably on minds of the men who drafted the ATS."[307] As Justice Breyer's concurring opinion in *Kiobel* observed, piracy takes place not just on the high seas beyond U.S. borders, but on ships, which are generally considered to be subject to the jurisdiction of the country whose flag they fly.[308] This historical backdrop to the ATS leaves little doubt that it was likely expected to apply beyond U.S. borders on ships that may well be subject to the jurisdiction of another state. The *Kiobel* majority sought to diminish the importance of the piracy example on the basis that applying U.S. law to pirates on the high seas had "less direct foreign policy consequences" because it generally did not impose "the sovereign will of the United States onto conduct occurring within the *territorial* jurisdiction of another sovereign."[309] Even assuming that the foreign policy consequences are lessened where U.S. law is applied in another state's jurisdiction, but not its territorial jurisdiction, the point still holds that the ATS was fairly clearly intended to have some extraterritorial application.

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304 28 U.S.C. § 1350.

305 Manning, *supra* note 5, at 16.

306 *Kiobel*, 569 U.S. at 124-25.

307 Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004).

308 *Kiobel*, 569 U.S. at 130 (Breyer, J., concurring); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 502 (AM. LAW. INST. 1987).

308 *Kiobel*, 569 U.S. at 130 (Breyer, J., concurring).

309 *Id.* at 121 (majority opinion) (emphasis added).

In *Smith*, by contrast, the Supreme Court invoked the presumption against extraterritoriality only to bolster its conclusion that the FTCA did not apply to tortious acts or omissions by the United States in Antarctica.[310] The Court "turn[ed] first to the language of" the FTCA's foreign country exception, which provided that "the FTCA's waiver of sovereign immunity does not apply to '[a]ny claim arising in a foreign country.'"[311] The Court held that the "commonsense meaning of the term" "country" included spaces like Antarctica, with no recognized government.[312] Acknowledging that the foreign-country exception was susceptible to multiple interpretations, the Court then turned to other provisions in the FTCA to reinforce its conclusion that the FTCA does not apply in Antarctica.[313] Only then did the Court cite the presumption against extraterritoriality, holding that it required "that any *lingering doubt* regarding the reach of the FTCA be resolved against its encompassing torts committed in Antarctica."[314] The presumption was thus superfluous, and textualists could have resolved the case in exactly the same way solely by reference to the text of the FTCA.

In sum, the geographic scope of many U.S. statutes can be determined by reference to ordinary tools of textualist statutory interpretation. In cases like *Smith*, courts cite the presumption only to bolster the result they would have reached via ordinary statutory interpretation. The presumption against extraterritoriality is superfluous in such cases, and there is no real harm or benefit from a textualist perspective in citing the canon. In cases like *Aramco* and *Kiobel*, by contrast, the presumption is used to displace the most plausible interpretation of the statutory text, read in context and against the remainder of the *corpus juris*.

Judges seeking to comply with textualist tenets should instead adopt the most plausible reading of the text and should no longer rely on the presumption against extraterritoriality to change the outcome in such cases. More specifically, textualist judges should

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310 Smith v. United States, 507 U.S. 197, 201-04 (1993); *see supra* note 99.

311 507 U.S. at 201 (quoting Federal Tort Claims Act, 28 U.S.C. § 2680(k)).

312 *Id.* (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 609 (2d ed. 1945)).

313 *Id.* at 201-03. For example, the Court determined that interpreting the FTCA to apply in Antarctica would lead to a "bizarre result" because the statute waives sovereign immunity only where tortious conduct would incur liability "in accordance with the law of the place where the act or omission occurred," and Antarctica has "no law." *Id.* at 201-02 (citing Federal Tort Claims Act, 28 U.S.C. § 1346(b)).

314 *Id.* at 203-04 (emphasis added).

seek to discern a statute's extraterritorial reach by reference to traditional textualist tools of statutory interpretation, including focusing on the statute's objectified intent along with permissible canons of statutory interpretation. Where that analysis permits a textualist judge to determine a statute's extraterritorial reach—or the most plausible interpretation of the statute's extraterritorial reach—the judge should not turn to the presumption against extraterritoriality to reach a different result.

3.2. Textualism Should Require Adopting a Consistent Canon for Determining the Extraterritorial Reach of Ambiguous and Universally Worded Statutes

In some cases, statutes will prove indeterminate as to their extraterritorial reach even after application of ordinary tools of textualist statutory interpretation,[315] including universally phrased statutes that refer, for example, to "any seaman,"[316] or "every contract."[317] Textualism would permit a substantive canon to resolve this statutory indeterminacy, but courts have varied the presumption against extraterritoriality so significantly over the past two centuries that there is no single test for courts to apply. In these circumstances, textualism currently provides only that judges faced with a statute that is indeterminate as to its geographic scope must exercise discretion and resort to a measure of judicial lawmaking in choosing which doctrinal test to apply. That conclusion is unsatisfactory because it is contrary to the textualist principle that the law should be applied consistently, enabling voters to hold Congress accountable for its actions. Textualism should instead be understood to require adopting a consistent approach for construing the extraterritorial reach of statutes that are ambiguous or universally worded.

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[315] *See* sources cited *supra* note 24; F. Hoffmann-La Roche v. Empagran, 542 U.S. 155, 164 (2004) (explaining that the presumption against extraterritoriality helps construe "ambiguous statutes").

[316] Lauritzen v. Larsen, 345 U.S. 571, 576-77 (1953) (citing Jones Act, 46 U.S.C. § 688 (1952) (current version at 46 U.S.C. § 30104)).

[317] Foley Bros. v. Filardo, 336 U.S. 281, 282 (1949) (quoting Eight Hour Law, Pub. L. No. 199, § 1, 37 Stat. 137, 137 (1912) (repealed 1962)). As discussed above, there is a background convention that such universally phrased statutes are subject to some territorial limitation and should not be read to apply worldwide. *See supra* notes 279-83 and accompanying text.

Textualists recognize that statutes inevitably contain ambiguity and gaps, and that judges have substantial discretion in those cases. Textualists contend that "no statute can be entirely precise, and that the elaboration of statutory detail inevitably takes place outside the formal confines of bicameralism and presentment."[318] They conceive of statutory ambiguity as "essentially a delegation of policymaking authority to the governmental actor charged with interpreting a statute," and believe that "it is no violation of the obligation of faithful agency for a court to exercise the discretion that Congress has given it."[319] Textualists therefore recognize that "statutory indeterminacy . . . may at times involve judges in the exercise of substantial policymaking discretion."[320]

Textualism thus could appear to accord judges discretion to construe statutes that are indeterminate as to their extraterritorial reach by reference to any of the iterations of the presumption against extraterritoriality or, potentially, their own policy preferences rather than any of the iterations. To be sure, textualists acknowledge the legitimacy of relying on substantive canons in exercising a court's discretion to resolve statutory indeterminacy,[321] and would permit a canon to resolve indeterminacy with respect to such a statute's geographic scope. Critically, however, no such canon currently exists due to the inconsistent and variable application of the presumption against extraterritoriality that has produced numerous doctrinal tests without any coherent framework as to when which test should apply.[322] In these circumstances, textualism should be understood to require the development of a consistent canon of statutory interpretation for determining the extraterritorial reach of ambiguous and universally worded statutes.

The Supreme Court has recognized the need for such consistency. In *Morrison*, *RJR Nabisco*, and *WesternGeco*, the Court sought to formulate an iteration of the presumption against extraterritoriality that could be applied consistently and predictably and that would thus respond to these criticisms. Importantly,

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318 Manning, *supra* note 10, at 699 (internal quotation marks and footnote omitted); *see also id.* ("All general legal texts require exposition when applied to particular fact situations.").

319 Coney Barrett, *supra* note 6, at 123.

320 *See* Manning, *supra* note 10, at 701; *see also* SCALIA, *supra* note 5, at 35 ("Whatever Congress has not *itself* prescribed is left to be resolved by the executive or (ultimately) the judicial branch.").

321 Coney Barrett, *supra* note 6, at 123.

322 *See supra* notes 258-68 and accompanying text.

however, while the Court has twice affirmed the *Morrison* analysis over the past decade, significant questions remain about when the *Morrison* analysis applies, what it requires, and whether it can be administered coherently. It remains at best unclear whether the newest iteration of the presumption against extraterritoriality will or should apply in the long term.[323]

It is important to textualist principles that a consistent formulation of the presumption be adopted. A consistently applied canon for statutes that are indeterminate as to their extraterritorial reach would further textualist tenets in several ways. First, adopting a uniform rule would further the textualist principle that "the law must be consistent,"[324] and would give fair notice of the conduct a statute regulates.[325] (Consistent and predictable application of the law is, of course, a fundamental principle that is embraced by all schools of statutory interpretation,[326] and it should weigh in favor of a uniform approach to extraterritoriality for each of them). Second, a consistent test would serve "[t]extualism's simple ambition . . . to require legislators to accept responsibility for their legislative acts."[327] Regardless whether legislators actually take the canons into account in drafting statutes,[328] a clear rule about how the text will be

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323 *See supra* notes 174-90 and accompanying text.

324 Scalia, *supra* note 220, at 588; Frickey, *supra* note 278, at 207-08 ("If the new formalism has not resulted in greater predictability and certainty, however, it has failed on its own terms."); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 127-28 (2000) ("Justice Scalia . . . has said about the canons of construction that '[w]hat is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules,' which suggests that any clearly established canonical default rule is better than judicial vacillation between the possible rules." (quoting Finley v. United States, 490 U.S. 545, 556 (1989))).

325 In addition to providing notice of the law, a consistently applied canon would also save public and private resources by encouraging settlements and reducing litigation to determine whether a law applies extraterritorially.

326 *See* Scalia, *supra* note 220, at 588 ("Consistency is the very foundation of the rule of law. . . . [Y]ou will search long and hard to find anyone, in any age, who would reject the fundamental principle underlying the equal protection clause: that persons similarly situated should be similarly treated—that is to say, the principle that the law must be consistent."); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 Nw. U. L. REV. 1389, 1420 (2005) ("Consistency has the potential, after all, to reap efficiency gains both for the drafters of legislation (who may predict how their creation will be interpreted . . .) as well as those actors who must adapt their behavior based upon a prediction of how the court will interpret certain statutory law . . . .").

327 Manning, *supra* note 10, at 738.

328 *See* Gluck & Schultz Bressman, *supra* note 224, at 945-47 (showing that congressional counsel involved in drafting statutes were generally not familiar with many of the substantive canons).

construed permits voters to hold Congress accountable for the predictable outcomes of legislation.[329] Finally, developing one consistent doctrinal test rather than permitting courts to pick among the doctrinal tests applied in the past and their own policy preferences best accords with courts' consistent recognition that *a* test is required in order to address ambiguity on extraterritoriality, even if courts have thus far been unable to settle on one.

There are a variety of potential ways of determining U.S. statutes' geographic scope, but each approach is subject to criticism. Whether and to what extent U.S. law should be read to apply extraterritorially absent clear congressional instructions is a complex and difficult policy question and, as experience demonstrates, there are no easy answers. That said, the most plausible approach appears to be a presumption that Congress intends to legislate up to the limits imposed by U.S. conceptions of public and private international law,[330] at least with respect to civil law.[331] Relying on public international law to construe ambiguous

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[329] *Cf.* John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 388 (2010) ("Only canons capable of predictable application enable courts to produce the interpretive backdrop that allows Congress, the executive, and others affected by federal statutes to understand how they are likely (albeit not certain) to be applied.").

[330] Numerous commentators have argued in favor of an approach that takes into account international law on prescriptive jurisdiction. *E.g.*, Born, *supra* note 21, at 82 ("[C]ourts could presume that Congress has extended federal law to the limits prescribed by the principles of international law currently prevailing in the United States."); Knox, *supra* note 329, at 353 (arguing in favor of a "renewed presumption against extrajurisdictionality," the strength of which "would depend on the international law of legislative jurisdiction"); O'Sullivan, *supra* note 19, at 1087-88 (arguing that for civil cases "it makes sense to revert to the Court's historical practice of (1) determining, with reference to normal canons of statutory interpretation, the appropriate geographical scope of a statute in light of the statute's policy objectives and (2) applying the *Charming Betsy* canon as a means of determining whether the extraterritorial reach of a statute would offend international law"). U.S. conceptions of public international law on prescriptive jurisdiction and private international law conflict of laws principles are currently the subject of much discussion and debate. *See, e.g.*, RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 405-413 (AM. LAW. INST. 2018); Donald Earl Childress III, *International Conflict of Laws and the New Conflicts Restatement*, 27 DUKE J. COMP. & INT'L L. 361 (2017). Defining the exact contours that a new international law presumption would take in light of these ongoing developments is beyond the scope of this Article.

[331] Some scholars have cogently argued that criminal law should be subject to a separate, stricter presumption against extraterritoriality based on "foundational separation of power and legality principles that are central in criminal adjudication but that are not applicable in civil cases." O'Sullivan, *supra* note 19, at 1089; *cf.*

statutes avoids international strife by ensuring that the exercise of U.S. legislative jurisdiction abroad is viewed as legitimate by the international community.[332] Furthermore, construing U.S. law to comply with conflict of laws principles that require courts to balance the interests of different states with connections to a dispute would minimize conflicts with other states' laws while ensuring that U.S. law is likely to apply where the United States has substantial regulatory interests.[333] In addition, U.S. courts have long applied public and private international law principles in order to interpret federal statutes' extraterritorial reach.[334] While courts have not applied those principles uniformly, choosing an approach with a strong historical foundation is more consistent with textualists' embrace of longstanding background conventions than a novel or infrequently applied test would be.

It is beyond the scope of this Article to provide a comprehensive assessment of the tests that courts might adopt to construe ambiguous or universally worded statutes, but courts should not follow the two-part analysis set forth in *Morrison* and *RJR Nabisco* or turn to the Due Process Clause of the Fifth Amendment. As discussed above, the *Morrison* analysis is difficult to administer consistently and predictably for at least two reasons. First, the Supreme Court has defined the "focus" of a statute so broadly as to provide no real guidance to lower courts, holding only that the "object of the statute's solicitude . . . can turn on the conduct, parties,

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Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340, 393-98 (2019) ("The better judicial approach should continue to balance foreign affairs and criminal interests, but do so in a manner that is tilted away from foreign affairs deference and towards criminal legal reasoning."). Employing different analyses for federal criminal and civil law does not contradict this Article's suggestion that courts should pick one test and apply it uniformly. As Professors Julie Rose O'Sullivan and Steven Arrigg Koh explain, additional considerations apply to federal criminal law, and uniformly applying two separate analyses to federal criminal and civil law achieves the same consistency and predictability this Article recommends.

332 Knox, *supra* note 329, at 382 ("If a U.S. law extends beyond the boundaries set by international law, it will almost unavoidably cause conflicts with other countries, conflicts in which the United States will be widely perceived as being in the wrong.").

333 *See generally* Born, *supra* note 21, at 82-90.

334 *See, e.g.*, The Apollon, 22 U.S. (9 Wheat.) 362 (1824); Lauritzen v. Larsen, 345 U.S. 571 (1953); Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 818 (1993) (Scalia, J., dissenting) ("[T]he practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence."); United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945).

or interests that it regulates or protects."[335] Second, the Court has not provided clear instruction as to which statutory provisions must separately pass muster under the presumption against extraterritoriality in order for U.S. law to apply abroad.[336] In *RJR Nabisco*, the Court held that the presumption applies regardless whether the statute "regulates conduct [or] affords relief"[337] and applied the presumption separately to RICO's private cause of action and liability provisions,[338] while in *WesternGeco* it refused to decide whether the presumption applies separately to "general damages remed[ies]."[339] And even though the Court has held that the *Morrison* analysis applies where "the statute in question . . . merely confers jurisdiction,"[340] commentators have rightly doubted that the Court will apply the canon separately to jurisdictional provisions like the federal question statute.[341]

A more fundamental problem with the *Morrison* analysis is that there is no reason to think that a statute's "focus" has any relation to Congress's intent as to whether the statute should apply to a cause of action with extraterritorial elements.[342] Nor does the "focus" test require courts to engage with the issues that gave rise to the presumption against extraterritoriality, including conflicts of law, friction with foreign nations, international law, and the feasibility of extending U.S. law abroad.[343] Courts assessing a statute's "focus"

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335 WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2138 (2018) (internal quotation marks and alteration omitted).

336 *See supra* notes 178-90 and accompanying text.

337 RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090, 2101 (2016).

338 *Id.* at 2101-11.

339 138 S. Ct. at 2136-37. Similarly, *RJR Nabisco* assessed the focus of RICO's private right of action (the plaintiff's injury) independently from the focus of the provisions imposing liability, while *WesternGeco* looked to the Patent Act's provisions on substantive liability to determine the focus of the damages remedy. *Supra* notes 180-81 and accompanying text.

340 *RJR Nabisco, Inc.*, 136 S. Ct. at 2101.

341 *See supra* notes 184-90 and accompanying text.

342 Brilmayer, *supra* note 127, at 657 ("*Morrison* substitutes a purely judicial construct, 'focus,' that makes no pretense at all of reflecting what Congress wanted.").

343 Parrish, *supra* note 176, at 1674 ("Instead of wrestling with the difficult questions of whether Congress intended a law to apply to foreign conduct and, if so, whether doing so is constitutional or consistent with international law, some courts have sidestepped the issue of legislative jurisdiction entirely" by "redefining extraterritoriality itself."); *see also* Lauritzen v. Larsen, 345 U.S. 571, 582 (1953) (holding that maritime law "has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the

interpret the statute and may pay close attention to the statutory text and structure, but there is no obvious relation between this assessment and whether a statute should apply in a given case as a matter of congressional intent or policy.[344] Assessing a statute's focus in order to determine whether U.S. law applies thus realizes warnings about "textualism's greatest risk: converting the Court's role to answering a clever puzzle."[345]

The "focus" analysis thus leaves courts ill-equipped to assess the difficult questions presented by many complex, transnational cases.[346] For example, in *In re Warrant to Search a Certain E-Mail*

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transaction and the states or governments whose competing laws are involved," and that "in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction").

344 One might argue that even though the "focus" test does not require assessment of conflicts of law, international law, or friction with foreign nations, it will still on balance lead to sensible results from a policy perspective. That argument is difficult to assess (or to credit) because the Supreme Court has provided little guidance on how to discern a statute's "focus." In addition, the "focus" analysis has the potential to generate conflicts of law or friction with foreign nations where it deems application of U.S. law to be domestic and thus permissible because the "focus" occurred in the United States even though significant aspects of the cause of action arose abroad. *See* Hannah L. Buxbaum, *The Scope and Limitations of the Presumption Against Extraterritoriality*, 110 AJIL UNBOUND 62, 66 (2016) (noting the potential for "jurisdictional conflict" where "application of U.S. law to foreign conduct" is permissible under the *Morrison* analysis). Conversely, the "focus" test may treat application of U.S. law as extraterritorial (and thus impermissible unless the presumption is rebutted) even where substantial parts of a cause of action occurred in the United States as long as the "focus" occurred abroad, and thereby potentially undermine U.S. regulatory interests.

345 Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2074 (2017) (citing Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 372 (1994)); *see also* Richard A. Posner, *Statutory Interpretation – In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816-17 (1983) ("By making statutory interpretation seem mechanical rather than creative, the canons conceal, often from the reader of the judicial opinion and sometimes from the writer, the extent to which the judge is making new law in the guise of interpreting a statute . . . ."); Brilmayer, *supra* note 127, at 665 (contending that the "change in terminology" implemented in *Morrison* "moves the process further away from statutory interpretation").

346 *See* William J. Moon, *Regulating Offshore Finance*, 72 VAND. L. REV. 1, 50 (2019) ("When a [modern financial] transaction takes place either in multiple places or electronically, fixating on the location of that transaction is bound to result in arbitrary and inconsistent decisions. At worst, it creates loopholes for private actors to opt out of mandatory laws of the United States that are in part designed to

Account Controlled & Maintained by Microsoft Corp. ("*Microsoft*"),[347] Microsoft sought to quash a warrant issued under the Stored Communications Act (SCA) requiring Microsoft to import data stored in Ireland for delivery to federal authorities in the United States. The Second Circuit ultimately concluded that the focus of the SCA was "on the privacy of stored communications,"[348] so that executing the warrant "would constitute an unlawful extraterritorial application of the Act."[349] Whether, absent congressional instruction, U.S. law should be construed to permit federal authorities to command a U.S. company to produce data held extraterritorially is a hard question, especially considering the difficulty localizing the data in a meaningful way.[350] Rather than providing for courts to consider and address the issues that make the question difficult—such as the potentially conflicting interests of the United States and Ireland and whether international law would permit such a warrant—*Morrison* requires courts to solve "a clever puzzle" and discern a statutory focus that has no bearing on whether a statute should apply as a matter of congressional intent or policy.[351]

In adopting the two-step *Morrison* analysis, the Supreme Court sought to establish a clear rule for resolving cases with extraterritorial elements, in line with "formalist themes of

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safeguard the general public's interest at large."); Colangelo, *supra* note 1, at 1044 (In *Morrison*, "the Court essentially returned the law to the old vested rights theory in choice of law, in which an entire multijurisdictional claim was 'localized' based on a single element. . . . But the idea that localizing a multijurisdictional claim to one jurisdiction and then applying that jurisdiction's laws to all elements of the claim somehow does not implicate extraterritoriality is to engage in a legal fiction."); Simowitz, *supra* note 177, at 389 ("[T]he focus test has divided and perplexed the courts.").

347 829 F.3d 197 (2d Cir. 2016), *vacated as moot and remanded sub nom.* United States v. Microsoft Corp., 138 S. Ct. 1186 (2018).

348 *Id.* at 217.

349 *Id.* at 220. The Supreme Court granted certiorari, but before the case was heard Congress enacted legislation overturning the Second Circuit's ruling and providing that a service provider must disclose data in its "possession, custody, or control, regardless of whether such communication, record, or other information is located within or outside of the United States." Clarifying Lawful Overseas Use of Data Act, 18 U.S.C. § 2713; *see generally* United States v. Microsoft Corp., 138 S. Ct. 1186 (2018) (per curiam).

350 *See* Orin S. Kerr, *The Next Generation Communications Privacy Act*, 162 U. PA. L. REV. 373, 407-08 (2014).

351 *See* Simowitz, *supra* note 177, at 403 (arguing with respect to the Second Circuit's decision in *Microsoft* that it is not clear "why the larger question of which sovereign's law should apply should turn on server location").

predictability and judicial restraint."[352] The Supreme Court itself explained in *Morrison* that "the wisdom of the presumption against extraterritoriality" was to supply "a stable background against which Congress can legislate with predictable effects" "[r]ather than guess anew in each case."[353] But the mechanical test set forth in *Morrison*—like any mechanical test—is ill-suited to resolving the difficult questions raised by complex transnational cases.[354] While "textualists may in practice have a predilection for rules,"[355] the rule set forth in *Morrison* does not further textualist ends of consistency and predictability.

Courts may also be tempted to turn to the Due Process Clause of the Fifth Amendment for the contents of a new presumption against extraterritoriality. Over the past thirty years, federal appellate courts have increasingly interpreted the Due Process Clause to limit the extraterritorial applicability of U.S. law.[356] With respect to criminal legislation, federal appellate courts generally focus on whether application of the law to the defendant would be arbitrary

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[352] Colangelo, *supra* note 1, at 1044; Buxbaum, *supra* note 344, at 62 (referring to "the Court's continuing quest to identify categorical, territory-based rules governing the application of U.S. statutes in cases involving significant foreign elements").

[353] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 261 (2010).

[354] *See* Buxbaum, *supra* note 344, at 62 (arguing that "like other recent decisions, *RJR* raises doubt as to the sufficiency of such [categorical, territory-based] rules to address the messy and often unpredictable patterns of transnational economic activity"); Moon, *supra* note 346, at 52 (arguing that an "'aggregate contacts' test allows courts to progressively develop case law that adapts to new forms of cross-border commercial transactions that will continue to challenge territorially defined laws"); Zachary D. Clopton, *Territoriality, Technology, and National Security*, 83 U. CHI. L. REV. 45, 45 (2016) ("On issues of technology and national security, territorial rules seem particularly ill suited: territorial rules aspire to certainty, but technology makes it harder to define 'territoriality' in a consistent and predictable way; technology weakens territoriality as a proxy for policy goals because data often move in ways disconnected with the interests of users and lawmakers; and technology makes it easier for public or private actors to circumvent territorial rules . . . .").

[355] Manning, *Textualism and Legislative Intent*, *supra* note 193, at 424.

[356] *See generally* Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 159-65 (2007). No circuit to consider the issue has rejected the applicability of the Due Process Clause, but the D.C. Circuit has deferred ruling on the issue. In re Sealed Case, 936 F.3d 582, 593-94 (D.C. Cir. 2019) (concluding that the "ultimate question under the Due Process Clause . . . is whether application of the statute to the defendant would be arbitrary or fundamentally unfair," but withholding judgment on "whether the Due Process Clause constrains the extraterritorial application of federal criminal laws at all" (internal quotation marks omitted)).

or fundamentally unfair,[357] but courts sometimes disagree on what that test entails.[358] The law is much less developed in the civil context, but a few circuits have indicated that the Due Process Clause would impose limits here too.[359] The Supreme Court has not

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[357] United States v. Epskamp, 832 F.3d 154, 168-69 (2d Cir. 2016); United States v. Perez-Oviedo, 281 F.3d 400, 403 (3rd Cir. 2002); United States v. Brehm, 691 F.3d 547, 552-54 & n.7 (4th Cir. 2012); United States v. Murillo, 826 F.3d 152, 157 (4th Cir. 2016); United States v. Cardales, 168 F.3d 548, 552-53 (1st Cir. 1999); United States v. Rojas, 812 F.3d 382, 393 (5th Cir. 2016); United States v. Medjuck, 156 F.3d 916, 918-19 (9th Cir. 1998); United States v. Caicedo, 47 F.3d 370, 371-73 (9th Cir. 1995); United States v. Shi, 525 F.3d 709, 723-24 (9th Cir. 2008); United States v. Baston, 818 F.3d 651, 669 (11th Cir. 2016); *cf.* In re Sealed Case, 936 F.3d at 593-94.

[358] *See generally* Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1323-35 (2014) (arguing that "courts have spawned multiple tests for evaluating whether exercises of U.S. extraterritorial prescriptive jurisdiction satisfy due process"). For instance, courts disagree whether and when the Due Process Clause requires a nexus between a defendant's criminal conduct and the United States for crimes committed by foreigners aboard foreign vessels where the flag nation consents to the application of U.S. law. *Compare* United States v. Perlaza, 439 F.3d 1149, 1169 (9th Cir. 2006) (holding that consent of the foreign state to the application of U.S. law aboard a vessel flying the foreign state's flag "does not eliminate the nexus requirement" that the Due Process Clause imposes), *with Perez-Oviedo*, 281 F.3d at 403 (holding that no nexus is required where the criminalized conduct "is condemned universally by law-abiding nations," and that "consent from the flag nation eliminates a concern that the application of the [federal drug trafficking law] may be arbitrary or fundamentally unfair"), *and Cardales*, 168 F.3d at 553 ("[D]ue process does not require the government to prove a nexus between a defendant's criminal conduct and the United States in a prosecution under [a drug trafficking law] when the flag nation has consented to the application of United States law to the defendants."). Courts also have different conceptions of the role of international law in the due process analysis. *See Cardales*, 168 F.3d at 553 ("In determining whether due process is satisfied, we are guided by principles of international law."); *Baston*, 818 F.3d at 669 (holding that "[c]ompliance with international law satisfies due process because it puts a defendant on notice that he could be subjected to the jurisdiction of the United States" (internal quotation marks omitted), but "is not *necessary* to satisfy due process"); *Rojas*, 812 F.3d at 392-93 (treating international law and the Due Process Clause as two distinct hurdles to extraterritorial application of U.S. criminal law); *Caicedo*, 47 F.3d at 372 ("Principles of international law are useful as a rough guide in determining whether application of the statute would violate due process." (internal quotation marks omitted)).

[359] *See* Eur. & Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 127 (2d Cir. 1998) ("Congress's power to impose civil penalties for fraud in predominately foreign securities transactions is limited only by the Due Process Clause of the Fifth Amendment."), *abrogated on other grounds by* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010); Tamari v. Bache & Co. (Leb.) S.A.L., 730 F.2d 1103, 1107 n.11 (7th Cir. 1984) (observing in dicta that certain extraterritorial federal legislation "could be challenged as violating the due process clause"); DeMateos v. Texaco, Inc., 562 F.2d 895, 900 (3d Cir. 1977) ("Obviously . . . the due process clause of the fifth amendment places bounds upon congressional efforts to

yet determined whether the Due Process Clause restricts Congress's constitutional authority to legislate extraterritorially.[360]

As courts develop a uniform presumption against extraterritoriality, they should not simply presume that federal law extends up to any bounds set by the Due Process Clause.[361] Any restrictions imposed on U.S. law by the Due Process Clause are constitutional outer bounds that do not necessarily indicate to what extent U.S. law should apply within those outer limits as a matter of likely congressional intent or of policy. Additionally, federal courts' disagreement over the requirements imposed by the Due Process Clause with respect to criminal legislation along with the lack of cases refining any such requirements for civil legislation pose a practical impediment to this approach. Courts developing a uniform presumption against extraterritoriality may nonetheless find it useful to draw on the analyses of international law on prescriptive jurisdiction[362] and fairness to defendants[363] that have been developed in the due process context. The critical point for present purposes is not the precise content of the substantive canon of statutory interpretation for determining the geographic scope of ambiguous statutes, but that textualism should be understood to favor adopting a consistent approach in these circumstances.

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apply American rules of decision to transactions in which the United States has no sufficient interest. In this respect, in the international arena, fifth amendment due process serves the same purpose as does fourteenth amendment due process with respect to the states.").

360 Stigall, *supra* note 20, at 347.

361 Whether courts have correctly interpreted the Due Process Clause to limit the extraterritorial applicability of U.S. law is beyond the scope of this Article and has been the subject of scholarly debate. *Compare* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1223 (1992) ("It is our thesis that the Fifth Amendment Due Process Clause limits federal actions in much the same manner that the Fourteenth Amendment Due Process Clause limits state actions."), *with* A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379, 427 (1997) (arguing that "the Fifth Amendment does not operate to limit Congress in this way"), *and* Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 338-41 (warning that "it may be logically awkward for a defendant to rely on what could be characterized as an extraterritorial application of the U.S. Constitution in an effort to block the extraterritorial application of U.S. law").

362 *See, e.g.*, United States v. Ibarguen-Mosquera, 634 F.3d 1370, 1379 (11th Cir. 2011) (holding that international law permits all states to exercise prescriptive jurisdiction aboard stateless vessels).

363 *See, e.g.*, United States v. Shi, 525 F.3d 709, 723-24 (9th Cir. 2008).

4. CONCLUSION

The presumption against extraterritoriality is incompatible with textualism insofar as it is used to displace the most plausible reading of the statutory text because courts have not applied the canon consistently enough for it to become part of the closed set of background conventions. Rather, courts have applied a multitude of different, inconsistent iterations of the presumption, invoking an equally diverse set of rationales. Ironically, the *Morrison* analysis that the Supreme Court has developed over the past decade, in part to address these difficulties, presents particular problems for textualism because it is wholly new and it supplants insufficiently clear congressional instructions that a statute applies extraterritorially. Judges seeking to comply with textualist tenets should therefore resolve statutes by reference to the best reading of the statutory text in context wherever possible, and they should not rely on the presumption against extraterritoriality to reach a contrary result.

Courts' consistent reliance on a presumption against extraterritoriality in one form or another nonetheless gives rise to a background convention that statutes with universal language, referring to "any contract" or "any seaman," are not meant to apply throughout the world. Textualists can construe such universally worded statutes to have some territorial limits consistently with textualism. Critically, however, textualism should be understood to require, but has not yet produced, a consistent approach for resolving the extraterritorial reach of such universally worded statutes and of statutes that are otherwise ambiguous as to their geographic scope. A canon assuming that Congress legislates up to the limits set by private and public international law is the most likely contender.

That conclusion points to a broader insight about textualism. Just as textualism would otherwise provide no meaningful guidance on interpreting statutes that are ambiguous as to their geographic scope, textualism generally does not aid courts in construing truly ambiguous statutes, beyond conceding that they entail some judicial discretion or lawmaking. For these statutes, textualism is incomplete and leaves judges to reach varying conclusions based on their own discretion.

In some circumstances, textualism can be augmented with new substantive canons to resolve these issues. Where, as for statutes

that are ambiguous as to their extraterritorial reach, numerous statutes over time present the same or similar recurring questions of statutory interpretation, textualism should provide for the adoption of a new, consistently-applied substantive canon.[364] In those cases, the judicial discretion inherent in ambiguous statutes can and should be harnessed to require judges to decide similar cases uniformly over time according to a substantive canon. Judges thereby grant litigants enhanced notice of the law, provide Congress with a stable background rule against which to legislate, and thus hold Congress accountable for its legislation.

[364] *See* Andrew C. Spiropoulos, *A Defense of Substantive Canons of Construction*, 2001 UTAH L. REV. 915, 942 ("The most obvious benefit to the legal system of judges developing rules of interpretation to resolve hard cases is that the articulation and implementation of these rules will increase predictability and coherence of the law."); Coney Barrett, *supra* note 6, at 124 (Canons that implement extraconstitutional values "are a useful way of specifying the social values that should influence judges in resolving statutory ambiguity.").