Extraterritorial Jurisdiction

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Additional guidance is urgently needed regarding the analytical framework that ought to be applied to decide (1) when a crime that spans borders is committed domestically as opposed to extraterritorially; and (2) when a criminal statute that does not on its face speak to extraterritoriality ought to apply to conduct overseas. Scholars have raised legitimate questions about the precedential support for, and the wisdom of, the Supreme Court's current strong presumption against extraterritorial applications of federal statutes. The Court's recently announced "focus" test for determining when a crime is committed extraterritorially as opposed to domestically is also of questionable legitimacy. Congress ought to act promptly to enact a general provision that provides uniform guidance on these questions in criminal matters.

INTRODUCTION

Assume that a Russian citizen hacked into the e-mail of the Democratic National Committee and then provided masses of stolen DNC e-mails to WikiLeaks for publication. This type of unauthorized access and release is unlawful in many countries (which will be referred to here as "States"). But where was the crime "committed"? At the hacker's keyboard in Russia? Where the DNC's servers are—presumably somewhere in the United States? Where WikiLeaks' servers are—presumably *not* in the United States? Or perhaps where the actual and intended effect of the criminal activity was felt? If it is concluded that this criminal activity took place outside the territory of the United States—that is, extraterritorially—further critical questions include whether Congress has the constitutional power to regulate such conduct, whether Congress intended the anti-hacking statute to apply extraterritorially, and what, if any, due process limits exist on such exercises of criminal jurisdiction.

These questions have increasing importance in a world where criminal activity and criminals regularly cross national borders. The question of whether U.S. laws can or should apply to such transborder criminal activity, then, is one that courts encounter frequently. The difficulty is that the applicable analysis is unclear, particularly in criminal cases. Scholars agree that "the case

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law is so riddled with inconsistencies and exceptions that [attempting to bring coherence to the law on extraterritoriality] … is probably futile and maybe even counterproductive."[1] It will not surprise, then, that "the only thing courts and scholars seem to agree on is that the law in this area is a mess."[2]

Despite this consensus, I will first attempt to summarize the analytical steps applied to extraterritoriality decisions, highlighting uncertainties and questions. I will then attempt to summarize the deep and rich literature on the modern Supreme Court's presumption against extraterritoriality,[3] which is today the predominant factor in extraterritoriality decisions in the usual case where the statute does not explicitly specify its geographic applicability. The Supreme Court originally applied this strong presumption against application of U.S. federal law to conduct outside U.S. territory in the 1991 case of *EEOC v. Arabian American Oil Co.* (*Aramco*),[4] and it has applied the presumption with vigor in its most recent extraterritoriality precedents, all of which were civil cases. I will conclude by proposing congressional action to clarify this critical but "messy" area of law.

My focus is on federal criminal law, but a preliminary note is in order regarding the question of the application of U.S. state criminal laws outside the territory of the United States. The Supreme Court has held that U.S. states

1. Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 Va. L. Rev. 1019, 1028 (2011); *see also* Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 Va. J. Int'l L. 505, 507 (1997); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 Berkeley J. Int'l. L. 85, 89-90 (1998); John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 Am. J. Int'l L. 351, 351–52, 396 (2010); Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professsors Lowenfeld and Trimble*, 89 Am. J. Int'l L. 750, 752 (1995); Austen Parrish, *The Effects Test: Extraterritorality's Fifth Business*, 61 Vand. L. Rev. 1455, 1458-1461 (2008); Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritorality*, 84 Nw. U. L. Rev. 598, 599–601 (1990).

2. Colangelo, *supra* note 1, at 1028.

3. *See* sources cited in note 1, *supra*; *see also* Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 Law & Pol'y Int'l Bus. 1 (1992); Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 Law & Contemp. Probs. 11, 33–34 (1987); Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. Rev. 1 (2014); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 Harv. Int'l L.J. 121 (2007); William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 Harv. Int'l L.J. 101 (1998); Larry D. Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 Sup. Ct. Rev. 179 (1991); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 Minn. L. Rev. 110 (2010); Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 Hastings Int'l & Comp. L. Rev. 323 (2012).

4. 499 U.S. 244 (1991).

may regulate extraterritorially on the same terms as the federal government, at least where the state has a legitimate interest and its laws do not conflict with acts of Congress.[5] Generally the geographic scope of U.S. state criminal statutes is a question of state law. In resolving such questions, some U.S. state courts apply a presumption against extraterritoriality,[6] but a comprehensive analysis is beyond the scope of this article.

I. PRESCRIPTIVE JURISDICTION

To begin, readers must have some understanding of the most generally relevant[7] international law principles that control prescriptive—here, legislative—jurisdiction in criminal cases. The prescriptive principles of international law delineate the legislative power "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things."[8] Although Congress has the power to specify that statutes apply beyond the limits set by international law,[9] the Supreme Court, in many of its pre-1991 cases, was reluctant to ascribe such a purpose to Congress absent expressed congressional intent. Thus, where a statute did not on its face speak to its extraterritorial application, the Supreme Court often applied the *Charming Betsy* canon of construction (named after an early 19th-century case), which dictates that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[10] The Supreme Court's extraterritoriality decisions have not been a model of consistency, but it is fair to say that the Court, prior to 1991, frequently referenced the customary international law prescriptive principles in ascertaining the scope of federal statutes pursuant to *Charming Betsy*.

5. *See* Skiriotes v. Florida, 313 U.S. 69, 77 (1941).

6. *See, e.g.*, Global Reinsurance Corp. U.S. Branch v. Equitas Ltd., 969 N.E.2d 187, 195 (N.Y. 2012).

7. Because Congress rarely uses it, I will not here discuss "universal jurisdiction." Restatement (Third) of the Foreign Relations Law of the United States § 404 (Am. Law Inst. 1987) [hereinafter Restatement]. I will also not address Restatement § 403, which advises application of a reasonableness balancing test in cases of concurrent jurisdiction. Even when U.S. courts reference the rule of reasonableness, "they are markedly disinclined to limit jurisdiction in transnational criminal matters on such grounds." Stigall, *supra* note 3, at 338.

8. Restatement, *supra* note 7, § 401.

9. S*ee, e.g.*, Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 Fordham L. Rev. 393, 397–98 (1997).

10. Murray v. Schooner Charming Betsy (Charming Betsy), 6 U.S. (2 Cranch) 64, 118 (1804); *see also* Restatement, *supra* note 7, § 114 ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

The most traditional and important basis for prescriptive jurisdiction is territorial. The *Restatement (Third) of Foreign Relations Law of the United States* (*Restatement*) recognizes that there are two types of territorial principles.[11] First, a State has jurisdiction to prescribe law with respect to "*conduct* that, wholly or in substantial part, takes place within its territory"[12] ("subjective" territorial jurisdiction). The second type of territorial jurisdiction gives a State the power to regulate "conduct outside its territory that has or is intended to have *substantial effect* within its territory"[13] ("objective" territorial jurisdiction or "effects" jurisdiction). One might logically ask: How can a given claim or prosecution be founded on "territorial" jurisdiction if it may not involve actionable conduct (only effects) on the territory of the State seeking to address the crime? One answer is that effects jurisdiction was intended to capture situations such as the following (frequently used) example: In an illegal duel, Jones, on the Canadian side of the border, shoots with intent to kill Smith, who dies on the United States' side of the border. In such a case, elements of the crime are committed in both jurisdictions: Firing the gun with intent to kill occurred in one country, but without the death in the other, there could be no murder prosecution. Many countries use some form of effects jurisdiction, but there is "disagreement over what it means and how the test should be applied."[14]

For many years, the lower courts accepted the *Restatement*'s view that both domestic conduct and domestic effects could mean that a claim constituted a territorial, as opposed to extraterritorial, application of a statute. They therefore employed a "conduct-and-effects" test founded both on subjective and objective territorial principles to discern when a suit concerned territorial

11. It should be noted that the American Law Institute is currently drafting a *Restatement (Fourth) of the Foreign Relations Law of the United States.* Its latest tentative draft no longer includes "effects" as a subset of territorial jurisdiction, delineating it instead as a discrete jurisdictional basis. *See* Restatement (Fourth) of the Foreign Relations Law of the United States §201(b) & cmts. 3, f (Am. Law Inst. Tentative Draft No. 2, Mar. 22, 2016).

12. Restatement, *supra* note 7, § 402(1)(a) (emphasis added).

13. *Id.* § 402(1)(c) (emphasis added).

14. International Bar Ass'n, Report of the Task Force on Extraterritorial Jurisdiction 12 (2009).

claims and thus was unobjectionable, as opposed to extraterritorial claims that would require an analysis of whether the statute was intended to be employed extraterritorially.[15] With respect to effects jurisdiction, for example, the D.C. Circuit, in *United States v. Philip Morris USA Inc.*, explained that:

> Because conduct with substantial domestic effects implicates a state's legitimate interest in protecting its citizens within its borders, Congress's regulation of foreign conduct meeting this "effects" test is "*not* an *extraterritorial* assertion of jurisdiction." Thus, when a statute is applied to conduct meeting the effects test, the presumption against extraterritoriality does not apply.[16]

As we shall see, however, the Supreme Court's modern presumption against extraterritoriality is keyed only to the subjective territoriality principle—that is, to conduct occurring on U.S. soil—and excludes the objective territorial principle—that is, reference to the effects of foreign conduct on the U.S. territory and population.

Another very traditional basis for jurisdiction concerns nationality. Thus, a State has prescriptive jurisdiction over "the activities, interests, status, or relations of its nationals outside as well as within its territory."[17] A less widely accepted basis for jurisdiction that relates to nationality, passive personality jurisdiction, "asserts that a state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the victim of the act was its national."[18] Many civil law countries make extensive use of nationality and passive personality jurisdiction, but the United States traditionally has been sparing in its use of these principles. Finally, a State also has the prescriptive jurisdiction to address "certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests."[19] This so-called "protective principle" is intended to be limited to offenses directed against the security of the State or the integrity of governmental functions, involving crimes such as espionage, counterfeiting the State currency, and the like.

15. *See, e.g.*, Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 984-993 (2d Cir. 1975); ITT v. Vencap, Ltd., 519 F.2d 1001, 1015-1018 (2d Cir. 1975); Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1333-39 (2d Cir. 1972); *see also* United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1130 (D.C. Cir. 2009); Laker Airways v. Sabena, 731 F.2d 909, 923 (D.C. Cir. 1984); Continental Grain (Australia) Pty. Ltd. v. Pacific Oilfields, Inc., 592 F.2d 409, 416 (8th Cir. 1979).
16. *Philip Morris*, 566 F.3d at 1130 (quoting *Laker Airways*, 731 F.2d at 923).
17. Restatement, *supra* note 7, § 402(2).
18. *Id.* § 402 cmt. g.
19. *Id.* § 402(3).

II. STATE OF PLAY: GENERAL

A. THE "WHERE" QUESTION

Logically, the first question is when a given application of a statute is "domestic," and thus unexceptional, as opposed to "extraterritorial," and thus questionable. If, as in the above WikiLeaks example, conduct occurs both in the United States and abroad, or if conduct abroad has concrete and harmful effects in the United States, where is the crime deemed to have been "committed"? When all the elements of a crime occur on one State's territory, that crime is clearly "committed" domestically. Where, however, the elements of the crime occur in different States, as in our dueling case, it may be that two (or more) States will claim territorial jurisdiction. A critical difficulty in applying the territoriality principle is the question of just what, and how much, activity must occur on a State's territory for a transborder crime to be deemed committed within that State and thus justified by the subjective territorial principle.

The Supreme Court did not address the question of what, or how much, conduct must occur in the territorial United States before a given claim or prosecution could be deemed domestic as opposed to extraterritorial until its 2010 decision in *Morrison v. National Australia Bank*.[20] Before *Morrison*, at least in securities and antitrust cases, the lower courts applied their conduct-and-effects test to determine whether they could adjudicate a case where the claim was founded on conduct that spanned borders.

The conduct-and-effects test, pioneered by the Second Circuit and adopted by other circuits, did not require a global inquiry into whether a certain statute was intended to apply extraterritorially or only domestically because the test *assumed* that only territorial cases could proceed. The courts assessed the facts of each case—the extent of the alleged conduct and effects—to determine whether "Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries."[21] If the answer was yes, the case proceeded; if the answer was no, the case was dismissed. In other words, the courts assumed that if the conduct-and-effects test was not satisfied, the claim concerned an extraterritorial application of the statute *and* that such extraterritorial claims could not proceed.

20. Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010).
21. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975) (Friendly, J.).

The Supreme Court emphatically rejected the use of the conduct-and-effects test, at least as applied in securities fraud cases, in *Morrison*.[22] Of course, the conduct-and-effects test can be abused, as Professor Parrish points out, as the test is subject to inconsistent results and can be manipulated.[23] Certainly, this was an argument that won the day with the *Morrison* Court.[24] (Courts could do better were Congress to provide more specific direction regarding what types of conduct and effects should satisfy the test, as is suggested below.)

In any case, the Court's rejection of the conduct-and-effects test meant that it had to come up with a global solution to the question of how to determine where a crime is committed. That is, given that the Court rejected use of an effects test, it had to decide what conduct must occur in a State for the crime to be considered domestic as opposed to extraterritorial. The *Morrison* Court articulated a "focus" test under which courts must evaluate what "territorial event" or "relationship" is the "focus" of the statute—that is, the "object[] of the statute's solicitude"—to identify the conduct that must occur in the United States for the suit to be deemed territorial.[25] In the *Morrison* case, the question concerned when a violation would be deemed domestic as opposed to extraterritorial when a civil securities fraud claim was based on conduct both in the United States and abroad. The Court identified one element of the claim to be decisive based on its "focus" test. It decreed that subjective territoriality is only present in civil securities fraud cases involving "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[26] Under *Morrison*'s transactional focus, the place where the fraudulent activity occurred and the location of the harm flowing from the fraud are all irrelevant.

Shortly after *Morrison* was decided, however, Congress amended the jurisdictional provisions of a number of securities laws in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) to authorize the SEC and Department of Justice to pursue securities violations where the "conduct within the United States … *constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors*; or … conduct occurring outside the United States that has a foreseeable substantial effect within the United States."[27] The

22. *Morrison*, 561 U.S. at 255–61.
23. Parrish, *supra* note 1, at 1475, 1478–79.
24. *See, e.g., Morrison*, 561 U.S. at 258–61.
25. *Id.* at 266–67.
26. *Id.* at 267.
27. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864-1865 (2010) (codified at 15 U.S.C. § 78aa(b)(1) & (2)) (emphasis added).

amendments applied only to securities fraud cases brought by the SEC and Department of Justice; it left untouched *Morrison*'s holding as to private civil securities suits. This reinstitution of the conduct-and-effects test clarifies that in government suits the crime will be deemed to have happened in the State where the fraud was hatched in addition to where the transaction took place. (It should be noted, however, that there is some dispute as to whether this provision was effective in overruling *Morrison*'s exclusive focus on the site of the relevant transactions in government-initiated cases.)[28]

Because *Morrison* was relatively recently decided, it is unclear how one determines a statute's "focus," which is not something Congress normally identifies and which appears to be an extremely subjective, and manipulable, determination. The Court's decision to focus on the location of the securities transaction, to the exclusion of the site of the fraud, seems arbitrary. The focus test was also an unnecessary innovation because more logical and well-developed references were available—venue, for example. "The Constitution makes it clear that the determination of proper venue in a criminal case requires determination of where the crime was *committed*."[29] When federal courts have been asked to determine where a criminal securities fraud was committed for venue purposes, they have recognized that criminal securities fraud happens both where the transactions are consummated and where the fraud is hatched.[30] Indeed, in identifying the site of the securities transaction as the only relevant factor in determining subjective territorial jurisdiction, the *Morrison* Court ignored the fact that Congress had, by statute, expressly provided that a criminal securities fraud is committed (for venue purposes) where "*any act* or transaction constituting the violation occurred."[31]

28. The question whether this provision was sufficient to overrule *Morrison* arises because Congress included its conduct-and-effects test in the securities laws' subject-matter jurisdiction provisions. *Morrison*, however, held that the extraterritorial limitation was a merits question and Congress did not amend the substantive portions of the statutes. *See, e.g.*, SEC v. Chicago Convention Center, LLC, 961 F. Supp. 2d 905, 909-17 (N.D. Ill. 2013); Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Necessary or Sufficient?*, 1 Harv. Bus. L. Rev. 195 (2011).

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

30. *See, e.g.*, United States v. Lange, 834 F.3d 58, 68-71 (2d Cir. 2016).

31. 15 U.S.C. § 78aa(a) (emphasis added); *see also* United States v. Johnson, 510 F.3d 521, 524 (4th Cir. 2007).

B. ARTICLE I CHALLENGES

If a situation is deemed to concern an extraterritorial application of the relevant statute, and if prompted (many litigants do not press this objection[32]), courts will then ask whether Congress had the power under Article I of the U.S. Constitution to reach the overseas conduct. The most popular Article I powers invoked to justify extraterritorial extensions of criminal prohibitions are the foreign or domestic Commerce Clause,[33] the power given Congress to define and punish piracies and felonies committed on the high seas and offenses against the law of nations,[34] and the Necessary and Proper Clause when employed by Congress to implement a treaty that requires the States that join it to enact criminal legislation pursuant to its terms.[35]

Assuming Congress has the constitutional power to extend a statute's coverage to extraterritorial conduct, courts will follow any direction provided in the statute as to its extraterritorial reach. Congress' instructions in this regard vary with the statute.[36] More commonly, Congress has not spoken to the issue of extraterritorially in the criminal statute itself. The inquiry then becomes whether Congress intended to give the statute extraterritorial effect.

C. JURISDICTION VERSUS MERITS

One threshold question is whether the issue of the geographic scope of a statute goes to the subject-matter jurisdiction of the court or goes only to whether a plaintiff or prosecutor has made out a case on the merits. For decades, the courts of appeals treated the issue as going to the courts' subject-matter jurisdiction, which meant, among other things, that it was a non-waivable issue that was reserved for judicial determination. In *Morrison*, the Court clarified that, unless Congress specifies otherwise, whether a statute applies extraterritorially is a merits question and does not go to jurisdiction.[37] This determination means that persons who plead guilty or who fail to timely object to the extraterritorial application of a statute will waive that objection.[38] But other consequences are less clear. For example, as a "merits" question, is

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

33. U.S. Const. art. 1, § 8, cl. 3.

34. *Id.* art. 1, § 8, cl. 10.

35. *Id.* art. 1, § 8, cl. 18.

36. *See, e.g.*, Charles Doyle, Cong. Research Serv., RL94-166, Extraterritorial Application of American Criminal Law 42-62 (2016).

37. *See* Morrison v. National Australia Bank Ltd., 561 U.S. 247, 253-254 (2010).

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

extraterritoriality now an element of the crime, and thus an issue that must be proven beyond a reasonable doubt to a jury? And, if so, just what would the jury be asked to decide?

D. CONGRESSIONAL INTENT

Where the statute is ambiguous as to its extraterritorial application, lower federal courts generally apply two canons of interpretation. The first is the presumption against extraterritoriality that the Supreme Court first articulated in its modern form in the 1991 case, *EEOC v. Arabian American Oil Co.* (*Aramco*).[39] In *Aramco* and subsequent cases, the Court decreed that unless a statute gives a "'clear indication'"[40] that Congress intended it to apply outside the "territorial jurisdiction"[41] of the United States, it does not. The presumption has become something approaching a clear statement rule (although the Court disclaims this reality[42]). To be clear, the presumption assumes that Congress acts only with subjective territoriality in mind and thus intends statutes to apply only to conduct in the territory over which the United States is sovereign unless Congress affirmatively indicates otherwise.

The second canon of construction that lower courts reference is the *Charming Betsy* canon, in reliance upon the Court's pre-1991 case law. As noted previously, "[f]or most of U.S. history, the Supreme Court determined the reach of federal statutes in light of international law—specifically, the international law of legislative jurisdiction. In effect, it applied a … presumption that federal law does not extend beyond the jurisdictional limits set by international law. This presumption was an offshoot of the long-standing *Charming Betsy* canon."[43]

39. 499 U.S. 244 (1991).

40. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013) (quoting *Morrison*, 561 U.S. at 255).

41. EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991) (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

42. *See Morrison*, 561 U.S. at 265. It is true that the Court has stated that there need not be "an express statement of extraterritoriality" and that "'context can be consulted as well.'" RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090, 2102 (2016) (quoting *Morrison*, 561 U.S. at 265). And the "presumption" is not irrebuttable, as is demonstrated by *RJR Nabisco*, where the Court held that the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. §1962 et. seq., has extraterritorial application in criminal cases where Congress has made extraterritorial the predicate statutes upon which the RICO case. That said, the *Morrison* Court required that congressional intent to apply a statute extraterritorially be "clearly expressed," *Morrison*, 561 U.S. at 255; and the *RJR Nabisco* Court took it up a notch by requiring that Congress "affirmatively and unmistakably instruct[] that the statute" will apply extraterritorially. *RJR Nabisco*, 136 S. Ct. at 2100.

43. Knox, *supra* note 1, at 352; *see also* Born, *supra* note 3, at 1 ("the earliest U.S. judicial decisions relied on the 'Law of Nations' to define the territorial reach of federal law").

Lower courts continue to ask, in cases raising extraterritoriality questions, whether the extraterritorial application of a statute will exceed the prescriptive jurisdiction of Congress under international law.

Although the Court employed the *Charming Betsy* canon in its pre-*Aramco* cases, it has referenced the canon in only one extraterritoriality decision over the past quarter century.[44] The Court, in its most recent extraterritoriality decision, *RJR Nabisco, Inc. v. European Community* (2016),[45] was explicit about its preferred analysis. First, the Supreme Court advised that courts must determine whether a statute has any extraterritorial purchase, and it again emphasized the strength of the presumption against extraterritoriality.[46] If the statute does *not* apply extraterritorially, the courts must take a second step and "determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's 'focus.'"[47] Nowhere was the *Charming Betsy* canon referenced or applied. It seems likely, then, that the *Charming Betsy* canon currently applied in extraterritoriality cases by the lower courts is akin to the human appendix—a structure that has lost its original function.

III. STATE OF PLAY: CRIMINAL CASES

A. BOWMAN

It is notable that, at least until recently, the lower federal courts have been very willing to find that federal statutes apply extraterritorially in criminal cases. They have resisted application of the Court's modern strong presumption in two ways. First, until recently, many courts did so by employing a fairly forgiving (from the government's point of view) conduct-and-effects test in a variety of cases, most notably antitrust and securities fraud cases. Lower courts' willingness to use this test has receded after they were taken to task for using it in no uncertain terms by the *Morrison* Court. But it is worth noting that even the Supreme Court, post-*Aramco*, has recognized that the conduct-and-effects test still controls in antitrust cases without reference to any presumption.[48] Due to the post-*Morrison* congressional attempt to reinstitute the conduct-and-effects test in government-initiated securities fraud cases, this test may well also apply in criminal securities fraud cases despite *Morrison*.[49]

44. *See* F. Hoffman La Roche Ltd. v. Empagrn, S.A., 542 U.S. 155, 165 (2004).
45. 136 S. Ct. 2090 (2016).
46. *Id.* at 2101.
47. *Id.*
48. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).
49. *See supra* notes 27-28 and accompanying text.

Second, in criminal cases, the lower federal courts escaped the presumption by relying on a Supreme Court opinion hailing from 1922, *United States v. Bowman*.[50] *Bowman* involved a scheme hatched on the high seas and brought to fruition in Rio de Janeiro pursuant to which a U.S. government-owned corporation was defrauded. The Court acknowledged that punishment of crimes against private individuals or their property "must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it."[51] But, the Court stated:

> The same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.[52]

Bowman is widely used—and some say misused—by lower courts looking to justify the extraterritorial application of criminal statutes. Some lower courts question whether, in light of *Bowman*, the presumption even applies in criminal cases, although those appear to be in the minority.[53] *Bowman* has never been overruled but it is arguably inconsistent with today's Court's emphatic embrace of the presumption against application of statutes in any circumstances other than where justified by the subjective territorial principle.

50. United States v. Bowman, 260 U.S. 94 (1922).
51. *Id.* at 98.
52. *Id.*
53. *Compare* United States v. Siddiqui, 699 F.3d 690, 700 (2d Cir. 2012), *and* United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011), *with* United States v. Vilar, 729 F.3d 62, 72 (2d Cir. 2013).

B. DUE PROCESS

A final step in the extraterritoriality analysis in criminal cases deals with the potential application of the Due Process Clause. Although no decision of the Supreme Court has yet addressed the issue of whether constitutional due process limitations apply in transborder federal criminal cases, the courts of appeals have found that such limitations do exist. The difficulty, however, is that the courts are split on the applicable test—that is, whether due process requires only that the extraterritorial prosecution not be arbitrary and unfair, or whether the Due Process Clause also requires proof of a sufficient "nexus" between defendant and the United States. Regardless, the odds of succeeding on such a due process claim are vanishingly small. Out of the hundreds of extraterritoriality cases I have read, I have found only one case in which a due process challenge succeeded.[54]

IV. THE PRESUMPTION AGAINST EXTRATERRITORIALITY

The above attempt to summarize the governing extraterritoriality analysis illustrates the extent to which the law is underdeveloped (*e.g.*, What does the Court mean by a statutory "focus" and how can one divine that focus? If extraterritoriality is a merits question, does that mean it is an element of the crime that must be proved beyond a reasonable doubt to the jury?). It also shows important areas of uncertainty (*e.g.*, What is the status of the *Charming Betsy* canon of construction? Does the presumption apply in criminal cases? What is the status of *Bowman*? Is there a due process limit on extraterritorial prosecutions, can it be invoked by non-U.S. nationals, and, if so, what is the applicable due process standard?).

Perhaps the only thing that is clear is the Court's commitment to a very strong presumption against extraterritoriality—one founded only on subjective territorial jurisdiction—and the generally case-determinative effect of that presumption. This raises the question many scholars have struggled with: Does this presumption make sense?

To the extent that the modern presumption against extraterritoriality is founded upon 19th-century convictions about the absolute nature of territorial sovereignty, such notions can no longer be entertained.[55] The United States—and the rest of the world—has long since recognized that in fact a State may legitimately extend its jurisdiction beyond its borders where effects, nationality,

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

55. Born, *supra* note 3, at 61.

passive personality, and protective jurisdictional principles permit. Then what, if anything, justifies the presumption against extraterritoriality upon which the modern Court is so insistent? Instead of adopting a default presumption, why not instead—as Larry Kramer suggested—"determine what policy a law was enacted to achieve in wholly domestic cases and ask whether there are connections between the case and the nation implicating that policy"?[56] The Court's explanation for why a presumption against extraterritoriality is appropriately applied has changed over time and even today has a certain shape-shifting quality.

A. CONFLICT WITH FOREIGN LAW

Probably the most consistent rationalization for the modern presumption against extraterritoriality is that it is necessary "to protect against unintended clashes between our laws and those of other nations which could result in international discord."[57] There is undoubtedly a potential for conflict where one sovereign seeks to enforce its laws on a non-national whose conduct occurred on the territory of another sovereign.[58] Subjecting foreign nationals to U.S. law for conduct that occurred on the territory of another State can create political controversies as well as retaliatory actions. Professor Parrish, a fan of the presumption, notes that the overextension of U.S. jurisdiction has provided a justification for other countries to aggressively use extraterritorial jurisdiction "for their own ends" and generated a number of other costs.[59]

But most commentators find that the conflicts argument is overstated and unpersuasive. First, as Professor Born notes, the presumption against extraterritoriality "unduly elevates Congress's presumed desire to avoid conflicts with foreign laws over other important legislative goals. Much more important, in the real world, are legislators' desires to assist local constituencies, to further domestic legislative programs and interests, and to make statements of political or moral principle."[60]

The presumption also underestimates Congress's appetite for conflict with other nations. Commentators generally concur that conflict with other States is most pronounced when the United States is exercising effects jurisdiction.[61]

56. Kramer, *supra* note 3, at 213.
57. EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991); *see also* RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090, 2100 (2016); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957).
58. *See, e.g.*, Stigall, *supra* note 3, at 328–31.
59. Parrish, *supra* note 1, at 1459; *id.* at 1489–93.
60. Born, *supra* note 3, at 76; *see also* Dodge, *supra* note 1, at 116–17.
61. Kramer, *supra* note 1, at 756.

Yet Congress has responded to the Supreme Court's application of the presumption and other extraterritoriality decisions in important regulatory areas—including areas, such as antitrust and securities law enforcement, most likely to generate international consternation—by expressly endorsing a conduct-and-effects test. Thus, Congress responded to lower courts' application of the conduct-and-effects test in antitrust cases by codifying it in the Foreign Trade Antitrust Improvements Act (FTAIA).[62] The FTAIA excludes from the Sherman Act's reach "conduct involving trade or commerce … with foreign nations," other than import trade or import commerce, unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic or import commerce.[63] And as noted previously, shortly after *Morrison* was announced, Congress amended the jurisdictional provisions in various securities statutes with the apparent intention to codify the conduct-and-effects test in government-initiated securities fraud actions.[64]

The conflict-avoidance rationale also appears to be disingenuous at worst and under- and over-inclusive at best. The Court does not actually inquire into whether a threat of conflict exists in each case. The Court has recognized that this concern does not arise in all cases in which it chooses to apply the presumption.[65] It has applied the presumption in cases in which it acknowledged that no conflict was possible[66] and has not applied the presumption where conflicts might well eventuate.[67] Where there is no potential for conflict, yet the Court has applied the presumption, the result may well be that no national law applies to objectionable conduct (as in a case arising in the Antarctic).[68] Indeed, in failing to apply U.S. law to situations where only U.S. law might apply, the Court may actually create conflicts.[69] Thus, for example, in *Sale v. Haitian Centers Council, Inc.*, the Court refused to apply restrictions Congress put in place to comply with U.S. treaty obligations to a U.S. vessel over which no other nation could exercise sovereignty—a result that disappointed, rather than appeased, the international community.[70]

62. 15 U.S.C. § 6a.
63. *Id.* § 6a(1)(A).
64. *See supra* notes 27-28 and accompanying text.
65. *See, e.g.*, RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090, 2100 (2016); Morrison v. National Australia Bank Ltd., 561 U.S. 247, 255 (2010); Smith v. United States, 507 U.S. 197, 206-07 (1993); Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 174 (1993).
66. *See Sale*, 509 U.S. at 173-174 (U.S. ship on the high seas); *see also Smith*, 507 U.S. 197 (Antarctica).
67. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).
68. *Smith*, 507 U.S. 197.
69. *See, e.g.*, *Sale*, 509 U.S. 155.
70. *See, e.g.*, Knox, *supra* note 1, at 380–83, 386–87.

Additionally, the Court draws no distinction in its application of the presumption between cases in which U.S. law would be applied to U.S. nationals as opposed to non-nationals abroad even though there is far greater potential for conflict in the latter cases than the former. And the Court does not seem to recognize that conflict-creation may occur whether or not U.S. statutes apply abroad. Many States employ all the prescriptive principles, including effects jurisdiction and expansive nationality and passive personality jurisdiction. Even where U.S. law is being applied strictly territorially, then, there may still be a potential for conflict because other States may, consistent with international law norms, apply their laws extraterritorially—for example, to their own nationals even if those nationals are acting on U.S. territory.[71]

Finally, the presumption overstates the potential for conflict. While it is true that, for example, many in the international community weighed in through amicus briefs in *Morrison* to argue against allowing civil securities actions in cases where extraterritorial elements predominate, it is also true that in *RJR Nabisco*, it was the European Community itself seeking damages in a civil RICO case against American cigarette companies. In that case, the European Community aggressively argued *for* extraterritorial application of U.S. law.

B. DOMESTIC CONCERNS

A rationale for the presumption against extraterritoriality that appears to have gained traction in the Court's most recent cases is that "Congress ordinarily legislates with respect to domestic, not foreign matters."[72] This is the weakest of the Court's justifications. It is questionable whether Congress in fact is primarily concerned only with conduct occurring on U.S. soil given the increasingly globalized nature of many problems and certainly given the explosion in cross-border criminality.[73] Indeed, as noted above, Congress has repeatedly overruled judicial decisions limiting the reach of statutes to the shores of the United States.[74]

71. *See* Clopton, *supra* note 3, at 12.

72. Morrison v. National Australia Bank Ltd., 561 U.S. 247, 258–61, 255 (2010); *see also* RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090, 2100 (2016); Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454–55 (2007); Smith v. United States, 507 U.S. 197, 204 n.5 (1993); EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991); Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949).

73. *See, e.g.*, Turley, *supra* note 1, at 657.

74. *See supra* notes 27-28 and accompanying text. Congress also overruled *Aramco* by amending Title VII to extend protection to United States citizens working overseas. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1077 (codified at 42 U.S.C. § 2000e(f)) ("With respect to employment in a foreign country," the term "employee" "includes an individual who is a citizen of the United States.").

Second, and more importantly, there is a fundamental indeterminacy here—what, exactly, is a "domestic concern"?[75] The assumption appears to be that Congress is concerned only with conduct that occurs on U.S. territory, while conduct that occurs abroad but has concrete, harmful effects in U.S. territory or on its citizens is not a "domestic concern." But as Professor Knox points out, "domestic concerns" "may include not only actions taken within U.S. borders, but also actions taken outside it when they either affect the United States or are taken by the U.S. government or even, in some cases, its nationals."[76] Further, even if one assumes that Congress is concerned only with circumstances affecting the territory of the United States, "[f]oreign actions can and often do affect conditions within U.S. borders so that, at least under certain conditions, legislation must address foreign conduct in order to regulate domestic concerns."[77] Professor Dodge in fact argues that Congress is primarily concerned with domestic effects and thus that the presumption should not apply at all when such effects are present.[78]

C. LEGISLATIVE EFFICIENCY

A third modern rationale for the presumption is the Court's stated belief that Congress knows of the Court's devotion to the presumption, and thus "legislates against the backdrop of the presumption against extraterritoriality."[79] This, the Court asserts, "preserv[es] a stable background against which Congress can legislate with predictable effects."[80]

Many question the implicit assumption underlying this rationale: that the presumption is value-neutral and that, like "driving a car on the right-hand side of the road," it "is not so important to choose the best convention as it is to choose one convention and stick to it."[81] Professor Eskridge explains that, to justify the presumption against extraterritoriality on this basis, three conditions must be met: (1) Congress must be "institutionally capable of knowing and working from an interpretive regime that the Court is institutionally capable of devising and transmitting in coherent form"; (2) the application of the interpretive regime must be "transparent" to Congress; and (3) the interpretive regime should

75. *See, e.g.*, Clopton, *supra* note 3, at 14–15.
76. Knox, *supra* note 1, at 383–84.
77. *Id.* at 384.
78. Dodge, *supra* note 1, at 118.
79. EEOC v. Arabian American Oil Co. (Aramco), 499 U.S. 244, 248 (1991); *see also* Smith v. United States, 507 U.S. 197, 204 (1993).
80. Morrison v. National Australia Bank Ltd., 561 U.S. 247, 261 (2010).
81. William N. Eskridge, Jr., Dynamic Statutory Interpretation 277 (1994).

not change in unpredictable ways.[82] He concludes that while the presumption established in *Aramco* may have satisfied the first of these conditions, it failed the second and "dramatically flunk[ed]" the third.[83] Many question whether the presumption is sufficiently transparent, coherent, and consistently applied to be a useful guide to Congress. Professor Knox, for example, argues that the Court has failed to clarify the application of the presumption and its rationales and has caused "chaos" among the lower courts.[84]

Finally, it is difficult to deny that the presumption has allocational effects.[85] The presumption advantages those, like transnational companies, who would rather avoid regulation whenever possible because the heavy burden of galvanizing Congress to overrule the Court after it has applied the presumption lies on advocates of regulation.[86] In part because of these obvious allocational effects, many commentators believe that the presumption is best understood as a disguised judicial normative preference.[87] This can be read as a commitment to territorial sovereignty or as a hostility to certain types of suits. For example, Justice Scalia, writing for the majority in *Morrison*, noted that one should be "repulsed" by the potential adverse consequences of a ruling permitting civil securities liability in cases like *Morrison* because this would lead to a "Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets."[88]

D. SEPARATION OF POWERS/JUDICIAL COMPETENCY

Professor Bradley asserts that "the determination of whether and how to apply federal legislation to conduct abroad raises difficult and sensitive policy questions that tend to fall outside both the institutional competence and constitutional prerogatives of the judiciary."[89] Arguably this rationale encompasses two concerns: judicial interference with the executive's conduct of foreign policy and judicial meddling with congressional prerogatives in determining the scope of federal statutes.[90]

82. *Id.* at 278.
83. *Id.*
84. Knox, *supra* note 1, at 390; *see also id.* at 390–96.
85. Eskridge, *supra* note 81, at 279.
86. Dodge, *supra* note 1, at 122–23; *see also* Turley, *supra* note 1, at 661–62.
87. *See, e.g.*, Eskridge, *supra* note 81, at 283.
88. Morrison v. National Australia Bank Ltd., 561 U.S. 247, 270 (2010).
89. Bradley, *supra* note 1, at 516; *see also* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013); Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 455 (2007); F. Hoffman-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 165 (2004); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957).
90. Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 188 (1993).

In criminal cases, there is no legitimate concern over interference with executive prerogatives because it is, of course, the executive who determines whether to launch a given case.[91] The Department of Justice's own policies reflect that it recognizes the sensitivity of transnational prosecutions and applies increased scrutiny to their appropriateness. For example, only money-laundering prosecutions that involve extraterritorial application of the relevant statutes require Main Justice approval.[92]

With respect to arguments founded on avoiding judicial intrusion on congressional decisions, these arguments assume that Congress actually has a view on extraterritoriality when it legislates, but as Professor Brilmayer notes, "in the vast majority of cases, legislatures *have* no actual intent on territorial reach."[93] Further, "[t]he presumption against extraterritoriality is supposed to be used only when congressional intent is unclear, so by definition it is ambiguous whether applying the statute territorially or extraterritorially would be the 'activist' position."[94] One may legitimately question whether the presumption, which "always sacrific[es] legislative aims in order to avoid conflict with foreign law," is truly the best way to limit judicial intrusion.[95] "A court attempting to carry out congressional intent should apply a statute extraterritorially whenever doing so would advance the domestic purposes that Congress sought to achieve with the statute. To constrain the extraterritorial application of a statute on the basis of a court's intuition that conflict with foreign law is undesirable is—to borrow a phrase—judicial activism."[96] Congress can, of course, respond to a mistaken judicial decision to deny a statute extraterritorial application by legislatively expanding the scope of the statute; but the reverse is true as well. Professor Dodge queries whether the Court should apply a presumption designed to "force Congress to reveal its preferences by adopting a rule that Congress would not want,"[97] noting that this argument seems strongly counter-majoritarian and contrary to separation of powers.[98]

91. *See* Knox, *supra* note 1, at 387–88.
92. *See* U.S. Attorneys' Manual § 9-105.300(1).
93. Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 Mich. L. Rev. 392, 393 (1980).
94. Clopton, *supra* note 3, at 16.
95. Dodge, *supra* note 1, at 120.
96. *Id.*
97. *Id.* at 121.
98. *Id.*

Finally, "if the presumption is intended to respect the decisions of the political branches—legislative and executive—it needs work."[99] Courts applying the Supreme Court's strong presumption have rejected the views of the executive-branch departments or agencies charged with interpretation and application of the relevant statutes.[100] And given the strength of the modern presumption, the Court has arguably ignored strong, but less than "clear," evidence of a congressional intent to apply statutes extraterritorially.[101]

E. THE PRESUMPTION AS A PROXY FOR LENITY

The scholarly and judicial consensus seems to be that criminal and civil cases ought to be treated the same for purposes of extraterritoriality analysis. One could, however, argue that the presumption makes more sense in the criminal context than in the civil. This is because the rule of lenity applies only in criminal cases. This rule requires that "when [a] choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before [the Court chooses] … the harsher alternative, to require that Congress should have spoken in language that is clear and definite."[102] The rule of lenity is founded first on the theory that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."[103] Second, legitimacy concerns reflected in separation-of-powers principles justify lenity. As the Supreme Court has explained, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."[104] "Lenity promotes th[e] conception of legislative supremacy not just by preventing courts from covertly undermining legislative decisions, but also by forcing Congress to shoulder the entire burden of criminal lawmaking even when it prefers to cede some part of that task to the courts."[105]

99. Clopton, *supra* note 3, at 17.

100. *See, e.g.*, EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 244 (1991); Keller Found./Case Found. v. Tracy, 696 F.3d 835, 846 (9th Cir. 2012).

101. *See, e.g.*, Eskridge, *supra* note 81, at 281–82.

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

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

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

105. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345, 350 (1994).

The Court has occasionally held that where a statute is capable of both civil and criminal enforcement, lenity ought to be applied[106]—but it has not done so in extraterritoriality cases concerning hybrid statutes. The presumption against extraterritoriality serves much the same function, at least in requiring Congress to specify, in advance, the extraterritorial application of a statute.

RECOMMENDATIONS

There is no shortage of interesting suggestions regarding how the Supreme Court should amend its extraterritoriality analysis; most of the proposals recommend jettisoning the presumption and replacing it with another test.[107] My own take is that there is no clear and convincing reason for a general presumption against extraterritoriality in civil cases. In criminal cases, the presumption makes more sense because it could serve as a surrogate for the rule of lenity.

But my bottom line is that all this statute-by-statute litigation over extraterritoriality and statutory "focus" is a colossal waste of time and judicial and other resources, and it unfairly burdens the defendant whose case is the vehicle for determining whether a statutory provision applies extraterritorially and, if not, what the statutory "focus" is. The federal criminal code is sprawling and most provisions do not speak to the extraterritoriality question.[108] Is it truly wise or fair to wait for each code section to be charged and then to litigate, perhaps all the way to the Supreme Court, the extraterritoriality question? And

106. *See, e.g.*, Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004); Scheidler v. NOW, 537 U.S. 393, 408–09 (2003); United States v. Thompson/Center Arms, 504 U.S. 505, 517–18 (1992) (plurality opinion); Crandon v. United States, 494 U.S. 152, 158 (1990); FCC v. ABC, 347 U.S. 284, 296 (1954). *But see* Babbitt v. Sweet Home Chapter, Communities for Great Or., 515 U.S. 687, 704 n.18 (1995).

107. *See, e.g.*, Knox, *supra* note 1, at 383 (the Court should adopt a clarified version of its presumption against extrajurisdictional application of U.S. law such that a hard presumption against extraterritoriality applies when no basis in international law exists, a soft presumption applies where there is a basis but not a the sole or primary one, and no presumption applies at all when the U.S. jurisdiction is sole or primary); Dodge, *supra* note 1, at 124 (a presumption is warranted as a means of discerning congressional intent but the definition of "domestic" cases should be based not on where the conduct occurred but on where the effects are felt); Turley, *supra* note 1, at 659–60 ("Instead of beginning with a presumption that Congress intends all statutes to apply only territorially, it would make more sense to presume that, unless expressly limited, Congress intends statutes to apply extraterritorially."); Clopton, *supra* note 3, at 1–5 (instead of applying the presumption to all extraterritorial cases, proposing that the *Charming Betsy* canon be applied to private civil litigation, the rule of lenity in criminal cases, and *Chevron* deference in administrative law cases). *But see* Parrish, *supra* note 1, at 1461–62 (arguing for reinvigoration of the territorial limits on jurisdiction in transnational cases).

108. *See* Stephen F. Smith, "Overfederalization," in the present Volume.

need we now, with respect to every statute that does not have extraterritorial application, litigate about the statutory "focus," again potentially all the way up to the Supreme Court?

This wasteful and unfair litigation is also completely unnecessary. Congress can and should step in to identify when it believes statutes ought to apply in transborder cases.

1. **Instead of reacting to each Supreme Court extraterritoriality decision that it does not like, Congress should act preemptively and create a general code section that dictates what crimes apply extraterritorially and under what circumstances.** Other countries have successfully done so.[109] Such a general extraterritoriality provision was drafted during the course of an attempted overhaul of the U.S. federal criminal code; unfortunately the overhaul, and thus this general provision, failed.[110] It appears that, at least recently, Congress has opted for territoriality jurisdiction as measured both in subjective (conduct) and objective (effects) territoriality terms. But effects jurisdiction has the potential for being limitless unless Congress exercises some discipline in defining its scope. It is worth keeping in mind the paradigmatic case for such jurisdiction: when a defendant, standing in State A, shoots and kills a victim who is present in State B. The effects, in other words, should be direct, substantial, and at the very least foreseeable if not intended.
2. **Congress should consider making an express provision, similar to that included in the Dodd-Frank Act, regarding where a crime is deemed committed for purposes of determining whether a given violation is domestic or extraterritorial.** In this respect, it may wish to reference the existing venue rules in criminal cases.

109. Swiss Crim. Code arts. 4–7, https://www.admin.ch/opc/en/classified-compilation/19370083/201701010000/311.0.pdf (unofficial English translation).

110. *See, e.g.*, Kenneth R. Feinberg, *Extraterritorial Jurisdiction and the Proposed Federal Criminal Code*, 72 J. Crim. L. & Criminology 385 (1981); Note, *Extraterritorial Jurisdiction Under the Proposed Federal Criminal Codes: Senate Bill 1630 and House Bill 1647*, 12 Ga. J. Int'l & Comp. L. 305 (1982).