
THE NEW PRESUMPTION AGAINST
EXTRATERRITORIALITY

William S. Dodge

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William S. Dodge*

Canons of statutory interpretation are sometimes said to promote continuity and stability in the law. Yet it is widely acknowledged that canons themselves often change. The presumption against extraterritoriality is a prime example. It evolved from a rule based on international law, to a canon of comity, to a tool for finding legislative intent. The presumption then fell into disuse for nearly forty years until it was reborn in EEOC v. Arabian American Oil Co. (Aramco) and substantially revised in Morrison v. National Australia Bank Ltd.

This Article makes three contributions. First, it describes the evolution of the presumption against extraterritoriality over two centuries, providing a detailed account of change in an important canon of interpretation. Second, the Article describes the new, post-2010 presumption, arguing — contrary to the conventional wisdom — that the current version of the presumption is superior to previous ones. Third, the Article addresses the problem of changing canons. It argues changing canons constitute a form of dynamic statutory interpretation, which imposes certain responsibilities: to justify the changed canon in normative terms, to explain the need for change, and to mitigate the transition costs.

INTRODUCTION

As the Supreme Court has increasingly relied on canons of statutory interpretation over the past three decades, these canons have received a great deal of scholarly attention.¹ Canons form an important part of what has recently been dubbed the “law of interpretation.”² Professor David Shapiro famously defended interpretive canons on the ground

* Martin Luther King, Jr. Professor of Law and John D. Ayer Chair in Business Law, University of California, Davis, School of Law. Earlier drafts were presented at the Colloquium on International Law and Politics at UC Berkeley School of Law, at the ASIL International Law in Domestic Courts Workshop at the University of Pennsylvania School of Law, and at UC Hastings College of the Law. My thanks to Kevin Benish, Ashutosh Bhagwat, Pamela Bookman, Curtis Bradley, Hannah Buxbaum, Zachary Clopton, Anthony Colangelo, John Coyle, Jennifer Daskal, Kristina Daugirdas, Scott Dodson, William Eskridge, Maggie Gardner, Franklin Gevurtz, Abbe Gluck, Andrew Kent, John Knox, Harold Hongju Koh, Anita Krishnakumar, Thomas Lee, Julian Mortenson, Austen Parrish, David Pozen, Richard Re, Shayak Sarkar, Reuel Schiller, Darien Shanske, Aaron Simowitz, Brian Slocum, David Sloss, Paul Stephan, Symeon Symeonides, Aaron Tang, Carlos Vázquez, and David Zaring for their comments, suggestions, and insights.

¹ For important early articles, see William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 65–71 (1994) (discussing canons as an interpretive regime); and Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 451–89 (1989) (discussing the role of interpretive principles and articulating a number of such principles). For recent book-length treatments, see WILLIAM N. ESKRIDGE JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* (2016); and ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

² See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1107–12 (2017) (discussing canons of interpretation).

that they promote continuity and stability in the law.³ Yet it is widely acknowledged that canons of statutory interpretation themselves change.⁴ The retroactive application of changed canons to statutes enacted before the changes may result in interpretations that are different from the ones the enacting Congresses would have expected. This problem has received little attention.⁵

The presumption against extraterritoriality is a prime example of a canon that has changed substantially over time.⁶ The presumption began in the nineteenth century as an application of the *Charming Betsy* canon, requiring that statutes be construed to avoid violations of

³ See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992) (“[T]he dominant theme running through most interpretive guides that actually influence outcomes is that close questions of construction should be resolved in favor of continuity and against change.”); see also Eskridge & Frickey, *supra* note 1, at 66 (writing that canons constitute an “interpretive regime” that renders statutory interpretation “more predictable, regular, and coherent”); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1428 (2005) (“[M]any of the canons play a valuable role within a greater interpretive framework that protects the stability of statutory law by elevating the values of continuity, coherence, and predictability . . .”).

⁴ See Baude & Sachs, *supra* note 2, at 1136 (“Interpretive rules can change over time.”); Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 494 (2015) (“The interpretive regime of the Supreme Court has not been static over time.”); Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1989–90 (2005) (observing that “the particulars of even longstanding canons drift over time” and that “the Court occasionally creates new canons”); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1988 (2011) (noting that “the canons of interpretation . . . have not been frozen in time” and that the “Supreme Court continues . . . to generate new interpretive rules”); Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court’s First Decade*, 117 MICH. L. REV. 71, 78 (2018) (“[R]ather than stability, it is change that characterizes the Roberts Court’s current collection of interpretive canons.”); Brian G. Slocum, *Overlooked Temporal Issues in Statutory Interpretation*, 81 TEMP. L. REV. 635, 639 (2008) (“[C]ourts consider the creation and modification of the rules of statutory interpretation to be subject to judicial prerogative and frequently change the rules.”); Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 149 (2001) (“[T]he Court has changed its practice, and sometimes the formally stated rules, with remarkable frequency.”).

⁵ See Slocum, *supra* note 4, at 640 (“[T]he temporal problems raised by the retroactive application of new or modified interpretive rules are greatly underappreciated and undertheorized in statutory interpretation scholarship.”). Among the few articles that have discussed the stability issues at length are Baude & Sachs, *supra* note 2, at 1132–40 (discussing what happens when interpretive rules change and who has the power to change them); Frickey, *supra* note 4, at 1981–86 (discussing the transition costs of interpretive-regime change); and Slocum, *supra* note 4, at 646–70 (considering when changes in interpretive rules should be applied retrospectively and prospectively). A few other articles have explored related questions, such as why canons change, see Vermeule, *supra* note 4, or how lower courts respond to those changes, see Bruhl, *supra* note 4. This Article focuses on the retroactivity question.

⁶ This Article deals only with the federal presumption against extraterritoriality that courts apply to federal statutes. For a critical discussion of state presumptions against extraterritoriality, see William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389 (2020).

international law.⁷ When international law evolved to permit greater extraterritorial regulation, the Supreme Court kept the presumption but articulated new rationales — first, international comity⁸ and then Congress’s primary concern with domestic conditions.⁹ The *American Banana* version of the presumption that the Court applied during the first half of the twentieth century turned entirely on the location of the conduct.¹⁰ When this approach would have led to results that seemed inconsistent with Congress’s intent, the Court distinguished or ignored the presumption.¹¹ After 1949, the presumption fell into disuse for four decades.¹² It was reborn in the 1991 case *EEOC v. Arabian American Oil Co.*¹³ (*Aramco*) and was applied regularly, if somewhat inconsistently, thereafter. The *Aramco* version of the presumption purported to be a clear statement rule,¹⁴ and, like *American Banana*’s version of the presumption, it turned entirely on the location of the conduct.¹⁵

The Supreme Court’s 2010 decision in *Morrison v. National Australia Bank Ltd.*¹⁶ articulated a new presumption against extraterritoriality. First, the Court said explicitly that the presumption was not a “clear statement rule” and that “context can be consulted” to determine whether the presumption has been rebutted.¹⁷ Second, *Morrison* abandoned the presumption’s traditional dependence on the location of the conduct. Whether the application of a statute should be considered domestic or extraterritorial would now turn on whether the object of the statute’s “focus” was found in the United States.¹⁸ In *RJR Nabisco, Inc. v. European Community*,¹⁹ the Court formalized *Morrison*’s approach, adopting “a two-step framework for analyzing extraterritoriality issues”

⁷ See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

⁸ See *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (stating that to apply the law of a place other than the place of the act “would be an interference with the authority of another sovereign, contrary to the comity of nations”).

⁹ See *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) (stating that the presumption is “based on the assumption that Congress is primarily concerned with domestic conditions”).

¹⁰ *Am. Banana*, 213 U.S. at 356 (“[T]he character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”).

¹¹ See *infra* p. 1592.

¹² See *infra* section I.C, pp. 1595–97.

¹³ 499 U.S. 244 (1991).

¹⁴ *Id.* at 258 (referring to Congress’s “need to make a clear statement that a statute applies overseas”).

¹⁵ See *infra* p. 1602.

¹⁶ 561 U.S. 247 (2010).

¹⁷ *Id.* at 265.

¹⁸ *Id.* at 266. In *Morrison*, the Court held that the focus of section 10(b) of the Securities Exchange Act was the transaction not the fraud. *Id.* at 266–67. Because the transaction in that case occurred outside the United States, applying section 10(b) was prohibited as extraterritorial, despite the fact that the fraudulent conduct occurred in the United States. *Id.* at 273.

¹⁹ 136 S. Ct. 2090 (2016).

that looks first for a clear indication of geographic scope and, in the absence of one, applies *Morrison*'s "focus" test.²⁰ This new presumption against extraterritoriality has also been restated in the *Restatement (Fourth) of Foreign Relations Law*.²¹

Scholars have been critical of the new presumption against extraterritoriality. It has been called a "runaway canon"²² and a "Frankenstein's monster."²³ But the Supreme Court shows no inclination to abandon the presumption despite repeated calls to do so.²⁴ The Court's articulation of a two-step framework for applying the presumption in *RJR Nabisco* was unanimous, even though the Court split 4–3 on how that framework should be applied to the private right of action in the Racketeer Influenced and Corrupt Organizations Act²⁵ (RICO).²⁶ In *WesternGeco LLC v. ION Geophysical Corp.*,²⁷ the Court applied the new presumption again, with the addition of two Justices who had not participated in *RJR Nabisco* and without a word of dissent from the new two-step framework.²⁸ At present, there does not appear to be a single member of the Court who wants to abandon the presumption against extraterritoriality.²⁹

²⁰ *Id.* at 2101.

²¹ RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (AM. LAW INST. 2018). I served as one of the co-reporters for Part IV of the *Restatement (Fourth)*. The views expressed in this Article are my own and should not be attributed to the American Law Institute.

²² Maggie Gardner, *RJR Nabisco and the Runaway Canon*, 102 VA. L. REV. ONLINE 134 (2016).

²³ Anthony J. Colangelo, *The Frankenstein's Monster of Extraterritoriality Law*, 110 AJIL UNBOUND 51 (2016).

²⁴ See Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. REV. 1, 20 (2014) (arguing that the presumption "should be abandoned"); see also 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, 1080–94 (2018) (arguing that the presumption should be abandoned in civil but not criminal cases); cf. Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 1 (1992) (arguing for abandonment of the earlier *Aramco* version).

²⁵ 18 U.S.C. §§ 1961–1968 (2018).

²⁶ All seven participating Justices joined the part of the Court's opinion articulating the two-step framework, see *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2096, 2101 (2016), though three of them disagreed with how the Court applied that framework to RICO's private right of action, see *id.* at 2111–16 (Ginsburg, J., concurring in part, dissenting in part, and dissenting from the judgment). Justice Scalia died before the case was decided. See Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <https://nyti.ms/1XqvGem> [<https://perma.cc/7A83-3KAZ>]. Justice Sotomayor was recused. See *RJR Nabisco*, 136 S. Ct. at 2111.

²⁷ 138 S. Ct. 2129 (2018).

²⁸ *Id.* at 2136–38. Justice Sotomayor joined the majority opinion. *Id.* at 2134. And while Justice Gorsuch wrote a dissent joined by Justice Breyer, he agreed with the Court's application of the presumption. See *id.* at 2139 (Gorsuch, J., dissenting).

²⁹ Justice Kavanaugh invoked *Morrison* as a circuit judge. See *Miller v. Clinton*, 687 F.3d 1332, 1360 n.8 (D.C. Cir. 2012) (Kavanaugh, J., dissenting). Elsewhere, he has suggested that presumptions like the one against extraterritoriality should be converted to "plain statement rule[s]." Brett

I argue that academic criticisms of the new presumption are misguided. The *Morrison/RJR Nabisco* version of the presumption is significantly more flexible than its *Aramco* and *American Banana* predecessors, and thus decidedly better. In combination with other principles of statutory interpretation and appropriate deference to administrative agencies, the new presumption against extraterritoriality provides a useful tool for courts to determine the geographic scope of federal statutory provisions.

But the problem of changing canons remains. In *Morrison*, the Supreme Court justified the presumption on the ground that it “preserv[es] a stable background against which Congress can legislate with predictable effects.”³⁰ Nowhere did the Court acknowledge that its focus approach represented a significant departure from the *Aramco* version of the presumption that it had applied since 1991, to say nothing of the *American Banana* version that the Court was applying (inconsistently) in 1934, when section 10(b) of the Securities Exchange Act³¹ was passed. In *RJR Nabisco*, plaintiffs argued that because Congress modeled RICO’s private right of action on the Clayton Act,³² RICO’s provision should be given the same geographic scope that the Supreme Court had already given the Clayton Act when RICO was passed.³³ But the Court rejected that argument, noting that it had subsequently “honed [its] extraterritoriality jurisprudence”³⁴ and instead applying its “current extraterritoriality doctrine.”³⁵ *RJR Nabisco* seemed to assert the Court’s authority to change the presumption against extraterritoriality, and to apply it retroactively, without regard to the expectations of the enacting Congress.

Rhetorically, the Supreme Court is committed to some combination of textualism and purposivism.³⁶ Changing canons, on the other hand, constitute a form of dynamic statutory interpretation in which courts apply statutes in ways that might not have been anticipated by Congress.³⁷ Currently, the retroactive application of changed canons operates as a “backdoor” form of interpretation that the Supreme Court

M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2156 (2016) (book review). His suggestion that the Supreme Court is already moving in that direction, *see id.* at 2156 & n.189, is mistaken however. *See Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010) (denying that the presumption is a “clear statement rule”); *see also infra* notes 193–96 and accompanying text.

³⁰ *Morrison*, 561 U.S. at 261.

³¹ 15 U.S.C. §§ 77a–77aa (2018).

³² *Id.* §§ 15–27, 52–53.

³³ *RJR Nabisco*, 136 S. Ct. at 2109.

³⁴ *Id.* at 2110.

³⁵ *Id.* at 2111.

³⁶ *See infra* notes 442–54 and accompanying text.

³⁷ *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 123–28 (1994) (discussing the role of courts in dynamic statutory interpretation).

generally fails to acknowledge or justify.³⁸ This is likely because of the theoretical problems that textualism and purposivism have with applying changed canons retroactively to existing legislation.³⁹ Some scholars have proposed applying changed canons of interpretation only prospectively, but doing so seems inconsistent with the judicial role.

Even if applying changed canons retroactively is an inevitable form of dynamism, the Supreme Court should be obligated to justify the changed canon in normative terms, to explain the need for change, and to mitigate the transition costs of moving from one interpretive regime to another. These obligations will apply differently to different canons, depending largely on the content of the new canon and the extent of reliance on the old one. Applying this framework to the new presumption against extraterritoriality, this Article concludes that its retroactive application to existing federal statutes is appropriate.

The Article makes three contributions to the literature. Part I describes the evolution of the presumption against extraterritoriality over two centuries, providing a detailed account of change in an important canon of statutory interpretation. Professor Adrian Vermeule has noted that “there are very few longitudinal studies tracing the history of particular canons.”⁴⁰ This Article helps fill that gap.⁴¹

Part II describes the new, post-2010 presumption.⁴² This Part also situates the new presumption in a broader interpretive regime for determining questions of geographic scope, a regime that also includes a principle of reasonableness in interpretation and principles of deference to administrative agencies. Finally, Part II offers an evaluation of the new regime, arguing — contrary to the conventional wisdom — that the latest version of the presumption is a decided improvement over previous ones.

³⁸ Cf. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992) (describing the creation of clear statement rules in the 1980s as “backdoor constitutional lawmaking”); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. (forthcoming 2020) (manuscript at 12) (on file with the Harvard Law School Library) (describing use of canons by textualist Justices as “backdoor purposivism”).

³⁹ See *infra* section III.B, pp. 1640–44.

⁴⁰ Vermeule, *supra* note 4, at 182 n.72. But see Mendelson, *supra* note 4, at 110–23 (discussing the evolution of canons during the first decade of the Roberts Court).

⁴¹ Professor John Knox has covered some of the same ground, for example, distinguishing among the original, international law–based version of the presumption, the *American Banana* version, and the *Aramco* version. See John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351, 361–78 (2010). Because Knox’s excellent article was published in 2010, it had no chance to address the new presumption against extraterritoriality inaugurated in *Morrison*.

⁴² Much of what was written prior to *Morrison* about how the presumption should be understood and applied is no longer accurate. See, e.g., William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85 (1998).

Part III moves beyond the presumption against extraterritoriality to suggest a framework that is applicable to changed canons generally. It argues that changing canons constitute an inevitable form of methodological dynamism⁴³ on a Supreme Court that is rhetorically committed to textualism and purposivism. Instead of ignoring this tension, as the Court has done, this Part proposes ways of living with methodological dynamism. If the Court feels the need to change a canon of interpretation, it should explain why it is doing so using the same factors that it uses to decide when to overrule a precedent.⁴⁴ Part III also makes specific proposals for mitigating the transition costs of moving to a new interpretive regime by adhering to prior interpretations of specific statutes under old canons, by honoring Congress's expectations when it borrows language from statutes that have been construed under old canons, and in appropriate cases by treating old canons as part of the context in applying new ones.

This Article concludes with a few words of caution. It notes that whether the new presumption against extraterritoriality fulfills its potential to produce sensible tests for the geographic scope of federal statutes ultimately depends on what the Supreme Court does with it.

I. A BRIEF HISTORY OF THE PRESUMPTION

There has been a presumption that acts of Congress do not apply extraterritorially for almost as long as there have been acts of Congress. But the Supreme Court has not always been consistent in applying the presumption against extraterritoriality. And over time, the presumption against extraterritoriality has changed significantly. Part I traces the presumption's evolution from a rule based on international law, to a canon of comity, to an approach for determining legislative intent. For several decades the presumption fell into disuse. And even during the periods when the Court was in principle committed to the presumption as a canon of interpretation, it would decline to apply the presumption when doing so would lead to an outcome that seemed contrary to the purpose of the statute.

A. Nineteenth Century: International Law Origins

The presumption against extraterritoriality grew out of the separate presumption that Congress does not intend to violate international

⁴³ I am indebted to Professor Anita Krishnakumar for the phrase.

⁴⁴ To be clear, I suggest that the Court should consider the same factors, not that the principle of stare decisis should apply generally to canons of interpretation as others have argued. See, e.g., Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863 (2008). But see Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573 (2014).

law.⁴⁵ The latter rule — today commonly known as the *Charming Betsy* canon — holds that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”⁴⁶ In the late eighteenth and early nineteenth centuries, the law of nations took a primarily territorial view of prescriptive jurisdiction.⁴⁷ Thus, in *The Apollon*,⁴⁸ when Justice Story applied to U.S. customs law a presumption that “municipal laws . . . must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction,”⁴⁹ he did so in order to avoid “a clear violation of the laws of nations.”⁵⁰ The Supreme Court gave a territorial interpretation to U.S. and foreign laws in other cases too.⁵¹ Even in those early days, international law recognized exceptions to the strictly territorial view of jurisdiction for a country’s own nationals and for universal crimes like piracy.⁵² For this reason, Professor John Knox has characterized the early presumption as a presumption against *extrajurisdictionality* — that statutes should be construed not to exceed the limits that international law places on jurisdiction.⁵³

During the late nineteenth and early twentieth centuries, international law’s limits on prescriptive jurisdiction became less territorial. In his 1887 *Report on Extraterritorial Crime*, John Bassett Moore noted the wide acceptance of jurisdiction based on effects: “The principle that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries.”⁵⁴ In 1905, Lassa Oppenheim reported in the first edition of his international law treatise that “[m]any States claim jurisdiction and threaten punishments for

⁴⁵ See David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 7, 38–39 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011).

⁴⁶ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

⁴⁷ See, e.g., JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC* § 20, at 21 (Boston, Hilliard, Gray & Co. 1834) (explaining that “it would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation, that other nations should be at liberty to regulate either persons or things within its territories”).

⁴⁸ 22 U.S. (9 Wheat.) 362 (1824).

⁴⁹ *Id.* at 370.

⁵⁰ *Id.* at 371.

⁵¹ See, e.g., *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 195 (1857) (stating that U.S. patent laws “do not, and were not intended to, operate beyond the limits of the United States”); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1808) (holding that foreign prize law was territorial).

⁵² See *The Apollon*, 22 U.S. (9 Wheat.) at 370 (“The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens.”); *United States v. Klinton*, 18 U.S. (5 Wheat.) 144, 152 (1820) (noting that pirates “are proper objects for the penal code of all nations”).

⁵³ Knox, *supra* note 41, at 352.

⁵⁴ John B. Moore, *Report on Extraterritorial Crime* (1887), reprinted in 2 JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* § 202, at 244 (1906).

certain acts committed by a foreigner in foreign countries.”⁵⁵ By 1927, the Permanent Court of International Justice would go further, not only endorsing prescriptive jurisdiction over foreigners abroad on the basis of effects⁵⁶ but also asserting that states were entirely free to regulate extraterritorially unless prohibited from doing so by a specific rule of international law.⁵⁷ The Supreme Court responded to these changes in international law not by abandoning the presumption against extraterritoriality, but rather by finding a new rationale for the presumption based on international comity.⁵⁸

B. 1909–1949: From International Law to International Comity and Congressional Intent

In 1909, the Supreme Court had to decide in *American Banana Co. v. United Fruit Co.*⁵⁹ whether the Sherman Act⁶⁰ applied to anticompetitive conduct by an American company in Costa Rica. Justice Holmes wrote that any statute should be construed, “in case of doubt[,] . . . as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. ‘All legislation is *prima facie* territorial.’”⁶¹ Significantly, Justice Holmes rested this presumption not on the law of nations, as Justice Story had done, but on international comity. Relying entirely on conflict-of-laws decisions, Justice Holmes wrote:

[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. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, *contrary*

⁵⁵ 1 L. OPPENHEIM, INTERNATIONAL LAW § 147, at 196 (1905).

⁵⁶ S.S. “Lotus” (Fr./Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 23 (Sept. 7) (noting that “many countries” interpreted their criminal law to apply to persons “in the territory of another State . . . if one of the constituent elements of the offence, and more especially its effects, have taken place there”).

⁵⁷ See *id.* at 19 (“Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules . . .”). This proposition was always controversial, and today it is generally acknowledged that customary international law requires a state to have a basis for jurisdiction to prescribe. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 407 reporters’ note 1 (AM. LAW INST. 2018).

⁵⁸ On the role of international comity in American law more generally, including its relationship to international law, see William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015).

⁵⁹ 213 U.S. 347 (1909).

⁶⁰ 15 U.S.C. §§ 1–38 (2018).

⁶¹ *Id.* at 357 (quoting *Ex parte Blain* (1879) 12 Ch D 522 at 528).

to the comity of nations, which the other state concerned justly might resent.⁶²

It is worth noting that *American Banana's* version of the presumption turned entirely on the location of the conduct — “the character of an act as lawful or unlawful must be determined wholly by the law of the country *where the act is done*.”⁶³ This aspect of the presumption would create significant tension in cases where such a limitation seemed inconsistent with the intent of Congress.⁶⁴

Over the next four decades, the Supreme Court applied this restyled presumption against extraterritoriality inconsistently. The Court used the presumption to limit the reach of the Seaman's Act and the Employer's Liability Act, relying on *American Banana* in each instance.⁶⁵ In *Blackmer v. United States*,⁶⁶ the Court acknowledged the presumption that “legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States,” but found that the statute at issue clearly gave the district court authority to compel a U.S. citizen to return from abroad to testify.⁶⁷

In other cases, the Court did not apply the presumption. *United States v. Bowman*⁶⁸ held that a statute criminalizing fraud against the U.S. government applied extraterritorially because of the nature of the offense, despite the absence of a clear indication in the statute.⁶⁹ In *Ford v. United States*⁷⁰ and *United States v. Sisal Sales Corp.*,⁷¹ the Court relied on effects in the United States to justify the extraterritorial application of the National Prohibition Act and the Sherman Act, respectively.⁷² And in *Cook v. Tait*,⁷³ the Court held that a tax statute applied to income derived from property in Mexico owned by a nonresident U.S. citizen without any attempt to explain why the presumption against extraterritoriality should not apply or had been overcome.⁷⁴ The Supreme Court seemed most likely to depart from the presumption against extraterritoriality when limiting a statute to conduct within the United States would have defeated the statute's apparent purpose.

⁶² *Id.* at 356 (emphasis added) (citations omitted).

⁶³ *Id.* (emphasis added).

⁶⁴ See *infra* notes 68–74 and accompanying text.

⁶⁵ See *N.Y. Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 31–32 (1925); *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918).

⁶⁶ 284 U.S. 421 (1932).

⁶⁷ *Id.* at 437.

⁶⁸ 260 U.S. 94 (1922).

⁶⁹ *Id.* at 97–100.

⁷⁰ 273 U.S. 593 (1927).

⁷¹ 274 U.S. 268 (1927).

⁷² See *Ford*, 273 U.S. at 623–24; *Sisal Sales*, 274 U.S. at 276.

⁷³ 265 U.S. 47 (1924).

⁷⁴ *Id.* at 55–56.

During this period, congressional intent also began to play a role, alongside comity, in shaping and justifying the presumption against extraterritoriality. It was *Bowman* that first tied geographic scope to statutory purpose.⁷⁵ At issue was the scope of a statute criminalizing fraud against a corporation owned by the United States, which the defendants were alleged to have violated both on the high seas and in Brazil.⁷⁶ Chief Justice Taft began the Court's analysis by tying the question of geographic scope to congressional intent: "The necessary *locus*, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations."⁷⁷ Chief Justice Taft then distinguished two categories of crimes. Crimes that "affect the peace and good order of the community," like assault, burglary, and arson, are presumptively territorial.⁷⁸ "If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard."⁷⁹

But Chief Justice Taft distinguished other statutes based on the nature of the offense. The presumption against extraterritoriality, he wrote, "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."⁸⁰ When territorial limits would "greatly . . . curtail the scope and usefulness of the statute," the Court would not require a "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."⁸¹ Chief Justice Taft concluded that the statute criminalizing fraud against the U.S. government fell into this latter category and thus applied to the defendants' conduct on the high seas and in Brazil despite the absence of any express statement in the statute itself.⁸² *Bowman* made clear, in a way that prior decisions had not, that the geographic scope of a statute "depends upon the purpose of Congress" and may "be inferred from the nature of the

⁷⁵ See *United States v. Bowman*, 260 U.S. 94, 97–98 (1922). *Bowman* has been called an "underappreciated" extraterritoriality decision. Ellen S. Podgor & Daniel M. Filler, *International Criminal Jurisdiction in the Twenty-First Century: Rediscovering United States v. Bowman*, 44 SAN DIEGO L. REV. 585, 589 (2007).

⁷⁶ *Bowman*, 260 U.S. at 95–96.

⁷⁷ *Id.* at 97–98.

⁷⁸ *Id.* at 98.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See *id.* at 100.

offense.”⁸³ While many criminal offenses are presumptively territorial, others should reasonably be construed as having no geographic limitations.

In 1949, when the Supreme Court applied the presumption against extraterritoriality in *Foley Bros. v. Filardo*,⁸⁴ it recharacterized the presumption as “a valid approach whereby unexpressed congressional intent may be ascertained.”⁸⁵ The presumption was based, the Court said, “on the assumption that Congress is primarily concerned with domestic conditions.”⁸⁶ The question in *Foley Bros.* was whether the federal Eight Hour Law applied to an American citizen working on a U.S. government contract in Iran and Iraq.⁸⁷ Looking to the language of the statute, its legislative history, and administrative interpretations, the Court concluded that the presumption had not been rebutted and 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.”⁸⁸

Foley Bros. marked the emergence of congressional intent as a second rationale for the presumption against extraterritoriality, in addition to comity.⁸⁹ Intent had certainly played a role in the presumption’s application before *Foley Bros.* The intent of Congress had served as a basis for rebutting the presumption in *Blackmer*,⁹⁰ for limiting the presumption in *Bowman*,⁹¹ and for ignoring the presumption in other cases.⁹² But it was *Foley Bros.* that took *Bowman*’s insight that

⁸³ *Id.* at 97–98.

⁸⁴ 336 U.S. 281 (1949).

⁸⁵ *Id.* at 285. Construing the Fair Labor Standards Act earlier in the same Term, the Court similarly stated that “the scope of the Wage-Hour Act lies in the purpose of Congress in defining its reach.” *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 385 (1948). The Court concluded in that case that the word “possession” in the Act included leased military bases on foreign territory. *See id.* at 390.

⁸⁶ *Foley Bros.*, 336 U.S. at 285.

⁸⁷ *Id.* at 283.

⁸⁸ *Id.* at 290.

⁸⁹ Comity and congressional intent continue to serve as the twin rationales for the presumption against extraterritoriality today. *See, e.g.,* *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016) (noting that the presumption “serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries” and reflects the “commonsense notion that Congress generally legislates with domestic concerns in mind” (second quote quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993))); *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 reporters’ note 2 (AM. LAW INST. 2018) (discussing rationales for the presumption).

⁹⁰ *See Blackmer v. United States*, 284 U.S. 421, 437 (1932) (stating that “legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States”); *supra* notes 66–67 and accompanying text.

⁹¹ *See United States v. Bowman*, 260 U.S. 94, 98 (1922) (holding that the presumption “should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government’s jurisdiction”); *supra* notes 75–83 and accompanying text.

⁹² *See supra* notes 70–74 and accompanying text (discussing *Ford*, *Sisal Sales*, and *Cook*).

geographic scope “depends upon the purpose of Congress”⁹³ and articulated a new rationale for the presumption itself based on congressional intent.

C. 1950–1989: Falling into Disuse

Although the Supreme Court briefly referred to the presumption against extraterritoriality in the Term after *Foley Bros.*,⁹⁴ it soon returned to its old habits of distinguishing or ignoring the presumption. Indeed, the Court would not apply the presumption against extraterritoriality again for another forty years.⁹⁵

In *Steele v. Bulova Watch Co.*,⁹⁶ the Court declined to apply the presumption to limit the reach of a federal statute protecting U.S. trademarks, over a strong dissent from Justice Reed.⁹⁷ The Court cited “the broad jurisdictional grant in the Lanham Act”⁹⁸ as well as the effects of the defendant’s foreign conduct in the United States.⁹⁹ The Court specifically distinguished *American Banana* as involving no harmful effects in the United States, noting that “[u]nlawful effects in this country, absent in the posture of the *Banana* case before us, are often decisive.”¹⁰⁰ The same year, in *Kawakita v. United States*,¹⁰¹ the Supreme Court applied the federal treason statute to a U.S. citizen’s conduct in Japan without mentioning the presumption.¹⁰²

Nor did the Court rely on the presumption against extraterritoriality in *Lauritzen v. Larsen*,¹⁰³ when it decided the geographic scope of the Jones Act provision allowing any seaman injured during the course of his employment to sue in U.S. courts. Instead, the Court invoked the *Charming Betsy* canon,¹⁰⁴ observing that “[b]y usage as old as the Nation, [shipping] statutes have been construed to apply only to areas and transactions in which American law would be considered operative

⁹³ *Bowman*, 260 U.S. at 97; see also *supra* notes 75–83 and accompanying text.

⁹⁴ See *United States v. Spelar*, 338 U.S. 217, 222 (1949) (holding that the Federal Tort Claims Act did not apply to tort claims at a U.S. military base abroad because of the Act’s exception for claims arising in a foreign country).

⁹⁵ See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 440 (1989) (applying presumption to the Foreign Sovereign Immunities Act); see also Gardner, *supra* note 22, at 136 (“[T]he presumption against extraterritoriality fell into disuse after the 1940s.”); Paul B. Stephan, *Private Litigation as a Foreign Relations Problem*, 110 AJIL UNBOUND 40, 40 n.3 (2016) (noting that the presumption “seemed to pass into desuetude after *Foley Brothers, Inc. v. Filardo*”).

⁹⁶ 344 U.S. 280 (1952).

⁹⁷ See *id.* at 289–92 (Reed, J., dissenting).

⁹⁸ *Id.* at 286 (majority opinion).

⁹⁹ *Id.* at 286–87.

¹⁰⁰ *Id.* at 288.

¹⁰¹ 343 U.S. 717 (1952).

¹⁰² *Id.* at 732–33.

¹⁰³ 345 U.S. 571 (1953).

¹⁰⁴ See *id.* at 578 (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

under prevalent doctrines of international law.”¹⁰⁵ For guiding principles, the Court looked not to public international law but to the conflict of laws, articulating and applying “the several factors which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim.”¹⁰⁶ The Court continued to apply *Lauritzen*’s balancing test in Jones Act cases¹⁰⁷ and used a less flexible “internal affairs” approach for other maritime statutes.¹⁰⁸ In none of these cases did it apply the presumption against extraterritoriality.

The American Law Institute tried to make sense of the Supreme Court’s inconsistent case law in its 1965 *Restatement (Second) of Foreign Relations Law*. Section 38 stated that rules of statutory law “apply only to conduct occurring within, or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute.”¹⁰⁹ As authority for the conduct prong, the *Restatement* naturally cited *Foley Bros.*¹¹⁰ As authority for the effects prong, the *Restatement* cited lower court cases like Judge Learned Hand’s antitrust decision in *United States v. Aluminum Co. of America*¹¹¹ (*Alcoa*).

Two decades later, in 1987, the *Restatement (Third) of Foreign Relations Law* dispensed with the presumption entirely.¹¹² One of the Reporters’ Notes quoted *American Banana*’s statement “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,”¹¹³ but went on to observe that “[t]his statement, though still often quoted, does not reflect the current law of the United States.”¹¹⁴ The *Restatement (Third)*’s decision to

¹⁰⁵ *Id.* at 577.

¹⁰⁶ *Id.* at 583; *see also id.* at 583–91 (discussing seven factors). For discussion of how changing theories of conflicts influenced different approaches to extraterritoriality, *see* William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L.J. 101 (1998).

¹⁰⁷ *See* *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 308–10 (1970); *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 382–84 (1959).

¹⁰⁸ *See* *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (“[O]ur attention is called to the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship.”).

¹⁰⁹ RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (AM. LAW INST. 1965).

¹¹⁰ *See id.* § 38 reporters’ note 1 (citing *Foley Bros. v. Filardo*, 336 U.S. 281 (1949)).

¹¹¹ *See id.* (citing *Alcoa*, 148 F.2d 416, 443–45 (2d Cir. 1945)). There were other cases the *Restatement* could have cited for the proposition that U.S. statutes applied to foreign conduct causing effects in the United States. *See, e.g.*, *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286–87 (1952) (*Lanham Act*); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927) (*Sherman Act*); *Ford v. United States*, 273 U.S. 593, 620–21 (1927) (*National Prohibition Act*).

¹¹² *See* Born, *supra* note 24, at 70 n.356 (“The *Third Restatement* did not include any counterpart to § 38.”).

¹¹³ 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 415 reporters’ note 2 (AM. LAW INST. 1987) (quoting *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909)).

¹¹⁴ *Id.*

abandon the presumption against extraterritoriality made sense at the time. The Supreme Court had not applied the presumption since *Foley Bros.* nearly forty years earlier, and many of the Court's subsequent decisions seemed inconsistent with such a rule of interpretation.

Lower courts had similarly tended to ignore the presumption, particularly in the important areas of securities and antitrust law. In securities cases, the Second Circuit developed its conduct and effects tests to define the geographic scope of the Exchange Act's antifraud provisions.¹¹⁵ In antitrust cases, some courts of appeals adopted a "jurisdictional rule of reason," which weighed a number of factors in each case to determine whether U.S. law should apply.¹¹⁶ Rather than attempting to restate a presumption against extraterritoriality based on seemingly outdated decisions, the *Restatement (Third)* articulated a general principle of reasonableness based on the antitrust decisions in its famous section 403¹¹⁷ and included specific applications of the principle to antitrust and securities law.¹¹⁸

The Supreme Court has declined to adopt section 403's approach of determining geographic scope through a case-by-case balancing of interests.¹¹⁹ But over the past three decades, the Court has revived the presumption against extraterritoriality and has applied that presumption in a significant number of cases.

D. 1991: The Presumption Reborn

The seminal case in the presumption's rebirth was the Supreme Court's 1991 decision in *EEOC v. Arabian American Oil Co.*¹²⁰

¹¹⁵ See *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972) (conduct test); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968) (effects test).

¹¹⁶ *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1301 (3d Cir. 1979) (Adams, J., concurring) (quoting KINGMAN BREWSTER, JR., ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958)); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613 (9th Cir. 1976) (same). *But see Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948–55 (D.C. Cir. 1984) (rejecting case-by-case balancing).

¹¹⁷ I RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403. For a critical account, see David B. Massey, Note, *How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law*, 22 YALE J. INT'L L. 419 (1997).

¹¹⁸ I RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 415 (antitrust); *id.* § 416 (securities).

¹¹⁹ See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797–99 (1993) (declining to engage in case-by-case balancing in the absence of foreign state compulsion). In *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), the Supreme Court cited section 403 to support a principle of reasonableness, *see id.* at 164, but refused the invitation to determine reasonableness on a case-by-case basis, saying that such an approach was "too complex to prove workable," *id.* at 168.

¹²⁰ 499 U.S. 244 (1991). The Court had briefly invoked the presumption against extraterritoriality two years earlier, interpreting the phrase "territory and waters, continental and insular, subject to the jurisdiction of the United States" in the Foreign Sovereign Immunities Act. See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989).

(*Aramco*). The defendant Aramco had hired the plaintiff in the United States and transferred him to work in Saudi Arabia.¹²¹ The plaintiff alleged that he was fired because of his race, religion, and national origin in violation of Title VII of the 1964 Civil Rights Act.¹²² Applying the presumption against extraterritoriality, the Supreme Court held that Title VII did not apply to employment discrimination abroad.¹²³

Quoting *Foley Bros.*, Chief Justice Rehnquist described the presumption as “a valid approach whereby unexpressed congressional intent may be ascertained.”¹²⁴ He also invoked the two modern rationales for the presumption. The first was *American Banana*’s comity rationale,¹²⁵ which Chief Justice Rehnquist rephrased as “protect[ing] against unintended clashes between our laws and those of other nations which could result in international discord.”¹²⁶ The second was *Foley Bros.*’s assumption that Congress “is primarily concerned with domestic conditions.”¹²⁷

Although there was evidence to support applying Title VII abroad, the Court found this evidence insufficient to rebut the presumption. Title VII’s definition of “commerce” as including commerce “between a State and any place outside thereof”¹²⁸ was dismissed as “boilerplate.”¹²⁹ Title VII’s statutory exemption for “the employment of aliens outside any State”¹³⁰ — unnecessary if Title VII itself did not apply outside the United States — was rejected because such an interpretation might lead to Title VII’s application to *foreign* companies operating abroad.¹³¹ And the EEOC’s argument for deference to its administrative interpretation was rejected on the grounds that the EEOC did not have rulemaking authority under *Chevron* and that its interpretation was not persuasive under *Skidmore*.¹³²

¹²¹ *Aramco*, 499 U.S. at 247.

¹²² *See id.*

¹²³ *See id.* at 248, 259. For more extensive discussion of *Aramco*, see Born, *supra* note 24, at 54–59; Dodge, *supra* note 42, at 92–94; and Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 198–203.

¹²⁴ *See Aramco*, 499 U.S. at 248 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

¹²⁵ *See supra* notes 59–62 and accompanying text.

¹²⁶ *Aramco*, 499 U.S. at 248 (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20–22 (1963)).

¹²⁷ *Id.* (quoting *Foley Bros.*, 336 U.S. at 285).

¹²⁸ 42 U.S.C. § 2000e(g) (2012).

¹²⁹ *Aramco*, 499 U.S. at 251.

¹³⁰ 42 U.S.C. § 2000e-1(a).

¹³¹ *See Aramco*, 499 U.S. at 255.

¹³² *See id.* at 257–58. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), courts must defer to a reasonable construction of the statute by an agency charged with administering the statute. Under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), the interpretations of other agencies are entitled to deference to the extent they are persuasive. For further discussion, see *infra* section II.D.2, pp. 1627–29.

Aramco was notable not just for reviving the presumption against extraterritoriality after four decades of disuse but also for the strength of the presumption it applied. Chief Justice Rehnquist referred to Congress's "need to make a clear statement that a statute applies overseas,"¹³³ and his opinion was widely read to convert the presumption against extraterritoriality into a clear statement rule.¹³⁴ In dissent, Justice Marshall complained that the Court had transformed the presumption "from a 'valid approach whereby unexpressed congressional intent may be ascertained,' into a barrier to any genuine inquiry into the sources that reveal Congress' actual intentions."¹³⁵

Aramco also appeared to be "reestablishing the presumption against extraterritoriality across the board."¹³⁶ Despite the large number of cases in which the Court had apparently declined to apply the presumption,¹³⁷ *Aramco* distinguished only *Steele*.¹³⁸ As Professor Larry Kramer pointed out at the time, *Aramco* had significant implications for other areas of law "including environmental law, labor law, corporate governance, . . . securities regulation" and "most obvious[ly] . . . antitrust."¹³⁹

In fact, the Court did begin to apply the presumption against extraterritoriality to other statutes.¹⁴⁰ In *Smith v. United States*,¹⁴¹ the Court used the presumption to interpret the Federal Tort Claims Act¹⁴² (FTCA), concluding that the Act did not apply to torts in Antarctica.¹⁴³ And in *Sale v. Haitian Centers Council, Inc.*,¹⁴⁴ the Court relied on the presumption to conclude that section 243(h) of the Immigration and Nationality Act — prohibiting the return of aliens to a country where they would be subject to persecution — did not apply to aliens apprehended on the high seas.¹⁴⁵ Because both *Smith* and *Sale* involved areas

¹³³ *Aramco*, 499 U.S. at 258.

¹³⁴ See, e.g., *id.* at 261 (Marshall, J., dissenting); Born, *supra* note 24, at 94 (noting that *Aramco* adopted a "clear statement" rule); Eskridge & Frickey, *supra* note 38, at 616 (noting that *Aramco* "expressed the canon as a clear statement rule"); Kramer, *supra* note 123, at 184 ("*Aramco* establishes a strong preference that can be overcome only by unequivocal language."). Subsequent cases did not apply the presumption as a clear statement rule, however, see Dodge, *supra* note 42, at 96–97, 110–12, and *Morrison* makes the point explicit, *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010).

¹³⁵ *Aramco*, 499 U.S. at 278 (Marshall, J., dissenting) (citation omitted) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

¹³⁶ Kramer, *supra* note 123, at 182.

¹³⁷ See *supra* notes 68–74, 96–108 and accompanying text.

¹³⁸ See *Aramco*, 499 U.S. at 252.

¹³⁹ Kramer, *supra* note 123, at 182.

¹⁴⁰ For more extensive discussion of these cases, see Dodge, *supra* note 42, at 95–98.

¹⁴¹ 507 U.S. 197 (1993).

¹⁴² 28 U.S.C. §§ 1346(b), 2671–2680 (2018).

¹⁴³ See 507 U.S. at 204–05.

¹⁴⁴ 509 U.S. 155 (1993).

¹⁴⁵ See *id.* at 173–74. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Court likely would have applied the presumption to the Endangered Species Act — as Justice Stevens did in his

outside any other country (Antarctica and the high seas) where conflict with foreign law was unlikely, the Court downplayed the comity rationale for the presumption, emphasizing instead “the commonsense notion that Congress generally legislates with domestic concerns in mind.”¹⁴⁶

Despite the apparent blossoming of the presumption against extraterritoriality, the Court conspicuously declined to apply the presumption to determine the geographic scope of U.S. antitrust law in *Hartford Fire Insurance Co. v. California*.¹⁴⁷ *Hartford* involved an alleged conspiracy by foreign reinsurers to make certain kinds of environmental insurance coverage unavailable in the United States.¹⁴⁸ After nodding briefly to *American Banana*,¹⁴⁹ the Court asserted that “it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”¹⁵⁰ The majority opinion did not explain why it was not applying the presumption against extraterritoriality or, alternatively, how the presumption had been overcome. The Court went on to reject the defendants’ argument that it should follow section 403 of the *Restatement (Third)* and decline to apply the Sherman Act on grounds of “international comity.”¹⁵¹

Justice Scalia argued in dissent that the Court should have employed section 403’s reasonableness analysis and declined to apply the Sherman Act to the foreign defendant’s conduct abroad.¹⁵² Unlike the majority, Justice Scalia at least attempted to deal with the presumption against extraterritoriality, asserting that the Court had “found the presumption to be overcome with respect to our antitrust laws” and that the question was now “governed by precedent.”¹⁵³ But in fact the question was not governed by precedent, and a straightforward application of *Aramco*

concurring opinion, *see id.* at 585–86 (Stevens, J., concurring in the judgment) — if the Court had not concluded that plaintiffs lacked standing, *see id.* at 578 (majority opinion).

¹⁴⁶ *Smith*, 507 U.S. at 204 n.5; *see also Sale*, 509 U.S. at 174 (noting “that the presumption has a foundation broader than the desire to avoid conflict with the laws of other nations”) (citing *Smith*, 507 U.S. at 204 n.5).

¹⁴⁷ 509 U.S. 764 (1993).

¹⁴⁸ *See id.* at 773–78.

¹⁴⁹ *See id.* at 795–96.

¹⁵⁰ *Id.* at 796.

¹⁵¹ *Id.* at 797–99. The Court suggested that it would consider such an argument only when the conduct prohibited by U.S. law was required by foreign law. *See id.* at 799 (“Since the London reinsurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States, . . . we see no conflict with British law.”).

¹⁵² *See id.* at 818–19 (Scalia, J., dissenting). Justice Scalia subsequently backed away from his uncharacteristic advocacy of balancing in *Hartford*, arguing in a later case that “fine tuning” the extraterritorial reach of statutes “through the process of case-by-case adjudication is a recipe for endless litigation and confusion.” *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 158 (2005) (Scalia, J., dissenting).

¹⁵³ *Hartford*, 509 U.S. at 814 (Scalia, J., dissenting).

would have led to the opposite result.¹⁵⁴ A more satisfying explanation is that the Sherman Act is plainly intended to prevent anticompetitive effects in the United States,¹⁵⁵ and the Court was willing to ignore the presumption when applying it would have frustrated the will of Congress, just as the Court had done in earlier cases involving harmful effects in the United States.¹⁵⁶

The first decade of the twenty-first century brought more apparent inconsistency in the Supreme Court's application of the presumption against extraterritoriality.¹⁵⁷ In *Microsoft Corp. v. AT&T Corp.*,¹⁵⁸ the Court applied the presumption to limit an exception to the generally territorial scope of the Patent Act.¹⁵⁹ In other cases, the Court acknowledged the presumption but found it inapplicable because the conduct had occurred in the United States,¹⁶⁰ or in territory over which the United States exercised "complete jurisdiction and control."¹⁶¹ And in one case, while finding the presumption against extraterritoriality technically inapplicable because the conduct at issue (possessing a gun after having been convicted of a felony) had occurred in the United States,¹⁶² the Court nevertheless found "help in the 'commonsense notion that Congress generally legislates with domestic concerns in mind.'"¹⁶³

In other cases, however, the Supreme Court simply ignored the presumption against extraterritoriality. In *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*,¹⁶⁴ the Court reaffirmed its effects approach to U.S.

¹⁵⁴ See Larry Kramer, *Extraterritorial Application of American Law after the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT'L L. 750, 751–54 (1995) (noting that previous Supreme Court cases had all involved some anticompetitive conduct in the United States).

¹⁵⁵ See *infra* note 206 and accompanying text.

¹⁵⁶ See *supra* notes 70–72, 96–100 and accompanying text.

¹⁵⁷ See generally William S. Dodge, *Loose Canons: International Law and Statutory Interpretation in the Twenty-First Century*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 45, at 547.

¹⁵⁸ 550 U.S. 437 (2007).

¹⁵⁹ See *id.* at 454–56. The Court reasoned that even when Congress has chosen to cover some activity abroad, the presumption "remains instructive in determining the *extent* of the statutory exception." *Id.* at 456.

¹⁶⁰ See, e.g., *Pasquantino v. United States*, 544 U.S. 349, 371 (2005) (holding that application of federal wire fraud statute to scheme to defraud the Canadian government was not extraterritorial because the "offense was complete the moment they executed the scheme inside the United States").

¹⁶¹ *Rasul v. Bush*, 542 U.S. 466, 480 (2004) (quoting *Lease of Lands for Coaling and Naval Stations, U.S.-Cuba*, art. III, Feb. 23, 1903, T.S. No. 418) (finding the presumption inapplicable to determine the reach of the federal habeas statute to Guantanamo Bay, Cuba).

¹⁶² *Small v. United States*, 544 U.S. 385, 389 (2005).

¹⁶³ *Id.* at 388 (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)). The Court's promotion of Congress's concern with domestic conditions from rationale to rule led Justice Thomas to accuse the majority of "invent[ing] a canon of statutory interpretation." *Id.* at 399 (Thomas, J., dissenting).

¹⁶⁴ 542 U.S. 155 (2004).

antitrust law and rejected case-by-case balancing.¹⁶⁵ It invoked a principle of avoiding “unreasonable interference with the sovereign authority of other nations”¹⁶⁶ but did not mention the presumption against extraterritoriality. Nor did the Court mention the presumption against extraterritoriality in *Sosa v. Alvarez-Machain*,¹⁶⁷ a human rights suit under the Alien Tort Statute¹⁶⁸ (ATS), despite the urgings of the U.S. government.¹⁶⁹ And in *Spector v. Norwegian Cruise Line Ltd.*,¹⁷⁰ the presumption received not one mention, with all of the Justices agreeing that application of the Americans with Disabilities Act to foreign-flagged cruise ships should be resolved by the internal affairs rule.¹⁷¹ The Supreme Court’s inconsistency in applying the presumption following *Aramco* is troubling, both because canons of interpretation aim to bring stability and predictability to statutory interpretation and because the Court did not explain why it chose to ignore the presumption in these cases.¹⁷²

Despite this apparent inconsistency, the Supreme Court adhered to the traditional view that application of the presumption turned on the location of the conduct.¹⁷³ Specifically, in both *Pasquantino v. United States*¹⁷⁴ and *Small v. United States*,¹⁷⁵ the Court held that the presumption did not apply if the relevant conduct had occurred in the United States.¹⁷⁶ When applying this conduct-centered version of the

¹⁶⁵ *Id.* at 168 (“In our view, . . . this approach is too complex to prove workable.”).

¹⁶⁶ *Id.* at 164.

¹⁶⁷ 542 U.S. 692 (2004).

¹⁶⁸ 28 U.S.C. § 1350 (2018).

¹⁶⁹ Brief for the United States as Respondent Supporting Petitioner at 46–48, *Sosa*, 542 U.S. 692 (No. 03-339).

¹⁷⁰ 545 U.S. 119 (2005).

¹⁷¹ See *id.* at 130–35, 137 (plurality opinion); *id.* at 142–45 (Ginsburg, J., concurring in part and concurring in the judgment); *id.* at 149–55 (Scalia, J., dissenting). In applying the internal affairs rule rather than the presumption against extraterritoriality, the Court simply followed its precedents with respect to foreign ships in U.S. ports. See *supra* note 108 and accompanying text.

¹⁷² See *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 261 (2010) (“Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.”). Part III argues that, although it is inevitable that canons of interpretation will change, the Supreme Court has an obligation to explain the need for such changes. See *infra* section III.C.2, pp. 1646–49.

¹⁷³ See *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (noting 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”). To the extent that the presumption is justified based on congressional intent, see *supra* section I.B, pp. 1591–95, the Court’s adherence to a conduct-centered version of the presumption reflected the dubious assumption that Congress cares more about conduct than it does about effects. See Dodge, *supra* note 42, at 117–19 (arguing that Congress’s concern with domestic conditions is generally concern with domestic effects).

¹⁷⁴ 544 U.S. 349 (2005).

¹⁷⁵ 544 U.S. 385 (2005).

¹⁷⁶ See *Pasquantino*, 544 U.S. at 371 (applying wire fraud statute to “a scheme to defraud a foreign sovereign of tax revenue” was not extraterritorial because petitioners had used wires in the

presumption against extraterritoriality would have defeated the purpose of the statute — for example, in the antitrust context by immunizing foreign agreements not to sell into the United States — the Court simply ignored the presumption.¹⁷⁷ It was not until *Morrison v. National Australia Bank Ltd.* in 2010 that the Court would abandon its traditional view of the presumption, adopting a more flexible approach to account for the fact that Congress sometimes focuses on something other than conduct.¹⁷⁸ *Morrison*'s reinterpretation, subsequently elaborated in *RJR Nabisco, Inc. v. European Community*, established a new presumption against extraterritoriality.

II. THE NEW PRESUMPTION

The Supreme Court's 2010 decision in *Morrison* substantially changed the presumption against extraterritoriality. First, it clarified that the presumption is not a clear statement rule, as *Aramco* had seemed to suggest.¹⁷⁹ Second, and more significantly, it abandoned the traditional view that application of the presumption turns on the location of conduct.¹⁸⁰ *Morrison* recognized that something other than conduct might be the focus of congressional concern and that the application of a statutory provision should be considered extraterritorial only if, in the particular case before the court, whatever was the focus of concern is outside the United States.¹⁸¹ *Morrison*'s "focus" approach gave the presumption against extraterritoriality new flexibility, allowing courts to reach interpretations that had previously been possible only by ignoring the presumption.

In 2016, *RJR Nabisco* formalized *Morrison*'s focus approach, adopting a two-step framework for applying the presumption against extraterritoriality.¹⁸² *RJR Nabisco* also raised questions about the scope of the presumption, in particular whether it applies to jurisdictional statutes and causes of action.¹⁸³ Significantly, *RJR Nabisco*'s articulation of the new presumption against extraterritoriality was unanimous.¹⁸⁴ In 2018, the Supreme Court applied the two-step framework in

United States and "[t]his domestic element of petitioners' conduct is what the Government is punishing in this prosecution"); *Small*, 544 U.S. at 388–89 (noting that presumption did not apply when gun possession occurred in the United States but would apply "were we to consider whether this statute prohibits unlawful gun possession abroad as well as domestically," *id.* at 389).

¹⁷⁷ See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797–99 (1993).

¹⁷⁸ 561 U.S. 247, 266 (2010).

¹⁷⁹ *Id.* at 265.

¹⁸⁰ *Id.* at 266.

¹⁸¹ *Id.*

¹⁸² *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2101 (2016).

¹⁸³ *Id.* at 2106–11.

¹⁸⁴ See *supra* note 26 and accompanying text.

WesternGeco, with all of the Justices agreeing on the application of the presumption.¹⁸⁵

Although the opinions in *Morrison* and *RJR Nabisco* tell us much about the new presumption against extraterritoriality, significant questions remain. This Part describes the new presumption and tries to answer some of the most important doctrinal questions. In doing so, it necessarily makes choices about how to read the cases. It tries to read the cases to be internally consistent, consistent with one another, and (to the extent possible) consistent with past decisions; it pays attention to what the Supreme Court has done, not just to what the Court has said; and it tries to avoid interpretations that would lead to absurd results. Other interpretations of the cases are possible. But the description of the presumption offered below is, in my view, the best version of the presumption that is consistent with the Supreme Court's decisions since 2010. This Part ends with an evaluation of the new presumption against extraterritoriality as a tool for determining the geographic scope of federal statutes, responding to some of the criticisms leveled against it.

A. *Morrison's Focus Approach*

The new presumption against extraterritoriality was born in *Morrison*.¹⁸⁶ The interpretive question before the Supreme Court was the geographic scope of section 10(b) of the Securities Exchange Act, which prohibits fraud in connection with the sale of securities.¹⁸⁷ Lower courts, which had first addressed this question during the four decades of the presumption's disuse, had developed two tests. Under the conduct test, section 10(b) applied if the case involved substantial fraudulent conduct in the United States, even if the effects of that conduct were felt abroad.¹⁸⁸ Under the effects test, section 10(b) applied if the case involved substantial effects in the United States, even if the fraudulent conduct occurred abroad.¹⁸⁹ Writing for the Court in *Morrison*, Justice Scalia criticized these tests as leading to "unpredictable and inconsistent" results.¹⁹⁰ The presumption against extraterritoriality promised greater predictability and consistency: "Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable

¹⁸⁵ See *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136–38 (2018) (applying *RJR*'s two-step framework); *id.* at 2139 (Gorsuch, J., dissenting) (agreeing with the majority's application of the presumption).

¹⁸⁶ See 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, 655–56 (2011) (recognizing the newness of *Morrison*'s approach).

¹⁸⁷ 15 U.S.C. § 78j(b) (2018).

¹⁸⁸ *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972).

¹⁸⁹ See *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968).

¹⁹⁰ *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 260 (2010).

background against which Congress can legislate with predictable effects.”¹⁹¹

Morrison applied the presumption against extraterritoriality to section 10(b) in two steps.¹⁹² First, the Court looked to see if the presumption had been rebutted by a “clear indication of extraterritoriality.”¹⁹³ Whether a clear statement in the text of the statute itself was required to rebut the presumption had been uncertain.¹⁹⁴ *Morrison* clarified that the presumption was not “a ‘clear statement rule,’ if by that is meant a requirement that a statute say ‘this law applies abroad.’ Assuredly context can be consulted as well.”¹⁹⁵ But the Court found nothing in either the text or the context of section 10(b) to indicate that it applied extraterritorially.¹⁹⁶

At the second step of its analysis, *Morrison* looked to see if the application of section 10(b) would be domestic or extraterritorial by examining the “focus” of the provision.¹⁹⁷ The plaintiffs argued that applying section 10(b) would be domestic because the alleged fraud occurred in the United States, even though they purchased their shares in Australia.¹⁹⁸ But the Court disagreed, concluding that the application of section 10(b) would be extraterritorial because “the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States.”¹⁹⁹ To determine the focus of section 10(b), the Court examined the text of the provision itself, other provisions of the Securities Exchange Act, the focus of a sibling statute (the 1933 Securities Act), and finally the problems that might arise from conflicts with foreign laws.²⁰⁰

Morrison’s focus approach constitutes a significant departure from the traditional understanding of the presumption against

¹⁹¹ *Id.* at 261.

¹⁹² See Brilmayer, *supra* note 186, at 658–63 (describing two steps).

¹⁹³ *Morrison*, 561 U.S. at 265.

¹⁹⁴ Compare *Aramco*, 499 U.S. 244, 258 (1991) (referring to Congress’s “need to make a clear statement that a statute applies overseas”), with *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177 (1993) (consulting “all available evidence about the meaning” of a provision).

¹⁹⁵ *Morrison*, 561 U.S. at 265 (citation omitted); see also RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. b (AM. LAW INST. 2018) (“The presumption is not a clear-statement rule, and a court will examine all evidence of congressional intent to determine if the presumption has been overcome.”).

¹⁹⁶ See *Morrison*, 561 U.S. at 262–65.

¹⁹⁷ *Id.* at 266.

¹⁹⁸ See *id.*

¹⁹⁹ *Id.*

²⁰⁰ See *id.* at 266–70. The Court also declined to defer to the SEC’s interpretation of section 10(b)’s geographic scope because “the Commission did not purport to be providing its own interpretation of the statute, but relied on decisions of federal courts.” *Id.* at 272. For further discussion of *Chevron* deference, see *infra* section II.D.2, pp. 1627–29.

extraterritoriality,²⁰¹ which had looked to the location of the conduct to determine whether the application of a provision would be domestic or extraterritorial.²⁰² The *Morrison* Court could have reached the same result in that case under the traditional view of the presumption by noting that, while some of the defendant's fraudulent conduct occurred in the United States, the more significant conduct — incorporating the statements that were generated in the United States into corporate accounts — occurred in Australia.²⁰³ The Court, however, considered the location of the defendant's fraudulent conduct irrelevant, adopting a test that turned entirely on the location of the transaction.²⁰⁴ One cannot reconcile *Morrison* with the traditional, conduct-centered view of the presumption by viewing the sale of the shares in Australia as the relevant conduct, because the defendants in *Morrison* did not engage in that conduct. Plaintiffs purchased their shares not from the defendants but from other sellers on the Australian Stock Exchange.²⁰⁵

Recognizing that a statutory provision may be focused on something other than conduct makes a good deal of sense. The Supreme Court has recognized that the focus of U.S. antitrust laws is on preventing anticompetitive effects in the United States.²⁰⁶ The same is true of the

²⁰¹ See Franklin A. Gevurtz, *Determining Extraterritoriality*, 56 WM. & MARY L. REV. 341, 362 (2014) (arguing that *Morrison* “abandoned — without the slightest acknowledgment — the traditionalist approach to determining extraterritoriality. . . [which] looked to the location of the ostensibly wrongful conduct”); Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 NOTRE DAME L. REV. 1673, 1674 (2012) (“The Court suggested that legislation ‘focus[ed]’ on domestic conditions is not extraterritorial, even if the legislation regulates foreign activity.” (alteration in original) (quoting *Morrison*, 561 U.S. at 266)); Aaron D. Simowitz, *The Extraterritoriality Formalisms*, 51 CONN. L. REV. 375, 383 (2019) (noting that *Morrison* “transformed [the presumption] into something new and distinct from its previous incarnations”).

²⁰² See *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (“[T]he character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”); see also *supra* p. 1602 (discussing the traditional view of the presumption in more recent cases).

²⁰³ That is what the Second Circuit had done below. See *Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167, 176 (2d Cir. 2008) (“The actions taken and the actions not taken by NAB in Australia were, in our view, significantly more central to the fraud and more directly responsible for the harm to investors than the manipulation of the numbers in Florida.”).

²⁰⁴ See *Morrison*, 561 U.S. at 269–70 (describing its “transactional test” as “whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange”). Lower courts applying *Morrison*’s transactional test for Securities Exchange Act § 10(b) have expressly rejected the argument that defendants must have “engaged in at least some conduct in the United States.” *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 69 (2d Cir. 2012).

²⁰⁵ *Morrison*, 561 U.S. at 251–52.

²⁰⁶ See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) (recognizing that U.S. antitrust laws “reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused”); see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (“[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”).

Lanham Act protecting trademarks.²⁰⁷ The new presumption against extraterritoriality allows the Court to be faithful to Congress's intent in such statutes without having to abandon the presumption, as it had seemed to do in past cases.

Under *Morrison* it is possible that a statutory provision might have more than one focus.²⁰⁸ In *RJR Nabisco*, for example, the U.S. government argued that the focus of RICO's criminal provisions was on both the pattern of racketeering activity and the affected enterprise.²⁰⁹ In such instances, application of the provision should be considered domestic even if only one such focus is found in the United States.²¹⁰

Morrison's approach even allows for the possibility that the focus of congressional concern could lead to no geographic limitations.²¹¹ In *Kirtsaeng v. John Wiley & Sons, Inc.*,²¹² decided three years after *Morrison*, the Supreme Court adopted a "nongeographical interpretation" of section 109 of the Copyright Act, under which the first sale of books in Thailand exhausted publisher Wiley's copyright.²¹³ One might argue that the Court was just being inconsistent once again, ignoring the presumption against extraterritoriality when it suited the Court to do so.²¹⁴ But *Kirtsaeng* can be reconciled with *Morrison* on the understanding that the focus of section 109 was nongeographic. The possibility of nongeographic provisions was noted as early as *Bowman*, where the Court recognized a class of statutes that are "not logically dependent on their locality for the Government's jurisdiction."²¹⁵

Of course, *Morrison*'s focus approach does not work if the Court refuses to ask the focus question. That is what happened in *Kiobel v. Royal Dutch Petroleum Co.*,²¹⁶ where the Supreme Court applied the

²⁰⁷ See *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286 (1952) (applying Lanham Act to foreign conduct causing domestic effects); see also *id.* at 288 ("Unlawful effects in this country . . . are often decisive.").

²⁰⁸ See Simowitz, *supra* note 201, at 409–10 (discussing the possibility of multiple focuses).

²⁰⁹ See Brief for the United States as Amicus Curiae Supporting Vacatur at 9, *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016) (No. 15-138) ("RICO's 'focus' is on the 'pattern' as well as the enterprise." (citation omitted)).

²¹⁰ See *id.* ("Accordingly, if a pattern of domestic racketeering activity occurs, RICO may be violated whether the enterprise is foreign or domestic.").

²¹¹ See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 reporters' note 10 (AM. LAW INST. 2018) (discussing nongeographic provisions); cf. Simowitz, *supra* note 201, at 402 (stating that "the legal fiction that all 'objects' are reducible [to] a physical location in space" is "plainly false").

²¹² 568 U.S. 519 (2013).

²¹³ *Id.* at 530. The Court later reached the same conclusion with respect to exhaustion under the Patent Act. See *Impression Prods., Inc. v. Lexmark Int'l, Inc.*, 137 S. Ct. 1523, 1536 (2017).

²¹⁴ See *Kirtsaeng*, 568 U.S. at 562 (Ginsburg, J., dissenting) (reasoning that the Copyright Act's first-sale provision did not apply because the Act itself "does not apply extraterritorially").

²¹⁵ *United States v. Bowman*, 260 U.S. 94, 98 (1922); see also *supra* notes 75–83 and accompanying text (discussing *Bowman*).

²¹⁶ 569 U.S. 108 (2013).

presumption against extraterritoriality to limit the implied cause of action under the ATS.²¹⁷ Having concluded that there was “no clear indication of extraterritoriality,”²¹⁸ the Court simply ended its analysis, without determining the focus of the cause of action.²¹⁹ The focus of an implied cause of action will inevitably be the same as the focus of the underlying statute,²²⁰ and so the focus of the ATS cause of action should depend on the focus of the ATS itself. Some have argued that the focus of the ATS was on providing redress for violations of the law of nations by U.S. citizens.²²¹ Others have argued that the focus of the ATS was on providing redress for violations of the law of nations more broadly, pointing to piracy as one of the ATS’s paradigm violations²²² and to the language of the ATS itself, which restricts the nationality of potential plaintiffs but not the nationality of potential defendants.²²³ Under either interpretation, the focus of the ATS would be nongeographic, just like the statutory provisions in *Kirtseng* and *Bowman*. *Kiobel*’s application of the new presumption was faulty because it was incomplete. The Supreme Court performed the first step of *Morrison*’s analysis, examining whether “the text, history, and purposes of the ATS rebut [the presumption] for causes of action brought under that statute.”²²⁴ But the Court failed to perform the second step and determine “the ‘focus’ of congressional concern.”²²⁵

B. RJR Nabisco’s Two-Step Framework

The Supreme Court formalized *Morrison*’s approach in *RJR Nabisco, Inc. v. European Community*, unanimously adopting “a two-step framework for analyzing extraterritoriality issues.”²²⁶ At step one,

²¹⁷ *Id.* at 117. *But see* Sarah H. Cleveland, *The Kiobel Presumption and Extraterritoriality*, 52 COLUM. J. TRANSNAT’L L. 8, 9 (2013) (arguing that *Kiobel* invented a new presumption “for the ATS only”).

²¹⁸ *Kiobel*, 569 U.S. at 124 (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010)).

²¹⁹ *Cf. id.* at 129 (Breyer, J., concurring in the judgment) (“The ATS, however, was enacted with ‘foreign matters’ in mind.”).

²²⁰ *See infra* notes 312–13 and accompanying text.

²²¹ *See* *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1415 (2018) (Gorsuch, J., concurring in part and concurring in the judgment); Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 510 (2011).

²²² *See* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720, 724 (2004) (identifying piracy as one of the paradigm violations that the First Congress had in mind).

²²³ *See* William S. Dodge, *The Original Meaning of the Alien Tort Statute*, JUST SECURITY (Oct. 26, 2017), <https://www.justsecurity.org/46352/original-meaning-alien-tort-statute> [<https://perma.cc/SP78-B4UB>].

²²⁴ *Kiobel*, 569 U.S. at 117.

²²⁵ *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010) (quoting *Aramco*, 499 U.S. 244, 255 (1991)).

²²⁶ 136 S. Ct. 2090, 2101 (2016). Part II of the Court’s opinion was joined by all seven participating Justices, although the Justices split 4–3 on the application of the presumption to RICO’s private cause of action. *See infra* notes 242–45, 252–57 and accompanying text.

the question is “whether the presumption against extraterritoriality has been rebutted — that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially.”²²⁷ If the presumption has been rebutted at *RJR Nabisco* step one, the Court applies the provision extraterritorially according to its terms without considering the statute’s focus.²²⁸ If, on the other hand, the Court finds that the presumption has not been rebutted at step one,

then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute’s “focus.” If the conduct relevant to the statute’s focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.²²⁹

Having articulated this two-step framework, the Supreme Court applied the framework to determine the geographic scope of two of RICO’s substantive provisions and its private cause of action. The European Community and twenty-six of its member states had brought a civil RICO suit against RJR Nabisco, alleging that RJR engaged in a scheme to launder drug-trafficking money through cigarette purchases, harming state-owned cigarette businesses and causing other injuries.²³⁰ The Court unanimously held that two of RICO’s substantive provisions apply extraterritorially to the same extent as its predicate acts,²³¹ but it concluded by a vote of 4–3 that RICO’s civil cause of action requires “a domestic injury to business or property and does not allow recovery for foreign injuries.”²³² The Court’s analysis in *RJR Nabisco* provides significant guidance about how the new presumption against extraterritoriality works.

With respect to two of RICO’s substantive provisions, the Supreme Court held that the presumption against extraterritoriality had been

²²⁷ *RJR Nabisco*, 136 S. Ct. at 2101.

²²⁸ See *id.* (“The scope of an extraterritorial statute . . . turns on the limits Congress has (or has not) imposed on the statute’s foreign application, and not on the statute’s ‘focus.’”). Whether *RJR Nabisco* forecloses the possibility of other prescriptive comity limitations is considered in section II.D, pp. 1623–29.

²²⁹ 136 S. Ct. at 2101. In a footnote, *RJR Nabisco* said that although “it will usually be preferable” to start at step one, courts have discretion to “start[] at step two in appropriate cases.” *Id.* at 2101 n.5. The Supreme Court itself exercised the discretion to start at step two in *WesternGeco*. See *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136–37 (2018); see also *infra* notes 259–66 and accompanying text.

²³⁰ See *RJR Nabisco*, 136 S. Ct. at 2098. RICO makes it illegal to use a pattern of racketeering activity in particular ways relating to an enterprise. Racketeering activity consists of certain federal and state offenses known as predicates. See 18 U.S.C. § 1961(1) (2018) (listing predicate acts). RICO also permits “[a]ny person injured in his business or property” by a RICO violation to recover treble damages. *Id.* § 1964(c).

²³¹ *RJR Nabisco*, 136 S. Ct. at 2102.

²³² *Id.* at 2111.

rebutted at *RJR Nabisco* step one.²³³ The Court found the required indication of extraterritoriality in the “structure” of the RICO statute.²³⁴ Specifically, at least some of RICO’s predicate acts expressly applied abroad. For example, the federal money-laundering statute — one of the predicate acts alleged in *RJR Nabisco* — applies to offenses “outside the United States” if “the defendant is a United States person.”²³⁵ The Court found this structure sufficient to rebut the presumption with respect to sections 1962(b) and (c) of RICO, which it held to apply extraterritorially “to the extent that the predicates alleged in a particular case themselves apply extraterritorially.”²³⁶ The absence in the RICO statute itself of language defining its geographic scope did not trouble the Court: “While the presumption can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential.”²³⁷ *RJR Nabisco* thus reaffirms *Morrison*’s point that the presumption against extraterritoriality is not a “clear statement rule.”²³⁸

Because the presumption had been rebutted with respect to these two substantive provisions at *RJR Nabisco* step one, the Supreme Court did not have to consider the provisions’ focuses at step two.²³⁹ The Court thus rejected the defendant’s argument that these substantive provisions should be limited to domestic enterprises because the focus of RICO is on the enterprise being corrupted.²⁴⁰ Sections 1962(b) and (c) applied to “all” transnational patterns of racketeering activity “regardless of whether they are connected to a ‘foreign’ or ‘domestic’ enterprise.”²⁴¹

The Supreme Court’s conclusion with respect to RICO’s civil cause of action was different. At step one, the Court found no “clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States.”²⁴² To the contrary, the Court

²³³ *Id.* at 2101–03.

²³⁴ *Id.* at 2103.

²³⁵ 18 U.S.C. § 1957(d)(2); see *RJR Nabisco*, 136 S. Ct. at 2101 (“RICO defines racketeering activity to include a number of predicates that plainly apply to at least some foreign conduct.”).

²³⁶ *RJR Nabisco*, 136 S. Ct. at 2102.

²³⁷ *Id.*

²³⁸ *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010); see also *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 119 (2013) (looking to the “historical background” of a statute to determine whether the presumption had been overcome); *Foley Bros. v. Filardo*, 336 U.S. 281, 285–88 (1949) (looking to “legislative history” to determine whether the presumption had been overcome); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. b (AM. LAW INST. 2018) (“The presumption is not a clear-statement rule, and a court will examine all evidence of congressional intent to determine if the presumption has been overcome.”).

²³⁹ See *RJR Nabisco*, 136 S. Ct. at 2103 (“Here . . . there is a clear indication at step one that RICO applies extraterritorially. We therefore do not proceed to the ‘focus’ step.”).

²⁴⁰ See *id.* at 2103–04.

²⁴¹ *Id.* at 2104.

²⁴² *Id.* at 2108.

reasoned that by referring only to injuries to “business or property” and not to personal injuries, Congress “signaled that the civil remedy is not coextensive with § 1962’s substantive prohibitions.”²⁴³ At step two, the Court held that “[s]ection 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries.”²⁴⁴ The basis for this holding seems to have been section 1964(c)’s focus on injuries to business or property, a focus suggested by the text of the provision.²⁴⁵ If whatever is the focus of the provision must occur in the United States for its application to be domestic, then applying RICO’s civil cause of action to injuries outside the United States would be impermissibly extraterritorial.

There is some language in *RJR Nabisco* suggesting that not just the focus of the statutory provision but also some conduct relating to the focus of the provision must occur in the United States.²⁴⁶ Such a separate conduct requirement should be rejected for at least three reasons.²⁴⁷ First, in applying the step-two analysis to RICO’s private right of action, *RJR Nabisco* itself made no mention of a need for conduct in the United States. The Court said that section 1964(c) “requires a civil RICO plaintiff to allege and prove a domestic injury to business or property,” not that it requires domestic injury *and* domestic conduct.²⁴⁸ Second, *Morrison* expressly found the location of conduct to be irrelevant in applying the presumption against extraterritoriality.²⁴⁹ And third, adding a conduct requirement would serve no useful purpose when the focus of a provision is something other than conduct, as is frequently the case.²⁵⁰ When Congress’s purpose in enacting a provision was to prevent injury, for example, it would make little sense to refuse to apply

²⁴³ *Id.*

²⁴⁴ *Id.* at 2111.

²⁴⁵ 18 U.S.C. § 1964(c) (2018) (“Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee . . .”). The Court’s analysis at *RJR Nabisco* step two was quite brief. For further discussion, see William S. Dodge, *The Presumption Against Extraterritoriality in Two Steps*, 110 AJIL UNBOUND 45, 48 (2016).

²⁴⁶ See *RJR Nabisco*, 136 S. Ct. at 2101 (“If the conduct relevant to the statute’s focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.”).

²⁴⁷ See Dodge, *supra* note 245, at 49–50.

²⁴⁸ *RJR Nabisco*, 136 S. Ct. at 2111. Lower courts have interpreted *RJR Nabisco* as requiring only domestic injury, not domestic conduct. See, e.g., *Bascuñán v. Elsaca*, 874 F.3d 806, 820–21 (2d Cir. 2017) (“Where the injury is to tangible property, we conclude that, absent some extraordinary circumstance, the injury is domestic if the plaintiff’s property was located in the United States when it was stolen or harmed, even if the plaintiff himself resides abroad.”).

²⁴⁹ See *supra* notes 201–05 and accompanying text.

²⁵⁰ See *supra* notes 206–07 and accompanying text.

that provision to injuries in the United States simply because all of the conduct causing the injury occurred abroad. Rejecting a separate requirement that there must be conduct in the United States is not only most consistent with what the Supreme Court did in *RJR Nabisco* and *Morrison*, but also most consistent with the thrust of the focus approach, under which the applicability of a provision turns on what Congress cared about. The better interpretation of the new presumption against extraterritoriality articulated in *Morrison* and *RJR Nabisco* is therefore that the application of a statutory provision is considered domestic so long as whatever is the focus of the provision occurred in the United States.²⁵¹

Although the Supreme Court's adoption of a two-step framework for the presumption against extraterritoriality in *RJR Nabisco* was unanimous, Justice Ginsburg (joined by Justices Breyer and Kagan) dissented from the Court's application of that framework to RICO's civil cause of action. She would not have distinguished "between the extraterritorial compass of a private right of action and that of the underlying proscribed conduct."²⁵² There is great force to this argument. If RICO's substantive provisions may take their geographic scope from RICO's predicate acts at step one of the *RJR Nabisco* analysis, it is not clear why RICO's civil cause of action may not also take its geographic scope from RICO's substantive provisions at step one.²⁵³ Under the Court's two-step framework, the conclusion that the presumption had been rebutted at *RJR Nabisco* step one would make section 1964(c)'s focus on injury to business or property irrelevant at *RJR Nabisco* step two — as irrelevant as the purported focus of sections 1962(b) and (c) on the enterprise being corrupted was with respect to their geographic scope.²⁵⁴ Just as these substantive provisions of RICO applied to "all" patterns of racketeering activity "regardless of whether they are connected to a 'foreign' or 'domestic' enterprise,"²⁵⁵ so too would RICO's civil cause of action apply to all injuries to business or property regardless of whether they occurred in the United States or abroad.

²⁵¹ See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. c (AM. LAW INST. 2018) ("If whatever is the focus of the provision occurred in the United States, then application of the provision is considered domestic and is permitted.").

²⁵² *RJR Nabisco*, 136 S. Ct. at 2113 (Ginsburg, J., concurring in part, dissenting in part, and dissenting from the judgment).

²⁵³ See Colangelo, *supra* note 23, at 54 (noting that the Court "'looked through' the RICO statute to the underlying predicate statutes to discern RICO's geographic coverage" but was unwilling to do the same for the private right of action); 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) (discussing the inconsistency).

²⁵⁴ See *supra* notes 239–41 and accompanying text.

²⁵⁵ *RJR Nabisco*, 136 S. Ct. at 2104.

Justice Ginsburg also pointed out that RICO's civil cause of action was based on section 4 of the Clayton Act, which the Supreme Court had held applicable to foreign injuries.²⁵⁶ The Court's majority found this history irrelevant. Indeed, it pointed out that the Supreme Court's approach to the geographic scope of U.S. antitrust law had changed and argued that the Court should resist "importing into RICO those Clayton Act principles that are at odds with *our current extraterritoriality doctrine*."²⁵⁷

Together, *Morrison* and *RJR Nabisco* articulate a new presumption against extraterritoriality. In some ways, the new presumption is more formal and structured than its predecessors. It divides the analysis into two steps, in ways that resemble *Chevron*, and (like *Chevron*) it is intended to provide guidance to lower courts.²⁵⁸ But the new presumption is more flexible in other ways. It neither operates as a clear statement rule at step one nor turns mechanically on the location of conduct at step two. Rather it recognizes that the focus of congressional concern may be something other than conduct and that application of a provision should not be considered impermissibly extraterritorial so long as whatever is the focus of that provision is found in the United States.

The flexibility of the new presumption was on display in the Supreme Court's most recent application of the two-step framework. The question in *WesternGeco* was whether a patent owner who proved infringement under a particular provision of the Patent Act²⁵⁹ could recover damages for lost profits abroad.²⁶⁰ The Court exercised its discretion to skip *RJR Nabisco* step one and begin with the focus of the damages provision.²⁶¹ The Court once again emphasized the importance of context: "If the statutory provision at issue works in tandem with other provisions, it must be assessed in concert with those other provisions."²⁶² Whereas *RJR Nabisco* had relied on the structure of the statute to find a clear indication of extraterritoriality at step one,²⁶³ *WesternGeco* relied on the structure of the statute to determine the focus of a provision at step two.²⁶⁴ Because the focus of the Patent Act's

²⁵⁶ *Id.* at 2113–14 (Ginsburg, J., concurring in part, dissenting in part, and dissenting from the judgment); see also *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707–08 (1962) (allowing recovery in suit under section 4 of the Clayton Act for injuries in Canada).

²⁵⁷ *RJR Nabisco*, 136 S. Ct. at 2111 (emphasis added). For further discussion, see *infra* notes 555–60 and accompanying text.

²⁵⁸ See *infra* notes 430–40 and accompanying text.

²⁵⁹ 35 U.S.C. § 271(f)(2) (2012) (defining infringement to include supplying from the United States specially adopted components for combination outside the United States).

²⁶⁰ *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2134 (2018).

²⁶¹ See *id.* at 2136–37.

²⁶² *Id.* at 2137.

²⁶³ See *supra* pp. 1609–10.

²⁶⁴ See *WesternGeco*, 138 S. Ct. at 2137 ("When determining the focus of a statute, we do not analyze the provision at issue in a vacuum.")

damages provision was the infringement, and because that infringement occurred in the United States, the Court concluded that the award of damages (including foreign lost profits) was a “domestic application” of the damages provision.²⁶⁵ While Justices Breyer and Gorsuch disagreed with the Court’s interpretation of the Patent Act, they agreed with its application of the presumption, making the decision unanimous on that point.²⁶⁶

Despite the guidance that recent cases have provided, significant questions remain about how the presumption should operate in practice. Section C considers some of the most important doctrinal questions about the scope of the presumption. Section D discusses the possibility of supplementing the presumption, both with additional comity limitations imposed by courts and with administrative interpretations made by agencies. Section E provides an evaluation of the new presumption against extraterritoriality. It argues that the new presumption against extraterritoriality is not a “runaway canon”²⁶⁷ or a “Frankenstein’s monster.”²⁶⁸ It is rather a flexible tool of statutory interpretation that — along with a limited principle of reasonableness in interpretation and appropriate deference to administrative agencies — will allow courts to determine the geographic scope of different statutory provisions and to devise appropriate tests for when they should be applied.

C. *The Scope of the Presumption*

RJR Nabisco raises questions about the scope of the new presumption against extraterritoriality. In describing the first step of its analysis, the Supreme Court said: “We must ask [whether the presumption has been rebutted] regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction.”²⁶⁹ Traditionally, the presumption against extraterritoriality had been applied only to substantive statutes and not to causes of action or jurisdictional statutes. This section considers whether the new presumption has changed its scope.

1. *Substantive Statutes.* — It is clear that the presumption against extraterritoriality applies to the substantive provisions of federal statutes.²⁷⁰ *RJR Nabisco* and *Morrison* emphasized that the presumption

²⁶⁵ *Id.* at 2138.

²⁶⁶ *Id.* at 2139 (Gorsuch, J., dissenting) (“The Court holds that WesternGeco’s lost profits claim does not offend the judicially created presumption against the extraterritorial application of statutes. With that much, I agree.”).

²⁶⁷ Gardner, *supra* note 22.

²⁶⁸ Colangelo, *supra* note 23.

²⁶⁹ *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2101 (2016).

²⁷⁰ See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013) (“We typically apply the presumption to discern whether an Act of Congress regulating conduct applies abroad.” (citing *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 254 (2010); *Aramco*, 499 U.S. 244, 246 (1991))).

applies to substantive statutes “across the board”²⁷¹ and “in all cases.”²⁷² But several important questions lurk behind those apparently simple statements.

First, are there any subject matter exceptions to the presumption against extraterritoriality? Historically, we have seen that the Supreme Court applied the traditional presumption against extraterritoriality inconsistently, ignoring the presumption when limiting a provision to conduct within the United States would have defeated the apparent purpose of the statute.²⁷³ Under the new presumption, however, a statutory provision need not be limited to conduct in the United States if the focus of the provision is on something other than conduct.²⁷⁴ It is even possible for the focus of a provision not to have a geographic aspect, as with the Copyright Act’s first-sale provision in *Kirtsaeng*.²⁷⁵ This flexibility makes it realistic to apply the new presumption in all cases without defeating Congress’s intent.²⁷⁶

A second question is whether the presumption against extraterritoriality applies when the U.S. government seeks to enforce a federal statute.²⁷⁷ Relying on the Supreme Court’s 1922 decision in *Bowman*, some lower courts have suggested that “[t]he ordinary presumption that laws do not apply extraterritorially has no application to criminal statutes.”²⁷⁸ This is a misreading of *Bowman*. As discussed above,²⁷⁹ *Bowman* held that *some* criminal statutes — like the statute criminalizing false claims against the government — are not limited to conduct in the United States.²⁸⁰ But *Bowman* also made clear that the presumption did apply to ordinary criminal offenses, like assault, murder, robbery, and fraud, that “affect the peace and good order of the community.”²⁸¹ As a general

²⁷¹ *RJR Nabisco*, 136 S. Ct. at 2100.

²⁷² *Morrison*, 561 U.S. at 261.

²⁷³ See *supra* notes 68–74 and accompanying text.

²⁷⁴ See *supra* notes 201–07 and accompanying text.

²⁷⁵ See *supra* notes 211–15 and accompanying text.

²⁷⁶ The new presumption against extraterritoriality would not allow the Supreme Court to revisit its existing precedents interpreting the geographic scope of particular statutory provisions. See *infra* notes 550–54 and accompanying text (discussing stare decisis effect of prior decisions interpreting geographic scope).

²⁷⁷ See Hannah L. Buxbaum, *Extraterritoriality in the Public and Private Enforcement of U.S. Regulatory Law*, in PRIVATE INTERNATIONAL LAW: CONTEMPORARY CHALLENGES AND CONTINUING RELEVANCE 236, 239–48 (Franco Ferrari & Diego P. Fernández Arroyo eds., 2019) (discussing differentiation in geographic scope depending on modes of enforcement).

²⁷⁸ *United States v. Siddiqui*, 699 F.3d 690, 700 (2d Cir. 2012); see also *United States v. Leija-Sanchez*, 820 F.3d 899, 901 (7th Cir. 2016) (“*Bowman* distinguishes criminal from civil law, holding that different rules apply . . .”). Professor Julie O’Sullivan has taken the opposite position, arguing that the presumption should apply in criminal but not civil cases. See O’Sullivan, *supra* note 24, at 1080–94.

²⁷⁹ See *supra* notes 75–83 and accompanying text.

²⁸⁰ *United States v. Bowman*, 260 U.S. 94, 98–101 (1922).

²⁸¹ *Id.* at 98.

matter, the Supreme Court has not “differentiated between enforcement of legislative policy by the Government itself or by private litigants proceeding under a statutory right.”²⁸² Of course, Congress might choose to distinguish between public and private enforcement in a statute. Following the Supreme Court’s adoption of a transactional test for application of section 10(b) of the Securities Exchange Act in *Morrison*,²⁸³ for example, Congress amended the Exchange Act to authorize jurisdiction based on the conduct and effects tests, but only in suits brought by the U.S. government.²⁸⁴ It is also possible that separate application of the presumption to private rights of action and to provisions authorizing government enforcement might result in differing scopes of enforcement authority with respect to particular substantive provisions.²⁸⁵ But as a basic rule, it is fair to say that the geographic scope of a provision is the same for both public and private enforcement.²⁸⁶

A third question involves the presumption’s application to so-called “ancillary” criminal provisions, like those for conspiracy or aiding and abetting. Typically, such provisions say nothing about their geographic scope.²⁸⁷ Lower courts have concluded that, “[g]enerally, the extraterritorial reach of an ancillary offense like aiding and abetting or conspiracy is coterminous with that of the underlying criminal statute.”²⁸⁸ In *RJR*

²⁸² *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286 (1952); *see also* *United States v. Vilar*, 729 F.3d 62, 70 (2d Cir. 2013) (holding that geographic scope of section 10(b) of the Securities Exchange Act was the same for criminal enforcement as for civil enforcement); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997) (holding that geographic scope of section 1 of the Sherman Act was the same for criminal enforcement as for civil enforcement).

²⁸³ *See supra* notes 198–200 and accompanying text.

²⁸⁴ *See* 15 U.S.C. § 78aa(b) (2018). Because Congress amended the Exchange Act’s jurisdictional provision rather than section 10(b) itself, the lower courts have divided on whether the provision effectively reversed *Morrison* in cases brought by the government. *Compare* *SEC v. A Chi. Convention Ctr., LLC*, 961 F. Supp. 2d 905, 909–17 (N.D. Ill. 2013) (suggesting that Congress may not have effectively amended the Exchange Act), *with* *SEC v. Scoville*, 913 F.3d 1204, 1215–18 (10th Cir. 2019) (finding clear indication of congressional intent). Both *RJR Nabisco* and *Morrison* have emphasized that the presumption is not a clear statement rule. *See supra* notes 193–96, 234–38, and accompanying text. Looking at context, the 2010 amendment provides the clear indication of extraterritoriality necessary to rebut the presumption with respect to government enforcement of section 10(b) irrespective of which provision was amended.

²⁸⁵ *See infra* section II.C.2, pp. 1617–20.

²⁸⁶ *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 reporters’ note 4 (AM. LAW INST. 2018) (“Unless a contrary congressional intent appears, the geographic scope of a statute is the same for the purposes of both public and private enforcement.”).

²⁸⁷ *See, e.g.*, 18 U.S.C. § 2(a) (2018) (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”); 18 U.S.C. § 371 (“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.”).

²⁸⁸ *United States v. Ali*, 718 F.3d 929, 939 (D.C. Cir. 2013); *see also* *United States v. Hoskins*, 902 F.3d 69, 96 (2d Cir. 2018); *United States v. Belfast*, 611 F.3d 783, 813 (11th Cir. 2010).

Nabisco, the Supreme Court assumed without deciding that the geographic scope of RICO's conspiracy provision tracked the geographic scope of the provisions underlying the conspiracy.²⁸⁹ *RJR Nabisco*'s holding that one statutory provision may take its geographic scope from another²⁹⁰ strongly supports the lower courts' similar practice with respect to ancillary criminal provisions.

Finally, there is the question of state statutes. It is well established that states may regulate beyond the borders of the United States to the same extent as the federal government.²⁹¹ Some states have their own presumptions against extraterritoriality.²⁹² But nothing requires a state to have a presumption against extraterritoriality,²⁹³ or to give a state presumption the same content as the federal presumption. In applying California's presumption against extraterritoriality to state provisions prohibiting securities fraud, for example, the Supreme Court of California rejected the argument that state law should apply only to the purchase or sale of securities in California²⁹⁴ — the limit that *Morrison* later imposed on the corresponding federal provision.²⁹⁵ The geographic scope of state statutes is a question of state law.²⁹⁶

2. *Causes of Action.* — *RJR Nabisco*'s application of the presumption against extraterritoriality to causes of action has drawn sharp criticism. Professor Hannah Buxbaum calls it “a startling expansion of the doctrine's application.”²⁹⁷ Many of these commentators have pointed to

²⁸⁹ See *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2103 (2016).

²⁹⁰ In *RJR Nabisco*, the Court held that § 1962(b) and (c) of RICO applied extraterritorially to the same extent as the underlying predicate acts. See *supra* notes 233–38 and accompanying text.

²⁹¹ See *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941).

²⁹² See, e.g., *Sullivan v. Oracle Corp.*, 254 P.3d 237, 248 (Cal. 2011) (“[W]e presume the Legislature did not intend a statute to be operative, with respect to occurrences outside the state, unless such intention is clearly expressed or reasonably to be inferred from the language of the act or from its purpose, subject matter or history.” (internal quotation marks and alterations omitted) (quoting *Diamond Multimedia Sys., Inc. v. Superior Court*, 968 P.2d 539, 553 (Cal. 1999)); *Global Reinsurance Corp.-U.S. Branch v. Equitas Ltd.*, 969 N.E.2d 187, 195 (N.Y. 2012) (“The established presumption is, of course, against the extraterritorial operation of New York law . . .”). See generally *Dodge, supra* note 6 (discussing state presumptions).

²⁹³ The draft *Restatement (Third) of Conflicts* rejects a presumption against extraterritoriality for state laws. See RESTATEMENT (THIRD) OF THE CONFLICT OF LAWS § 5.01 cmt. c (AM. LAW INST., Council Draft No. 2, 2017) (“A State court following this Restatement will not apply a presumption against the extraterritorial application of its own State's laws.”).

²⁹⁴ *Diamond Multimedia*, 968 P.2d at 546.

²⁹⁵ See *supra* notes 198–200 and accompanying text.

²⁹⁶ See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 reporters' note 5 (AM. LAW INST. 2018).

²⁹⁷ Hannah L. Buxbaum, *The Scope and Limitations of the Presumption Against Extraterritoriality*, 110 AJIL UNBOUND 62, 64 (2016); see also *Gevurtz, supra* note 253, at 3 (stating that *RJR* sounds a “death knell” for private claims based on overseas injuries); Carlos M. Vázquez, *Out-Beating Beale*, 110 AJIL UNBOUND 68, 70 (2016) (“The most significant holding of *RJR* is that the [presumption against extraterritoriality] applies separately to a statute's substantive and remedial provisions.”).

Title VII of the 1964 Civil Rights Act to show how applying the new presumption to causes of action might frustrate congressional intent.²⁹⁸ In 1991, Congress legislatively overturned the Supreme Court's decision in *Aramco* by providing that Title VII does apply to the employment of American citizens abroad in at least some circumstances.²⁹⁹ But Congress did not also amend Title VII's enforcement provisions, which authorize the person aggrieved to file a civil action if the EEOC or the Attorney General has not done so within a certain period of time.³⁰⁰ Does this mean that Title VII's substantive prohibitions of employment discrimination might apply extraterritorially but that its enforcement provisions might not?

One should begin by noting that there is nothing inherently wrong with applying the presumption against extraterritoriality separately to a cause of action that Congress put in a separate provision of a statute. The Supreme Court has consistently held that the presumption against extraterritoriality applies provision by provision.³⁰¹ Moreover, the Court had previously applied the presumption to a cause of action in *Kiobel*, albeit to an implied cause of action rather than an express cause of action created by Congress.³⁰² If Congress creates an express cause of action with a different focus than the substantive provisions of the statute, then it seems reasonable to apply the new presumption against extraterritoriality to the cause of action. The presumption would then require that whatever is the focus of the cause of action be found in the United States before a private action may be brought.

The critical question is not *whether* the new presumption applies to causes of action but *how* it applies to causes of action.³⁰³ In most instances, it is logical to look through the cause of action and determine

²⁹⁸ See, e.g., Pamela K. Bookman, *Doubling Down on Litigation Isolationism*, 110 AJIL UNBOUND 57, 59-61 (2016); Buxbaum, *supra* note 297, at 64; Gardner, *supra* note 22, at 142-43.

²⁹⁹ See Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077 (codified as amended in scattered sections of the U.S. Code). As amended, Title VII defines "employee" to include, "[w]ith respect to employment in a foreign country, . . . an individual who is a citizen of the United States." 42 U.S.C. § 2000e(f) (2012). Congress also created a number of exceptions to Title VII's extraterritorial application. See 42 U.S.C. § 2000e-1.

³⁰⁰ See 42 U.S.C. § 2000e-5(f)(1).

³⁰¹ See, e.g., *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010) ("[W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms."); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455-56 (2007) (noting that when a statute "cover[s] certain activity abroad," the presumption "remains instructive in determining the extent of the statutory exception"); see also RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 reporters' note 9 ("[A] court applying the presumption against extraterritoriality must do so provision by provision.").

³⁰² See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013); see also *supra* pp. 1607-08.

³⁰³ Recall that in *RJR Nabisco*, Justices Ginsburg, Breyer, and Kagan did not dissent from the general proposition that the presumption against extraterritoriality applies to causes of action but only to the way in which the presumption was applied to RICO's cause of action. See *RJR Nabisco*,

its geographic scope by examining the geographic scope of the underlying substantive provision. That is what lower courts have done to determine the reach of ancillary criminal statutes.³⁰⁴ It is also what the Supreme Court did in *WesternGeco* to determine the reach of the Patent Act's damages provision.³⁰⁵ It is, indeed, what the Supreme Court did in *RJR Nabisco* to determine the reach of RICO's substantive provisions, looking through those provisions to the geographic scope of the underlying predicate acts.³⁰⁶

Three Justices in *RJR Nabisco* would have done the same thing with RICO's cause of action.³⁰⁷ Of course, this is not what the *RJR Nabisco* majority did with RICO's cause of action because it thought that Congress's decision to limit the cause of action to "[a]ny person injured in his business or property" indicated a narrower scope.³⁰⁸ But the Court was narrowly divided on this question, the majority consisted of only four Justices, and the majority's treatment of the question stands in significant tension with the portion of the opinion that unanimously held that one provision may take its geographic scope from another. Even when a cause of action contains limiting language, it is not inevitable that a court will reach the same conclusion that *RJR Nabisco* did.³⁰⁹

Many express causes of action do not contain limiting language like RICO's. Title VII is a good example. Its enforcement provisions state that "[t]he person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General" and that if no such action is brought within a certain time period, "a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved."³¹⁰ This language suggests that Title VII's civil cause of action should be given the same geographic scope as the government's enforcement powers and Title

Inc. v. European Community, 136 S. Ct. 2090, 2113 (2016) (Ginsburg, J., concurring in part, dissenting in part, and dissenting from the judgment); see also *supra* pp. 1612–13.

³⁰⁴ See cases cited *supra* note 288.

³⁰⁵ In *WesternGeco*, the petitioner argued that the presumption should never be applied to damages provisions. See *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018). The Court chose to avoid that question, see *id.* at 2136–37, and instead determined the focus of the damages provision by looking to the underlying substantive provision, see *id.* at 2137. See also *supra* pp. 1613–14.

³⁰⁶ See *RJR Nabisco*, 136 S. Ct. at 2102; see also *supra* p. 1610.

³⁰⁷ See *RJR Nabisco*, 136 S. Ct. at 2113 (Ginsburg, J., concurring in part, dissenting in part, and dissenting from the judgment) ("I would not distinguish . . . between the extraterritorial compass of a private right of action and that of the underlying proscribed conduct."); see also *supra* p. 1612.

³⁰⁸ See *RJR Nabisco*, 136 S. Ct. at 2108 (majority opinion) ("[B]y cabin[ing] RICO's private cause of action to particular kinds of injury — excluding, for example, personal injuries — Congress signaled that the civil remedy is not coextensive with [RICO's] substantive prohibitions."); see also 18 U.S.C. § 1964(c) (2018).

³⁰⁹ Cf. *Vázquez*, *supra* note 297, at 73 ("[T]he Justices should seriously consider not applying the new 'injury' requirement beyond RICO.").

³¹⁰ 42 U.S.C. § 2000e-5(f)(1) (2012).

VII's substantive prohibitions. There is also the "context" of Title VII's amendment, which strongly suggests that Congress intended to reverse *Aramco* and allow U.S. citizens to sue for employment discrimination abroad.³¹¹ It seems highly unlikely that any sensible court would apply *RJR Nabisco* to require that the aggrieved person's injury under Title VII have occurred in the United States.

It seems even more unlikely that courts will apply the new presumption against extraterritoriality to construe the geographic scope of *implied* causes of action more narrowly than their substantive provisions. In the case of an implied cause of action, there is no statutory text to examine other than the text of the underlying provision. Thus, in *Morrison* the Supreme Court assumed that the geographic scope of the implied right of action under Rule 10b-5 was identical to the geographic scope of section 10(b).³¹² Similarly, in *Kiobel*, the Supreme Court looked at the text and history of the ATS to determine the geographic scope of its implied cause of action.³¹³

It is certainly possible that a Supreme Court bent on restricting private litigation in transnational cases might read *RJR Nabisco* broadly to require domestic injury in every case. But such a reading would tend to defeat Congress's intentions in many cases, and for that reason would be ill-advised.

3. *Jurisdictional Statutes.* — *RJR Nabisco* says that the presumption against extraterritoriality applies not just to substantive provisions and causes of action but also to statutes that "merely confer[] jurisdiction."³¹⁴ Professor Anthony Colangelo worries "that this loose language will be read to extend the presumption to subject-matter jurisdiction statutes more generally."³¹⁵ If that were to happen, the general federal question statute,³¹⁶ the alienage and diversity jurisdiction statute,³¹⁷ and the general jurisdictional statute for federal criminal offenses³¹⁸ might each be read to deny the federal courts subject matter jurisdiction over cases arising abroad, even when the case involves the violation of a federal substantive statute that clearly applies extraterritorially. None of these jurisdictional statutes appears to provide the clear indication of extraterritoriality that *RJR Nabisco* step one requires. As Professor Maggie Gardner has noted, holding that such jurisdictional statutes

³¹¹ See *supra* note 299 and accompanying text.

³¹² See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 261 n.5 (2010) (stating that the text of the statute controls the scope of the implied private cause of action).

³¹³ See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 117–25 (2013).

³¹⁴ *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2101 (2016).

³¹⁵ Colangelo, *supra* note 23, at 53.

³¹⁶ 28 U.S.C. § 1331 (2018).

³¹⁷ *Id.* § 1332.

³¹⁸ 18 U.S.C. § 3231 (2018).

apply only to cases arising within the United States would be “deeply disruptive.”³¹⁹

But the Supreme Court could not have meant what it said in *RJR Nabisco* about purely jurisdictional statutes to be taken literally.³²⁰ *RJR Nabisco* was trying to capture what the Court did with the presumption in *Kiobel*.³²¹ As we have seen, *Kiobel* did not apply the presumption against extraterritoriality to the ATS itself but rather to the implied cause of action under the ATS.³²² In fact, *RJR Nabisco* correctly describes *Kiobel* as applying the presumption to the ATS cause of action.³²³ Read in context, *RJR Nabisco*’s statement that the presumption against extraterritoriality applies to statutes that “merely confer[] jurisdiction”³²⁴ refers to the presumption’s application to implied causes of action under jurisdictional statutes, not its application to jurisdictional statutes themselves.

This reading finds confirmation elsewhere in the *RJR Nabisco* opinion. First, the Court applied the presumption against extraterritoriality to RICO’s substantive provisions and to its private cause of action but *not* to section 1331, the general federal question statute on which subject matter jurisdiction was based in that case.³²⁵ The European Community (EC) lost on the merits of whether RICO’s private cause of action applied,³²⁶ merits that the Court would never have reached if the presumption against extraterritoriality applied to section 1331. Second, the Court discussed the possibility that the EC might bring suit under its own laws, “invok[ing] federal diversity jurisdiction as a basis for

³¹⁹ Gardner, *supra* note 22, at 142; see also Bookman, *supra* note 298, at 59 (“Such an application of the presumption [to jurisdictional statutes] seems ludicrous . . .”).

³²⁰ See 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/DW9D-95FY>]; see also Carlos M. Vázquez, *Things We Do with Presumptions: Reflections on Kiobel v. Royal Dutch Petroleum*, 89 NOTRE DAME L. REV. 1719, 1723 (2014) (“The concerns underlying the presumption against extraterritoriality are . . . categorically inapplicable to . . . statutes conferring jurisdiction on the federal courts.”).

³²¹ Indeed, *RJR Nabisco*’s paragraph describing *Kiobel* immediately precedes the paragraph outlining the scope of the presumption. See *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100–01 (2016) (discussing *Kiobel*).

³²² See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013) (“[W]e think the principles underlying the canon of interpretation similarly constrain courts considering *causes of action* that may be brought under the ATS.” (emphasis added)); see also Vázquez, *supra* note 320, at 1724–25 (noting that “*Kiobel* held instead that the presumption against extraterritoriality applies to the federal common law causes of action that [the Court] had recognized in *Sosa v. Alvarez-Machain*”).

³²³ See *RJR Nabisco*, 136 S. Ct. at 2100 (explaining that *Kiobel* “concluded that the principles supporting the presumption should ‘similarly constrain courts considering causes of action that may be brought under the ATS’” (quoting *Kiobel*, 569 U.S. at 116)).

³²⁴ *Id.* at 2101.

³²⁵ RICO lacks its own provision granting subject matter jurisdiction. See 18 U.S.C. §§ 1961–1968 (2018).

³²⁶ See *RJR Nabisco*, 136 S. Ct. at 2111 (“Respondents’ remaining RICO damages claims therefore rest entirely on injury suffered abroad and must be dismissed.”).

proceeding in U.S. courts.”³²⁷ That possibility would not exist, however, if the presumption against extraterritoriality applied to section 1332 and limited diversity jurisdiction to cases arising in the United States. Third, the Court expressly held that two of RICO’s substantive provisions apply extraterritorially to the same extent as its predicate acts,³²⁸ preserving the ability of the U.S. government to prosecute, for example, “a pattern of killings of Americans abroad in violation of § 2332(a) — a predicate that all agree applies extraterritorially.”³²⁹ But this holding would mean nothing if the presumption against extraterritoriality applied to section 3231, the general jurisdictional provision for federal criminal offenses.³³⁰ In short, what *RJR Nabisco* says and does elsewhere in the opinion confirms that it did not mean to say that the presumption applies to purely jurisdictional statutes.

The proposition that the new presumption against extraterritoriality does not apply to jurisdictional statutes finds further support in *Morrison*. There, the Court applied the presumption to section 10(b) of the Securities Exchange Act,³³¹ but not to section 27, the provision granting the district courts “exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder.”³³² In fact, *Morrison* affirmatively held that the district court “had jurisdiction under [section 27] to adjudicate the question whether § 10(b) applies.”³³³

There are two cases in which the Supreme Court has applied the presumption against extraterritoriality to statutes that might be characterized as partly jurisdictional. In *Argentine Republic v. Amerada Hess Shipping Corp.*,³³⁴ the Court applied the presumption to the Foreign Sovereign Immunities Act³³⁵ (FSIA),³³⁶ and in *Smith v. United States*,

³²⁷ *Id.* at 2109.

³²⁸ *Id.* at 2103.

³²⁹ *Id.* at 2102.

³³⁰ Nor could such a criminal prosecution be brought in state courts, since federal jurisdiction over federal criminal offenses is exclusive. See 18 U.S.C. § 3231 (“The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.”).

³³¹ See *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 250–51 (2010) (“We decide whether § 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants . . .”).

³³² 15 U.S.C. § 78aa (2018).

³³³ *Morrison*, 561 U.S. at 254. A court might reach the same result in at least some cases by assuming that the presumption does apply to jurisdictional statutes, but that a clear indication of extraterritoriality in the substantive statute rebuts the presumption with respect to the jurisdictional statute. Such a line of argument would be analogous to *RJR Nabisco*’s reasoning that RICO’s substantive provisions take their geographic scope from RICO’s predicate acts. See *RJR Nabisco*, 136 S. Ct. at 2102–03. But it is worth noting that this is not what the Court *did* in either *Morrison* or *RJR Nabisco*. Nor would it work for diversity suits in which no violation of federal law is alleged.

³³⁴ 488 U.S. 428 (1989).

³³⁵ Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified in scattered sections of 28 U.S.C.).

³³⁶ *Amerada Hess*, 488 U.S. at 440–41.

it applied the presumption to the FTCA.³³⁷ But both the FSIA and the FTCA codify rules of immunity, which the Court has characterized as substantive.³³⁸ Neither statute is purely jurisdictional.

In sum, the new presumption against extraterritoriality applies to all substantive provisions of federal statutes. It also applies to causes of action, although causes of action will frequently have the same geographic scope as the underlying substantive statute. But the presumption against extraterritoriality does not apply to purely jurisdictional statutes granting subject matter jurisdiction to the federal courts.³³⁹

D. Supplementing the Presumption

A final doctrinal question is how the new presumption against extraterritoriality relates to other canons of statutory interpretation. Does it preclude courts from recognizing other limits on the geographic scope of federal statutory provisions as a matter of international comity? Does it override the interpretations of administrative agencies concerning the geographic scope of statutes they administer?

This section argues that the answer to both questions is no. Courts retain authority to impose additional comity limitations on federal statutes, under what the *Restatement (Fourth)* calls a principle of “reasonableness in interpretation.”³⁴⁰ Agencies also have considerable discretion to determine the geographic scope of the statutes they administer.³⁴¹ These two principles further increase the flexibility of the interpretive regime for determining questions of geographic scope.³⁴² Taken

³³⁷ *Smith v. United States*, 507 U.S. 197, 203–04 (1993).

³³⁸ *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 497 (1983) (“The [FSIA] codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law . . .”).

³³⁹ *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. a (AM. LAW INST. 2018) (“The presumption against extraterritoriality applies to substantive provisions of federal statutes and to express and implied federal causes of action. The presumption does not apply to provisions granting subject-matter jurisdiction to federal courts.”).

³⁴⁰ *Id.* § 405; *see also* William S. Dodge, *Reasonableness in the Restatement (Fourth) of Foreign Relations Law*, 55 WILLAMETTE L. REV. (forthcoming 2020) (on file with the Harvard Law School Library) (discussing principle of reasonableness in interpretation).

³⁴¹ *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. e (“If Congress has not spoken directly to the geographic scope of a statutory provision, courts in the United States must defer to a reasonable construction of the statute by an administering agency exercising delegated lawmaking authority.”).

³⁴² A third principle of interpretation that potentially limits the geographic scope of federal statutes is the *Charming Betsy* canon — that acts of Congress should be construed not to violate international law. *See id.* § 406 (“Where fairly possible, courts in the United States construe federal statutes to avoid conflict with international law governing jurisdiction to prescribe. If a federal statute cannot be so construed, the federal statute is controlling as a matter of federal law.”). Because customary international law permits a great deal of extraterritorial regulation, *see id.* §§ 407–413 (restating customary international law rules on jurisdiction to prescribe), a federal statute trimmed by the presumption against extraterritoriality, the principle of reasonableness in interpretation, and deference to administrative agencies is quite unlikely to violate customary international

together, the new presumption, the principle of reasonableness, and deference to administrative agencies provide the tools needed to develop appropriate tests for when various statutory provisions apply extraterritorially, tests that can be applied consistently and can moderate the reach of federal law without having to give courts discretionary authority not to apply federal law on a case-by-case basis.

I. Reasonableness in Interpretation. — The new presumption against extraterritoriality is based partly on international comity, but it does not exhaust that principle. *Morrison* and *RJR Nabisco* should not be read to preclude courts from putting additional limits on the geographic scope of federal statutory provisions as a matter of prescriptive comity.³⁴³ There are two basic situations in which courts might consider additional comity limitations: (1) to provide limits when the presumption has been rebutted at *RJR Nabisco* step one; and (2) to supplement the test that has been developed by applying the presumption at *RJR Nabisco* step two.

Some language in *RJR Nabisco* might be thought to preclude additional comity limitations when the presumption has been rebutted. “The scope of an extraterritorial statute,” the Court observed, “turns on the limits Congress has (or has not) imposed on the statute’s foreign application, and not on the statute’s ‘focus.’”³⁴⁴ But here, *RJR Nabisco* was rejecting only additional limitations based on the focus of a statutory provision, not limitations that might have some other foundation. Moreover, the passage in *Morrison* on which *RJR Nabisco* relied expressly noted the possibility of “some other limitation” on a provision’s geographic scope.³⁴⁵ As Buxbaum has pointed out, other limitations “might include limitations imposed by doctrines such as comity, not merely additional limitations imposed legislatively.”³⁴⁶

In fact, lower courts have imposed additional comity limitations in at least some cases where the presumption against extraterritoriality has

law limits on jurisdiction to prescribe. The *Charming Betsy* canon therefore plays little practical role in the interpretive regime for determining the geographic scope of federal statutory provisions.

³⁴³ To be clear, the question here is only whether the new presumption precludes additional *prescriptive* comity limitations — that is, limitations on the geographic reach of U.S. law. As Justice Ginsburg pointed out in her *RJR Nabisco* dissent, there are also doctrines of *adjudicative* comity, like the doctrine of *forum non conveniens* and due process limitations on personal jurisdiction, that serve to keep cases with little connection to the United States out of U.S. courts. See *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2115 (2016) (Ginsburg, J., concurring in part, dissenting in part, and dissenting from the judgment); see also Dodge, *supra* note 58, at 2090–120 (providing overview of international comity doctrines). Nothing in the presumption against extraterritoriality precludes the use of other comity doctrines in appropriate circumstances.

³⁴⁴ *RJR Nabisco*, 136 S. Ct. at 2101 (majority opinion); see also *id.* at 2104 (stating that because RICO’s substantive provisions had a clear indication of extraterritoriality, “it applies to all [patterns of racketeering]”).

³⁴⁵ *Id.* at 2104 (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 267 n.9 (2010)).

³⁴⁶ Buxbaum, *supra* note 297, at 67.

been rebutted. The Bankruptcy Code, for example, defines a bankruptcy estate to include all of the debtor's property (with some exceptions) "wherever located and by whomever held."³⁴⁷ Lower courts have held that this language is sufficient to rebut the presumption against extraterritoriality.³⁴⁸ But courts have nevertheless used a choice-of-law analysis to determine whether a particular provision of the Bankruptcy Code should be applied on the facts of a particular case.³⁴⁹

Lower courts have also sometimes imposed additional comity limitations to supplement a test that the Supreme Court developed by applying the presumption against extraterritoriality (the second situation noted above). In *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*,³⁵⁰ the defendants were alleged to have made fraudulent misstatements that affected the price of securities-based swaps in the United States, although the defendants were not parties to the swaps.³⁵¹ Under *Morrison*'s transactional test, section 10(b) of the Exchange Act would have applied because the swaps were purchased in the United States.³⁵² But the Second Circuit concluded that under *Morrison*, a transaction in the United States was a "necessary" but not "sufficient" condition for applying section 10(b),³⁵³ and it dismissed the case because the defendants were not parties to the transactions and the claims were "so predominantly foreign as to be impermissibly extraterritorial."³⁵⁴ Any other conclusion would have allowed parties to a swap transaction in the United States to subject foreign companies with no voluntary connections to the United States to liability under section 10(b) simply by referencing the foreign securities in the domestic swaps.³⁵⁵

The *Restatement (Fourth) of Foreign Relations Law* takes the position that "[a]s a matter of prescriptive comity, courts in the United States may interpret federal statutory provisions to include other limitations on their applicability."³⁵⁶ Drawing on the Supreme Court's decision in

³⁴⁷ 11 U.S.C. § 541(a) (2018).

³⁴⁸ See, e.g., *In re French*, 440 F.3d 145, 151 (4th Cir. 2006); *In re Simon*, 153 F.3d 991, 996 (9th Cir. 1998); *In re Rimsat, Ltd.*, 98 F.3d 956, 961 (7th Cir. 1996).

³⁴⁹ See, e.g., *In re Picard*, 917 F.3d 85, 103–05 (2d Cir. 2019); *French*, 440 F.3d at 152–54; *In re Florsheim Grp. Inc.*, 336 B.R. 126, 130 (Bankr. N.D. Ill. 2005); *In re Maxwell Comm. Corp.*, 170 B.R. 800, 809 (Bankr. S.D.N.Y. 1994).

³⁵⁰ 763 F.3d 198 (2d Cir. 2014) (per curiam).

³⁵¹ *Id.* at 201.

³⁵² *Id.* at 214.

³⁵³ *Id.* at 215.

³⁵⁴ *Id.* at 216.

³⁵⁵ See *id.* at 215 (noting that strict application of *Morrison* "would require courts to apply the statute to wholly foreign activity clearly subject to regulation by foreign authorities solely because a plaintiff in the United States made a domestic transaction, even if the foreign defendants were completely unaware of it").

³⁵⁶ RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 405 (AM. LAW INST. 2018).

Empagran, the *Restatement (Fourth)* explains that “[i]n interpreting the geographic scope of federal law, courts seek to avoid unreasonable interference with the sovereign authority of other states.”³⁵⁷ There is some danger in allowing courts to supplement the presumption against extraterritoriality in this way. Gardner has pointed out that “broadly phrased concerns about ‘unreasonable interference with the sovereign authority of other nations’ could encourage judges to back too quickly away from cases that Congress (and those other nations) would really rather they keep.”³⁵⁸ To address that concern, the *Restatement (Fourth)* places significant limitations on the principle of reasonableness: (1) it states that “[w]hen the intent of Congress to apply a particular provision is clear, a court must apply that provision even if doing so would interfere with the sovereign authority of other states”;³⁵⁹ (2) it points out that “[i]nterference with the sovereign authority of foreign states may be reasonable if application of federal law would serve the legitimate interests of the United States”;³⁶⁰ (3) it cautions that “[i]n combining other comity limitations with the presumption against extraterritoriality, a court should take care not to double-count the legitimate interests of other states”;³⁶¹ and perhaps most importantly (4) it emphasizes that “[r]easonableness is a principle of statutory interpretation and not a discretionary judicial authority to decline to apply federal law.”³⁶²

It is critical to distinguish the *Restatement (Fourth)*’s provision-by-provision approach to reasonableness from the *Restatement (Third)*’s case-by-case approach.³⁶³ As noted above, section 403 of the *Restatement (Third)* embraced the “jurisdictional rule of reason” that some lower courts had adopted in antitrust cases.³⁶⁴ It included a non-exclusive list of eight factors that courts could weigh to determine

³⁵⁷ *Id.* § 405 cmt. a; *cf.* *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (“[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.”).

³⁵⁸ Gardner, *supra* note 22, at 148 (footnote omitted) (quoting *Empagran*, 542 U.S. at 164).

³⁵⁹ RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 405 cmt. a.

³⁶⁰ *Id.* § 405 cmt. b.

³⁶¹ *Id.* § 405 cmt. c.

³⁶² *Id.* § 405 cmt. a. Of course, government enforcement authorities have discretion whether to bring enforcement actions and may consider a wide range of factors. *See, e.g.*, U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION § 4.1 (2017) (listing factors); *see also* Buxbaum, *supra* note 277, at 248–50 (discussing government enforcement authorities’ consideration of case-specific factors).

³⁶³ *See* Dodge, *supra* note 340 (comparing approaches of *Restatement (Third)* and *Restatement (Fourth)*).

³⁶⁴ *See supra* notes 116–18 and accompanying text. The *Restatement (Third)* also “state[d] the principle of reasonableness as a rule of international law.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. a (AM. LAW INST. 1987). The *Restatement (Fourth)* concludes, to the contrary, that “state practice does not support a requirement of case-by-case balancing to establish reasonableness as a matter of international law.”

whether the exercise of jurisdiction would be reasonable in each case.³⁶⁵ The *Restatement (Fourth)*, by contrast, emphasizes that “[r]easonableness is a principle of statutory interpretation and not a discretionary judicial authority to decline to apply federal law.”³⁶⁶ The tests that courts develop under the *Restatement (Fourth)*’s principle of reasonableness to supplement the presumption against extraterritoriality will vary “depending on the text, history, and purpose of the particular provision.”³⁶⁷ In some instances, the test may require a case-by-case weighing of factors.³⁶⁸ In other instances, the test will preclude case-by-case analysis.³⁶⁹ And in many instances, no additional limitations will be appropriate at all. The central point is that the *Restatement (Fourth)*’s principle of reasonableness in interpretation — like the new presumption against extraterritoriality — allows courts to tailor the geographic scope of federal law on a provision-by-provision basis, not on a case-by-case basis. If courts apply the reasonableness principle with due caution, it may help smooth some of the harder edges of the new presumption against extraterritoriality while avoiding the unbridled discretion of a case-by-case approach.

2. *Deference to Administrative Agencies.* — Courts need not always depend on their own interpretive resources to determine the geographic scope of federal statutory provisions. Under *Chevron*, courts generally must defer to reasonable interpretations of a statute by an agency exercising delegated lawmaking authority.³⁷⁰ Under *Skidmore*, courts may defer to other agency interpretations to the extent they are persuasive.³⁷¹ The question of deference to administrative agencies has arisen in several Supreme Court cases applying the presumption.³⁷² The Court has consistently treated questions of geographic scope as subject to the normal rules of deference.³⁷³ The *Restatement (Fourth)* also takes the position that, “[i]f Congress has not spoken directly to the geographic scope of a statutory provision, courts in the United States must defer to

RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 407 reporters’ note 3 (AM. LAW INST. 2018).

³⁶⁵ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2).

³⁶⁶ RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 405 cmt. a.

³⁶⁷ *Id.* § 405 cmt. d.

³⁶⁸ See *id.* § 405 reporters’ note 5 (discussing bankruptcy cases).

³⁶⁹ See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004) (rejecting case-by-case approach for antitrust law as “too complex to prove workable”).

³⁷⁰ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

³⁷¹ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

³⁷² See, e.g., *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 272 (2010); *Aramco*, 499 U.S. 244, 257 (1991); *Foley Bros. v. Filardo*, 336 U.S. 281, 288 (1949).

³⁷³ See William S. Dodge, *Chevron Deference and Extraterritorial Regulation*, 95 N.C. L. REV. 911, 932–43 (2017) (discussing cases).

a reasonable construction of the statute by an administering agency exercising delegated lawmaking authority.”³⁷⁴

In determining questions of geographic scope, agencies have a number of advantages over courts:

Agencies are likely to have a better understanding of the statutory policy, the regulatory options available to effectuate that policy, and the degree of conflict with other countries that each option might cause. Agencies can also calibrate their interpretations to a far greater degree than courts in order to maximize the effectiveness of statutory policies while minimizing conflicts with other nations.³⁷⁵

As Professor Curtis Bradley has noted, the presumption against extraterritoriality “reflects a desire to push certain issues away from the courts, not a preference for congressional as opposed to Executive determination.”³⁷⁶

Agencies have issued detailed regulations defining the geographic scope of federal statutory provisions in many instances.³⁷⁷ For example, the Securities Exchange Commission (SEC) has delimited the registration requirements of section 5 of the 1933 Securities Act in Regulation S.³⁷⁸ Regulation S exempts offers and sales made in an “offshore transaction” that involve no “directed selling efforts” in the United States.³⁷⁹ But it defines each of those concepts in ways that do not precisely track national borders.³⁸⁰ The SEC adjusted its regulation specifically to give “recognition to the doctrine of comity.”³⁸¹ A court applying the presumption against extraterritoriality could never have created such a finely tailored scheme.³⁸²

The new presumption against extraterritoriality should not be viewed in isolation but rather as part of a larger interpretive regime for determining the scope of federal statutory provisions. Administrative agencies have authority to interpret the geographic scope of many statutes, and under *Chevron* courts must defer to those interpretations if

³⁷⁴ RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. e (AM. LAW INST. 2018).

³⁷⁵ Dodge, *supra* note 373, at 917.

³⁷⁶ Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 694 (2000); *see also* Clopton, *supra* note 24, at 40 (arguing for deference to administrative determinations of geographic scope); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1204 (2007) (same).

³⁷⁷ *See* Dodge, *supra* note 373, at 958–68 (discussing examples).

³⁷⁸ 17 C.F.R. §§ 230.901–905 (2018).

³⁷⁹ *Id.*

³⁸⁰ *See* Dodge, *supra* note 373, at 962–65 (describing Regulation S).

³⁸¹ Offshore Offers and Sales, Securities Act Release No. 27,942; Investment Company Act Release No. 17,458, 55 Fed. Reg. 18,306, 18,307 (May 2, 1990) (codified in scattered parts of 200 & 300 C.F.R.).

³⁸² Lower courts have held that Regulation S is entitled to deference under *Chevron*. *See, e.g., Eur. & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 123 & n.3 (2d Cir. 1998), *abrogated on other grounds, Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

they are reasonable, even if the interpretations differ from those a court applying the new presumption against extraterritoriality would have reached.³⁸³ When no answers are to be found in administrative interpretations, courts must apply the new presumption against extraterritoriality, which instructs them first to follow Congress's direction if there is a clear indication of extraterritoriality in the text, structure, or legislative history of the provision, and second to develop tests based on the focus of congressional concern if there is not.³⁸⁴ Finally, courts may apply a limited principle of "reasonableness in interpretation" to impose additional comity limitations that are consistent with the text, history, and purpose of particular provisions.³⁸⁵ Section E evaluates this interpretive regime in comparison with some of the alternatives.

E. Evaluation

Many scholars have criticized the new presumption. To the extent that these criticisms rest on fears about how the presumption might be applied to jurisdictional statutes and causes of action, the analysis above may allay some concerns.³⁸⁶ But criticisms of the new presumption go beyond questions of its scope. Gardner worries that "the presumption has run away from its stated purpose of effectuating congressional intent. Instead it is generating an ever-growing series of hoops through which Congress must jump if it wants its laws to extend beyond U.S. borders."³⁸⁷ Buxbaum argues that the categorical nature of the new presumption "is simply incompatible with the effective operation of regulatory statutes in today's economy, and fails to capture the ways in which domestic and foreign regulatory interests coincide."³⁸⁸ And Colangelo derides *RJR Nabisco's* two-step framework as "needlessly formalistic."³⁸⁹

This section responds to such criticisms. First, I note that the new presumption against extraterritoriality is significantly more flexible than previous versions. This added flexibility increases the ability of courts to effectuate congressional intent by finding a clear indication of extraterritoriality or by fashioning an appropriate test based on a provision's focus. Second, I argue that the remaining rigidity in the presumption reflects the institutional limits of courts in statutory interpretation. Courts lack the capacity of administrative agencies to produce finely detailed rules of geographic scope. To an even greater extent, courts lack the institutional capacity to decide on a case-by-case basis that

³⁸³ RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. e (AM. LAW INST. 2018).

³⁸⁴ *Id.* § 404 cmt. b & c.

³⁸⁵ *Id.* § 405.

³⁸⁶ See *supra* sections II.C.2 & 3, pp. 1617–23.

³⁸⁷ Gardner, *supra* note 22, at 143.

³⁸⁸ Buxbaum, *supra* note 297, at 66.

³⁸⁹ Colangelo, *supra* note 23, at 51.

federal law should not be applied. Courts must develop generally applicable tests, and they must do so more at the wholesale than at the retail level. Finally, I note that the formalization of the new presumption against extraterritoriality may promote consistency in statutory interpretation, particularly in the lower federal courts.

As noted above, the new presumption against extraterritoriality is significantly more flexible than previous versions at each step of the analysis.³⁹⁰ At *RJR Nabisco* step one, it is not necessary to find a clear statement that a statutory provision applies abroad, and a court may consider a provision's "context" to determine if the presumption has been rebutted. At *RJR Nabisco* step two, even if the presumption has not been rebutted, the application of a provision will be considered domestic and permissible if whatever is the focus of the statute is found in the United States.

The new presumption's flexibility in determining whether the presumption has been rebutted is a decided improvement over *Aramco*, which referred to Congress's "need to make a clear statement that a statute applies overseas"³⁹¹ and which was widely read to establish a clear statement rule.³⁹² In a later case, the Supreme Court indicated that it would look at "all available evidence" to determine the geographic scope of a provision.³⁹³ But it was not until *Morrison* that the Court disavowed the presumption as a clear statement rule and instructed courts to consult the "context" of a provision to determine its geographic scope.³⁹⁴ *RJR Nabisco* reaffirms *Morrison* in this regard, noting that "an express statement of extraterritoriality is not essential."³⁹⁵ *RJR Nabisco* also makes clear that the "structure" of a statute is part of its "context," and more specifically that one statutory provision may take its geographic scope from another.³⁹⁶ To be sure, the presumption still requires a "clear indication" of extraterritoriality,³⁹⁷ but there are now a number of different ways to meet that requirement.

The new presumption also makes the extraterritoriality analysis more flexible by adding a second step at which applying a provision will be considered domestic if whatever is the "focus" of the provision is

³⁹⁰ See *supra* text following note 258.

³⁹¹ *Aramco*, 499 U.S. 244, 258 (1991).

³⁹² See *supra* notes 133–34 and accompanying text.

³⁹³ *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177 (1993).

³⁹⁴ *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010) ("But we do not say . . . that the presumption against extraterritoriality is a 'clear statement rule,' if by that is meant a requirement that a statute say 'this law applies abroad.' Assuredly context can be consulted as well." (citation omitted)).

³⁹⁵ *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2102 (2016).

³⁹⁶ *Id.* at 2102–03.

³⁹⁷ *Morrison*, 561 U.S. at 265.

found in the United States.³⁹⁸ Traditionally, the presumption against extraterritoriality turned exclusively on where the conduct occurred,³⁹⁹ and the Supreme Court seems to have maintained that understanding until *Morrison*.⁴⁰⁰ *Morrison* broke the link between the presumption and conduct by recognizing that the focus of congressional concern could be something other than conduct — in *Morrison*, the “transactions”;⁴⁰¹ in *RJR Nabisco*, the “domestic injury.”⁴⁰² Thoughtful observers have long noted that “territoriality” and “extraterritoriality” are not self-defining.⁴⁰³ If conduct in one state causes harm in another, each might be deemed to be acting territorially, or extraterritorially, if it applied its law.⁴⁰⁴ The new presumption against extraterritoriality recognizes the fluidity of these concepts and uses congressional concerns to give meaning to the words “domestic” and “extraterritorial.”

The new presumption’s flexibility gives courts greater leeway to effectuate congressional intent. If the text speaks directly to the geographic scope of a provision, courts will follow that direction.⁴⁰⁵ But courts may also look to other evidence of congressional intent, like the structure of a statute.⁴⁰⁶ If the intent inquiry does not reveal a clear indication of extraterritoriality, the new presumption lets courts fashion rules for the geographic scope of a provision based on its purpose.⁴⁰⁷ If whatever was the focus of congressional concern is found in the United States, the provision will be applied even though the case might be considered extraterritorial in other respects. Instead of “an ever-growing series of hoops through which Congress must jump,”⁴⁰⁸ the new

³⁹⁸ *Id.* at 266. As noted above, it is also possible for a provision to have multiple focuses or for its focus to be nongeographic. See *supra* notes 208–15 and accompanying text.

³⁹⁹ See *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (noting 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”).

⁴⁰⁰ See *supra* notes 173–76 and accompanying text.

⁴⁰¹ *Morrison*, 561 U.S. at 267; see also *supra* notes 198–200 and accompanying text.

⁴⁰² *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2111 (2016); see also *supra* notes 242–45 and accompanying text.

⁴⁰³ See, e.g., Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631, 635 (2009) (“‘Territoriality’ and ‘extraterritoriality,’ though, are legal constructs. They are claims of authority, or of resistance to authority, that are made by particular actors with particular substantive interests to promote.”); Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1323 (2014) (noting that “‘territorial’ and ‘extraterritorial’ are fluid constructs subject to conceptual manipulation”).

⁴⁰⁴ For a good discussion, see Gevurtz, *supra* note 201, at 351–55.

⁴⁰⁵ See *RJR Nabisco*, 136 S. Ct. at 2101 (“The scope of an extraterritorial statute . . . turns on the limits Congress has (or has not) imposed on the statute’s foreign application . . .”).

⁴⁰⁶ See *id.* at 2103 (noting that the “structure” of RICO “clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality”).

⁴⁰⁷ See *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2138 (2018) (noting that the focus of a provision “can turn on the ‘conduct,’ ‘parties,’ or interests that it regulates or protects” (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 267 (2010))).

⁴⁰⁸ Gardner, *supra* note 22, at 143.

presumption may be viewed as expanded series of pathways — based on text, intent, and purpose — that courts can use to determine the geographic scope of particular provisions.⁴⁰⁹ Some of those pathways were simply not available under previous versions of the presumption that looked exclusively to the location of the conduct⁴¹⁰ or required a clear statement to rebut the presumption.⁴¹¹

Of course, the Supreme Court might use the new presumption's flexibility to effectuate its own normative preferences rather than those of Congress. It is certainly possible to read the Court's decisions since 1991 more cynically than this Article has done — as reflecting a bias against private plaintiffs,⁴¹² particularly those asserting civil rights⁴¹³ or human rights,⁴¹⁴ while preserving the power of public officials.⁴¹⁵ The more flexible the presumption becomes, the easier it may be for the Court to indulge any biases that it may have. On the other hand, both steps of the new presumption refer expressly to congressional intent, the first by asking “whether the statute gives a clear, affirmative indication that it applies extraterritorially”⁴¹⁶ and the second “by looking to the statute's ‘focus.’”⁴¹⁷ It will certainly be possible for courts to manipulate the new presumption, but the fact that they must speak in the language of congressional intent imposes at least some constraints.

Despite its added flexibility, the new presumption against extraterritoriality retains some rigidity, which has been another target of criticism. As Buxbaum has noted, it tends to seize upon “a particular connecting factor,” “regardless of whether other factors in a particular case might trigger a U.S. regulatory interest.”⁴¹⁸ Such a categorical approach, she

⁴⁰⁹ The fact that the new presumption combines textualism and purposivism (the approaches that dominate the Supreme Court today, *see infra* notes 442–54 and accompanying text) may account for the current consensus on the Court in favor of the presumption. *See supra* notes 26–29 (noting consensus in favor of the presumption).

⁴¹⁰ *See Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (noting 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”).

⁴¹¹ *Aramco*, 499 U.S. 244, 258 (1991) (referring to Congress's “need to make a clear statement that a statute applies overseas”).

⁴¹² *See Morrison*, 561 U.S. at 252–53 (ruling against private plaintiffs bringing securities fraud claims).

⁴¹³ *See Aramco*, 499 U.S. at 247 (ruling against private plaintiff bringing employment discrimination claim).

⁴¹⁴ *See Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 111–12 (2013) (ruling against plaintiffs bringing human rights claims).

⁴¹⁵ *See RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2103, 2106 (2016) (allowing U.S. government to bring extraterritorial criminal prosecutions under RICO but limiting private plaintiffs' ability to bring civil claims for damages).

⁴¹⁶ *Id.* at 2101.

⁴¹⁷ *Id.*

⁴¹⁸ Buxbaum, *supra* note 297, at 65. As noted above, the new presumption does allow for the possibility that a provision might have multiple focuses or that its focus might be nongeographic. *See supra* notes 208–15 and accompanying text.

writes, “is simply incompatible with the effective operation of regulatory statutes in today’s economy, and fails to capture the ways in which domestic and foreign regulatory interests coincide and overlap with each other.”⁴¹⁹ Buxbaum is right that regulatory interests may interact in a variety of ways and that the ideal scope for a particular regulatory provision may not be the same scope that a court applying the presumption against extraterritoriality would give it. Administrative agencies have been able to devise more fine-grained rules on geographic scope for provisions like the registration requirements of the Securities Act⁴²⁰ and Hart-Scott-Rodino’s premerger notice requirement.⁴²¹

But courts are not administrative agencies. They do not have the same information about statutory purposes, regulatory options, and conflicts with foreign agencies.⁴²² It would be impossible for a court to develop through statutory interpretation a regulatory scheme that resembles what the SEC has promulgated for the Securities Act or what the FTC has promulgated for Hart-Scott-Rodino. The courts’ lack of institutional capacity is a good reason for courts to defer to agency interpretations of geographic scope.⁴²³ But it is also a good reason for them not to attempt similar calibrations on their own.

If courts lack the institutional capacity to develop detailed regulations for the geographic scope of federal statutory provisions, they even more clearly lack the institutional capacity to decide whether to apply those provisions on a case-by-case basis. Section 403 of the *Restatement (Third) of Foreign Relations Law* advanced a multifactor balancing approach that asked courts to determine whether the application of U.S. law would be reasonable in each case.⁴²⁴ Some lower courts still follow this approach under the name of “international comity,” at least in anti-trust cases.⁴²⁵ But it is far from clear that courts have either the capacity or the authority to engage in the case-by-case evaluation of interests that section 403 envisioned.⁴²⁶ Writing for the Court in *Empagran*, Justice Breyer observed that taking “account of comity considerations case by case” is “too complex to prove workable.”⁴²⁷ And Justice Scalia, who

⁴¹⁹ Buxbaum, *supra* note 297, at 66. The categorical nature of the new presumption is moderated to some extent by the principle of reasonableness in interpretation. See *supra* section II.D.1, pp. 1624–27. But some rigidity remains.

⁴²⁰ 15 U.S.C. § 77e (2018); see Regulation S, 17 C.F.R. §§ 230.901–905 (2018).

⁴²¹ 15 U.S.C. § 18a (2018); see 16 C.F.R. §§ 802.50–52 (2018).

⁴²² See Dodge, *supra* note 373, at 944–50.

⁴²³ See *supra* section II.D.2, pp. 1627–29.

⁴²⁴ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (AM. LAW INST. 1987).

⁴²⁵ See, e.g., *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 183 (2d Cir. 2016), *vacated on other grounds sub nom.* *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018).

⁴²⁶ See Dodge, *supra* note 106, at 159–63.

⁴²⁷ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004).

seemed to endorse section 403 in his *Hartford* dissent,⁴²⁸ later had a change of heart, writing in a subsequent case that “fine tuning” the extraterritorial reach of statutes “through the process of case-by-case adjudication is a recipe for endless litigation and confusion.”⁴²⁹

Besides the new presumption’s categorical approach to determining geographic scope, critics have complained that its two-step framework is “needlessly formalistic.”⁴³⁰ *RJR Nabisco*’s decision to express the new presumption in a formal framework seems intended to promote consistency in its application. Like the categorical approach, it responds to limits on the institutional capacity of courts — but in this instance, to limits on the institutional capacity of the Supreme Court to supervise the lower federal courts.

Decisions about interpretive methods generally do not carry stare decisis effect.⁴³¹ The principal exception to this rule is *Chevron*’s doctrine of deference to administrative agencies.⁴³² Although the Supreme Court is not always consistent in applying the *Chevron* framework,⁴³³ the Court seems to consider that framework precedential.⁴³⁴ Moreover,

⁴²⁸ See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818–19 (1993) (Scalia, J., dissenting).

⁴²⁹ *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 158 (2005) (Scalia, J., dissenting).

⁴³⁰ Colangelo, *supra* note 23, at 51.

⁴³¹ See Gluck, *supra* note 4, at 1910 (“[T]he Court does not generally give formal stare decisis effect to its statements about statutory interpretation methodology.”); Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 389 (2005) (“[W]hen the Court issues opinions interpreting statutes, stare decisis effect attaches to the ultimate holding as to the meaning of the particular statute interpreted, but not to general methodological pronouncements, no matter how apparently firm.”).

⁴³² See Gluck, *supra* note 4, at 1990 n.320 (“*Chevron* might be the most important exception to the Supreme Court’s general resistance to methodological stare decisis . . .”).

⁴³³ William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1121 (2008) (reporting that the Supreme Court applied *Chevron*’s two-step test in only 8.3% of cases involving agency interpretation).

⁴³⁴ See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1817 (2010) (“[T]he Court does apply methodological stare decisis in this unique context: *Chevron* is precedential for much more than its mere substantive (environmental law) holding; far more significant has been the methodology it sets forth for all future potential deference cases.” (footnote omitted)). *But cf.* Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1733–34 (2010) (describing the authors’ study of 667 Supreme Court cases involving agency interpretation and concluding that “[t]hese empirical findings . . . falsify[] the proposition that any of the Justices treats *Chevron* . . . as precedent[.]” *id.* at 1734). In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Supreme Court treated *Auer* deference (deference to agency interpretations of their own regulations) as entitled to stare decisis effect. *Id.* at 2422–23. Chief Justice Roberts, who provided the fifth vote, cautioned that the issues surrounding *Auer* deference are different from those surrounding *Chevron* deference. *Id.* at 2425 (Roberts, C.J., concurring). But he seems not to have been referring specifically to whether *Chevron* is precedential, and it would be difficult to distinguish *Chevron* from *Auer* in that regard.

lower courts appear to treat *Chevron*'s methodological framework as binding.⁴³⁵

The new presumption against extraterritoriality constitutes a similar methodological framework — like *Chevron*, it even has two steps. Whether *RJR Nabisco*'s two-step framework is formally binding as precedent or not, it is likely to be as influential as *Chevron*.⁴³⁶ Lower courts tend to follow the Supreme Court's lead on questions of interpretation.⁴³⁷ The new presumption against extraterritoriality also shares characteristics with *Chevron* that are likely to make it influential, including its structure, clarity, and the Supreme Court's expressed intention to apply the new presumption going forward.⁴³⁸ A formal methodological framework is not only more likely to be embraced voluntarily by lower courts, but it also exerts pressure on those courts in other ways. A formal framework structures how lawyers present their arguments to courts, increasing the chances that those courts will frame their own analyses in the same way.⁴³⁹ A formal framework also makes departures from that framework easier to spot and to correct.⁴⁴⁰

Binding lower courts to a formal interpretive framework for determining questions of geographic scope is likely to make the answers to those questions more predictable and uniform. But in reconfiguring the presumption against extraterritoriality to achieve this goal, the Supreme Court has clearly changed this canon of interpretation.

III. CHANGING CANONS

The presumption against extraterritoriality has changed several times over the course of its long history. Part I recounted those changes up until 2010. Part II described the new presumption against extraterritoriality articulated in *Morrison* and formalized in *RJR Nabisco*. Part III considers the new presumption as an example of dynamic statutory interpretation on a Supreme Court that is at least rhetorically committed to some combination of textualism and purposivism.

⁴³⁵ See Bruhl, *supra* note 4, at 539 (noting that "*Chevron* probably plays a more significant role in the lower courts than in the Supreme Court").

⁴³⁶ See Dodge, *supra* note 245, at 49 ("By formalizing the presumption against extraterritoriality into a two-step framework . . . , the Supreme Court has given significant guidance to lower courts.").

⁴³⁷ See Bruhl, *supra* note 4, at 496 ("Regarding the large-scale trends, the existing research suggests that the lower courts' patterns of behavior do reflect — in a loose way — patterns in the Supreme Court.").

⁴³⁸ See *id.* at 547–57 (discussing factors that make interpretive decisions influential).

⁴³⁹ See *id.* at 487 ("[T]he interpretive regime affects how judges justify their decisions and how attorneys must advocate for positions, both of which are important in their own right.").

⁴⁴⁰ See *id.* at 491 ("[T]he fear of reversal might play a role in encouraging lower courts to heed their superiors' preferences"); Gluck, *supra* note 4, at 1912 ("[O]ne could argue that as a formal matter, state and lower federal court judges are free to apply whatever interpretive principles they like, even ones different from the Court's. But as a practical matter, adopting such an approach . . . would be courting reversal.").

Changing canons of interpretation pose significant theoretical problems for both textualists and purposivists, who often justify the use of canons as background assumptions of Congress. When the Supreme Court changes a canon and applies the changed canon retroactively to statutes enacted before the change, it runs the risk of upsetting legislative expectations. Dynamic interpreters have fewer theoretical problems with changing canons, but they too object when canons change too abruptly.

Despite the theoretical problems with changing canons, it is inevitable that canons of interpretation will change. The presumption against extraterritoriality is just one example of this phenomenon. It is also inevitable that changed canons will be applied retroactively to existing legislation. To apply them only prospectively, as some have suggested, would be inconsistent with the judicial role. What is not inevitable is that the development of interpretive canons should remain hidden from view. This Part argues that when the Supreme Court changes a canon of interpretation, it should justify the changed canon in normative terms, explain the need for change, and consider steps to mitigate the transition costs of the change.⁴⁴¹

A. *Backdoor Dynamism*

Justice Kagan has famously remarked, “We’re all textualists now.”⁴⁴² Statements about the dominant role of the text in statutory interpretation are common in Supreme Court opinions today.⁴⁴³ Yet the Supreme Court sometimes relies on the purpose of a statute, even to override apparently plain language. For example, in an opinion holding that health insurance exchanges “established by the State” included exchanges established by the federal government, Chief Justice Roberts acknowledged that “[a] fair reading of legislation demands a fair understanding of the legislative plan.”⁴⁴⁴

Much has been written about whether the Supreme Court’s approach to statutory interpretation — and the approaches of particular

⁴⁴¹ Although the discussion that follows focuses on the presumption against extraterritoriality, the arguments for justifying the new canon in normative terms, explaining the need for change, and mitigating the transition costs apply to changed canons generally.

⁴⁴² Harvard Law School, *The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 28, 2015), https://www.youtube.com/watch?time_continue=512&v=dpEtszFToTg [<https://perma.cc/SF6M-TF75>].

⁴⁴³ See, e.g., *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 138 S. Ct. 617, 631 (2018) (Sotomayor, J., for a unanimous Court) (“Because the plain language . . . is ‘unambiguous,’ ‘our inquiry begins with the statutory text, and ends there as well.’” (quoting *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion))).

⁴⁴⁴ *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015).

Justices — is best characterized as textualist or purposivist.⁴⁴⁵ Textualism holds that when the statutory text is clear, courts should follow that text without resorting to its background purposes.⁴⁴⁶ Purposivism maintains that courts should first “[d]ecide what purpose ought to be attributed to the statute” and then “[i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can.”⁴⁴⁷ Dean John Manning has argued that the Supreme Court has moved in a decidedly textualist direction and “no longer claims the authority to deviate from the clear import of the text.”⁴⁴⁸ He describes even the purposivists on the Court as “textually constrained”⁴⁴⁹ in the sense that they take their “cues directly from Congress about how and to what degree to take background purpose or policy into account.”⁴⁵⁰ Professor Richard Re, on the other hand, has pointed to a resurgence of purposivism in recent Supreme Court opinions, arguing that the Court now uses statutory purposes to determine whether a text is ambiguous in the first place, and then again to resolve the ambiguities.⁴⁵¹ Professor Anita Krishnakumar goes further and argues that textualists on the Court often engage in “backdoor purposivism,”⁴⁵² “using textual canons and practical considerations as *launch pads* for assuming or constructing legislative purpose and intent.”⁴⁵³ She finds the backdoor character of this sort of interpretation “troubling because it increases the risk that textualist Justices will — perhaps inadvertently — conflate their own intuitions and normative policy judgments with the legislature’s.”⁴⁵⁴

⁴⁴⁵ See, e.g., William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Krishnakumar, *supra* note 38; John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113; Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006); Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407 (2015).

⁴⁴⁶ See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 73 (2006). This is both because it may be difficult to identify Congress’s purposes accurately and because it is the text, rather than a set of purposes, that Congress actually enacted. See *id.* at 73–75.

⁴⁴⁷ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958). Some forms of purposivism gave preference to statutory purpose even when it conflicted with statutory text. See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (“It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”).

⁴⁴⁸ Manning, *supra* note 445, at 129; see also *id.* at 117 (“[A]ll that distinguishes new purposivists from textualists is the new purposivists’ willingness to invoke legislative history in cases of genuine semantic ambiguity.”).

⁴⁴⁹ *Id.* at 147.

⁴⁵⁰ *Id.* at 132.

⁴⁵¹ Re, *supra* note 445, at 417.

⁴⁵² Krishnakumar, *supra* note 38 (manuscript at 4).

⁴⁵³ *Id.* (manuscript at 12). Krishnakumar argues “that textualist Justices’ use of practical reasoning and language canons to infer purpose confers just as much discretion on judges as do purposivist-preferred interpretive tools such as legislative history or the mischief rule.” *Id.* (manuscript at 41).

⁴⁵⁴ *Id.* (manuscript at 13).

But the Supreme Court appears to be engaged in another sort of hidden interpretation — backdoor dynamism. Dynamic statutory interpretation views courts as agents of the political branches, just as textualism and purposivism do, but not as agents who must blindly follow the original instructions of the legislature.⁴⁵⁵ Professor William Eskridge describes the judge as a “relational agent,” who is “subordinate in an ongoing enterprise and follows directives issued by the legislature” but who “must often exercise creativity in applying prior legislative directives to specific situations.”⁴⁵⁶ Such an agent, Eskridge argues, “should have freedom to adapt the statute’s directive to changed circumstances.”⁴⁵⁷ In his recent book on canons, Eskridge writes that “judges are not just umpires or faithful agents — they are partners in governance and are fiduciaries of We the People.”⁴⁵⁸ Their constitutional role charges them with “applying a statutory scheme dynamically over time.”⁴⁵⁹

Courts act as dynamic interpreters not only when they adapt specific statutes to new situations, but also when they change the rules of statutory interpretation that apply to statutes generally. Changing canons constitute a form of methodological dynamism,⁴⁶⁰ adapting not the statute itself but rather the methods of interpretation that the interpreter uses to construe the statute. In comparison to its statute-specific counterpart, methodological dynamism seems more radical in some ways and less radical in others. On the one hand, methodological dynamism tends to be driven less by changes in the real world and more by changes in the views of judges. Thus, methodological dynamism imposes fewer constraints on judges than statute-specific dynamism. On the other hand, developing methods of interpretation is generally understood to be the province of courts,⁴⁶¹ making this one area in which dynamic statutory interpretation may be more widely considered acceptable.

⁴⁵⁵ See ESKRIDGE, *supra* note 37, at 123–28 (discussing the role of courts as “relational agents”).

⁴⁵⁶ *Id.* at 125.

⁴⁵⁷ *Id.* at 127. Eskridge notes a number of ways in which circumstances may change, including “new understandings about individual, group, or institutional behavior; revised professional consensus or popular mores; and fresh factual information or intellectual paradigms.” *Id.* at 53.

⁴⁵⁸ ESKRIDGE, *supra* note 1, at 11.

⁴⁵⁹ *Id.* Then-Professor Guido Calabresi had gone further, proposing that courts should have authority to modify or abandon obsolete statutes just as they may modify or abandon obsolete rules of common law. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 82 (1982).

⁴⁶⁰ Again, I am indebted to Professor Anita Krishnakumar for the phrase.

⁴⁶¹ See Slocum, *supra* note 4, at 639 (“[C]ourts consider the creation and modification of the rules of statutory interpretation to be subject to judicial prerogative . . .”). There have been proposals for Congress to legislate rules of statutory interpretation. See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002). Professor Abbe Gluck has noted that state courts have often resisted efforts by state legislatures to dictate interpretive rules. See Gluck, *supra* note 434, at 1827 (“Perhaps because some judges view interpretation as a core aspect of the judicial function, they may believe such rules intrude on what is exclusively judicial terrain.”).

Methodological dynamism is neither new nor unusual. In a 1992 article, Eskridge and Professor Philip Frickey identified significant changes in the Supreme Court's deployment of interpretive canons from 1975 to 1991, arguing that the development of new interpretive rules constituted a kind of "backdoor constitutional lawmaking."⁴⁶² More recently, Professor Nina Mendelson has described changes in the canons of statutory interpretation that the Roberts Court used from 2006 to 2015.⁴⁶³ And as Parts I and II of this Article have shown, the presumption against extraterritoriality has changed several times over the course of the past two centuries.

Although methodological dynamism creates theoretical problems under some theories of statutory interpretation,⁴⁶⁴ it reflects a normal judicial role. As Eskridge describes them, canons of statutory interpretation are like the common law.⁴⁶⁵ They "evolve through a process of critical deployment in case after case, by a wide variety of judicial minds."⁴⁶⁶ Importantly, Eskridge also notes that "[t]his process of critical deployment is normative and can be evaluated."⁴⁶⁷ Subjecting canons to evaluation and criticism helps to legitimize the process of development.

The problem is not changing canons themselves but rather the backdoor nature of the changes. In their 1992 article, Eskridge and Frickey acknowledged that "there are powerful arguments for quasi-constitutional law rooted in a vision of our public lawmaking processes as a partnership in which the judiciary plays an active role, but eventually defers to the democratically accountable branches."⁴⁶⁸ But they also pointed out that "a lack of recognition and candor about what the Court has done recently with quasi-constitutional law has submerged a variety of hotly contestable normative and empirical issues."⁴⁶⁹ When interpretive canons change, it is not just the content of the new canons that needs to be evaluated but the need for change itself.⁴⁷⁰

Section C argues that methodological dynamism should start using the front door, with the Supreme Court recognizing and explaining the

⁴⁶² Eskridge & Frickey, *supra* note 38, at 598.

⁴⁶³ Mendelson, *supra* note 4, at 110–23 (describing abandonment of the canon that remedial statutes shall be liberally construed, the development of new canons like "no elephants in mouseholes," and the modification of other canons like the rule of lenity).

⁴⁶⁴ See *infra* section III.B, pp. 1640–44.

⁴⁶⁵ See ESKRIDGE, *supra* note 1, at 21 (calling canons "America's common law of statutory interpretation"). For earlier treatments of interpretive methodology as common law, see Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 755 (2013); and Gluck, *supra* note 4, at 1912–17.

⁴⁶⁶ ESKRIDGE, *supra* note 1, at 21.

⁴⁶⁷ *Id.*

⁴⁶⁸ Eskridge & Frickey, *supra* note 38, at 646; see also *id.* at 630–31 (describing those arguments).

⁴⁶⁹ *Id.* at 646.

⁴⁷⁰ See *infra* section III.C.2, pp. 1646–49.

changes it makes in canons of statutory interpretation. But because the Justices tend to view themselves as textualists and purposivists rather than as dynamic interpreters, it is worth examining how those theories of interpretation have dealt with changing canons and whether their proposed responses are realistic.

B. Theories of Interpretation and Retroactivity

Most theories of statutory interpretation have problems with applying changed canons retroactively to legislation passed before the change. The problems are most acute for textualists. With respect to substantive canons like the presumption against extraterritoriality, textualists face the initial question of where courts get the authority to create such canons in the first place.⁴⁷¹ Writing in an academic capacity, Justice Scalia once observed: “[W]hether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say? I doubt it.”⁴⁷² Changing a canon raises the same questions of judicial authority.

Applying a changed canon retroactively to previously enacted statutes poses an additional problem. For a textualist, the best justification for substantive canons is that “background conventions, if sufficiently firmly established, may be considered part of the interpretive environment in which Congress acts.”⁴⁷³ Writing in his judicial capacity, Justice Scalia has said: “What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.”⁴⁷⁴ Changing canons undercut this justification, because “even the most competent legislature can only accommodate an interpretive regime that is transparent and entrenched at the time the legislature acts.”⁴⁷⁵ As Manning has suggested, the only real solution to this problem for a textualist is “to identify and apply the conventions in effect at the time of a statute’s enactment.”⁴⁷⁶ Retroactively changing the interpretive regime is defensible,

⁴⁷¹ See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010) (noting that substantive canons pose “a significant problem of authority . . . for textualists, who understand courts to be the faithful agents of Congress”).

⁴⁷² 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, 28–29 (Amy Gutmann ed., 1997).

⁴⁷³ John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2467 (2003).

⁴⁷⁴ *Finley v. United States*, 490 U.S. 545, 556 (1989).

⁴⁷⁵ Frickey, *supra* note 4, at 1982; see also *Dellmuth v. Muth*, 491 U.S. 223, 239 (1989) (Brennan, J., dissenting) (“[I]t makes no sense whatsoever to test congressional intent using a set of interpretive rules that Congress could not conceivably have foreseen at the time it acted . . .”).

⁴⁷⁶ Manning, *supra* note 473, at 2474 n.318.

Manning writes, only if it “rest[s] on some determination that the prior convention contradicts structural constitutional norms.”⁴⁷⁷

Changing canons are also problematic for purposivists who try to interpret the words of a statute to carry out its purposes. Attributing a purpose to a statute first involves reading its words,⁴⁷⁸ and textual canons (like *ejusdem generis*) “are useful as reassurances about the meaning which particular configurations of words *may* have in an appropriate context.”⁴⁷⁹ Substantive canons also have a role to play when a court must infer the purpose of a statute. Professors Henry Hart and Albert Sacks suggest that “a court should try to put itself in imagination in the position of the legislature which enacted the measure.”⁴⁸⁰ This involves looking at the “mischief” the legislation was meant to address,⁴⁸¹ examining the “legislative history,”⁴⁸² and — as a “last resort” — relying on “an appropriate presumption drawn from some general policy of the law.”⁴⁸³ If inferring purpose requires a court to put itself “in the position of the legislature which enacted the measure,”⁴⁸⁴ however, it can only be the interpretive canons that existed at the time of enactment, both textual and substantive, that are relevant. Thus, for purposivists — as for textualists — interpretation is a backward-looking exercise.

Dynamic statutory interpretation is the theory most open both to creating rules of interpretation and to changing them. Eskridge and Frickey have endorsed the authority of judges to create new interpretive rules, noting that “by rendering statutory interpretation more predictable, regular, and coherent, interpretive regimes can contribute to the rule of law.”⁴⁸⁵ Once created, canons naturally evolve as judges apply them in different cases.⁴⁸⁶ For dynamic interpreters, the question “is not whether [a] canon is forbidden because it was not formally established in the time of John Marshall,” but instead “whether it is a useful guideline for resolving an interpretive problem.”⁴⁸⁷

⁴⁷⁷ *Id.* at 2475 n.318.

⁴⁷⁸ See HART & SACKS, *supra* note 447, at 1375 (“The words of a statute, taken in their context, serve both as guides in the attribution of general purpose and as factors limiting the particular meanings that can properly be attributed.”).

⁴⁷⁹ *Id.* at 1376.

⁴⁸⁰ *Id.* at 1378.

⁴⁸¹ *Id.*

⁴⁸² *Id.* at 1379.

⁴⁸³ *Id.* at 1380. Hart and Sacks also discuss the possibility of “policies of clear statement [that] may on occasion operate to defeat the actual, consciously held intention of particular legislators, or of the members of the legislature generally.” *Id.* at 1376. But they seem to limit these to policies that are “constitutionally imposed.” *Id.*

⁴⁸⁴ *Id.* at 1378.

⁴⁸⁵ Eskridge & Frickey, *supra* note 1, at 66.

⁴⁸⁶ ESKRIDGE, *supra* note 1, at 21.

⁴⁸⁷ Frickey, *supra* note 4, at 1991.

But even for dynamic interpreters, canons of interpretation can sometimes change too abruptly. The central problem is what Frickey has called the “transition costs” of shifting from one interpretive regime to another.⁴⁸⁸ To the extent that Congress has relied on an interpretive rule — like the rule that courts will consider legislative history — changing the rule “entrenches one interpretive regime at the cost of vitiating earlier reliance on its predecessor.”⁴⁸⁹ In his 1994 book *Dynamic Statutory Interpretation*, Eskridge was particularly critical of *Aramco*’s version of the presumption against extraterritoriality on these grounds.⁴⁹⁰ He explained that Congress “in 1964 would have thought that the *Foley Brothers* presumption was not good law *or* that the presumption would not apply to an American plaintiff suing an American defendant *or* that the broad jurisdictional grant . . . would have been sufficient to rebut any such presumption.”⁴⁹¹ In Eskridge’s view the clear statement rule adopted in *Aramco* not only defeated Congress’s expectations with respect to Title VII but also imposed additional institutional costs by undermining confidence in the Supreme Court as a trustworthy partner in interpretation.⁴⁹² Changing the rules abruptly “will undermine any advantage to be obtained from clarifying the canons, for Congress may be chary of trusting the Court to be consistent over time, much as the dupe burned in a game of bait and switch may be chary of playing again.”⁴⁹³ Eskridge suggested that both problems could be solved “by the Court’s announcing its new ‘clear interpretive rules’ prospectively when they represent a break with past practice.”⁴⁹⁴

From a range of theoretical perspectives, then, it seems that courts should generally apply the rules of statutory interpretation that were in effect at the time of enactment. For textualists, courts must do this to understand the “interpretive environment” in which Congress acted.⁴⁹⁵ For purposivists, courts must do this to put themselves “in the position of the legislature which enacted the measure.”⁴⁹⁶ And for dynamic interpreters courts should sometimes do this to mitigate the transition

⁴⁸⁸ *Id.* at 1982.

⁴⁸⁹ *Id.* at 1983. The less reliance there has been, the lower the transition costs will be. *See infra* p. 1649.

⁴⁹⁰ *See* ESKRIDGE, *supra* note 37, at 280–83 (discussing *Aramco*).

⁴⁹¹ *Id.* at 281.

⁴⁹² *Id.* at 283–84.

⁴⁹³ *Id.* at 284.

⁴⁹⁴ *Id.* at 285. These arguments are obviously weaker to the extent that Congress is unaware of a particular canon. *See* 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, 1016 (2013) (finding that Congress is aware of some canons of interpretation and unaware of others).

⁴⁹⁵ Manning, *supra* note 473, at 2467.

⁴⁹⁶ HART & SACKS, *supra* note 447, at 1378.

costs of interpretive regime change and to serve as trustworthy partners in interpretation.⁴⁹⁷

Applying changed canons only prospectively may be appealing in theory, but it seems unworkable in practice because it is inconsistent with the judicial role.⁴⁹⁸ After some experimentation with prospective-only decisionmaking, the Supreme Court has held that new rules must be applied retroactively to all cases on direct appeal, in both the civil and criminal context.⁴⁹⁹ As Justice Scalia observed, “prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be.”⁵⁰⁰

Although courts undoubtedly make law, they do so in the context of deciding the cases before them.⁵⁰¹ A court that announced a rule for prospective-only application would not only be failing to apply the law to the case that was before it, but would also be making law for cases that were not before it. Both aspects of prospective-only application are inconsistent with the role of a judge as someone who makes law only in the context of deciding cases.⁵⁰² This is no less true for rules of interpretation than for rules of substantive law.⁵⁰³

There are also practical reasons why applying changed canons only prospectively would be unworkable. As Professor Brian Slocum and others have pointed out, parties would have little incentive to argue that canons should be changed, depriving courts not just of briefing on the question but of the opportunity to decide the question, since courts ordinarily do not address questions that are not raised by the parties.⁵⁰⁴

⁴⁹⁷ Professors William Baude and Stephen Sachs’s approach does not fit neatly into any of the theories discussed above, but they also conclude that courts should generally apply “the version of the rule . . . that governed at the time the text was adopted and made its impact on the law.” Baude & Sachs, *supra* note 2, at 1133. They make an exception for what they call “application rules,” which tell interpreters “what to do at the point of application,” like the rule that courts should generally defer to the State Department’s interpretation of a treaty. *Id.* (emphasis omitted).

⁴⁹⁸ See generally Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL’Y 811, 838–45 (2003) (discussing the adjudicative function); Slocum, *supra* note 4, at 644 (same).

⁴⁹⁹ See *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 97 (1993) (“When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.”); *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987) (noting that “failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication”); see also Shannon, *supra* note 498, at 816–33 (discussing the Supreme Court’s cases on retroactivity).

⁵⁰⁰ *Am. Trucking Ass’ns, Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment).

⁵⁰¹ See *Griffith*, 479 U.S. at 322 (“[I]t is a settled principle that this Court adjudicates only ‘cases’ and ‘controversies.’” (quoting U.S. CONST. art. III, § 2)).

⁵⁰² See Shannon, *supra* note 498, at 839–42.

⁵⁰³ See Slocum, *supra* note 4, at 644 (“Applying new rules only prospectively would require courts to announce new rules that would not be applied to the case before the court.”).

⁵⁰⁴ *Id.*

It is perhaps for these reasons that the Supreme Court routinely applies changed canons retroactively despite the Justices' commitment to theories of interpretation — textualism and purposivism — that seem to require application of the canons in effect at the time of enactment. Part II recounted how the Court has handled the tension between its interpretive commitments and the necessity for change in the context of the presumption against extraterritoriality. Sometimes, it has simply pretended that nothing has changed, proclaiming the aim of “preserving a stable background against which Congress can legislate with predictable effects” even as it changes a canon.⁵⁰⁵ Sometimes it has acknowledged the change but without protecting Congress's reliance on the prior interpretive rule.⁵⁰⁶ Neither response is satisfactory. If methodological dynamism is inevitable, the Supreme Court needs to develop ways of living with it.

C. *Living with Methodological Dynamism*

Methodological dynamism acknowledges that courts have authority to develop canons of statutory interpretation and to apply changed canons retroactively to existing legislation. But with this authority come responsibilities that are inherent in the notion of judges as “partners in governance.”⁵⁰⁷ First, when the Supreme Court changes a canon of interpretation, the Court should justify the new canon in normative terms, explaining why it is an improvement on the old. Second, the Court should explain the need for change. Although the principle of stare decisis generally does not apply to rules of interpretation, the factors that courts consider in deciding whether to overrule precedents are also relevant in deciding whether an interpretive canon requires change. These factors include workability, reliance, jurisprudential consistency, and factual accuracy.⁵⁰⁸ By providing normative justification and explaining the need for change, the Court can help bring methodological dynamism in through the front door, subjecting the development of canons to critical evaluation and thereby helping to legitimize the process of development.

Finally, the Supreme Court should seek to mitigate the transition costs of applying changed canons retroactively to existing statutes. Measures in mitigation include standing by statutory precedents decided under the prior interpretive regime, giving effect to Congress's expectations when it borrows language from a statute that has previously been

⁵⁰⁵ *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 261 (2010).

⁵⁰⁶ See *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2110 (2016) (noting that the Court had “honed [its] extraterritoriality jurisprudence” but refusing to give language borrowed from another statute the same geographic scope as the source).

⁵⁰⁷ ESKRIDGE, *supra* note 1, at 11.

⁵⁰⁸ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992); see also RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 108–18 (2017) (discussing these factors).

interpreted, and considering the prior interpretive regime as part of the context when the Court applies the new canon. These suggestions recognize that developing interpretive regimes comes at a cost. The cost may be worth paying, but ought to be mitigated if this can be done without too great a sacrifice.

I. Justifying the Changed Canon. — When the Supreme Court changes a canon of statutory interpretation, it ought to justify the new canon in normative terms. The point may be obvious, but if the new canon is not an improvement, then the change is not worth making.

The Supreme Court has offered two general justifications for the presumption against extraterritoriality — first, the proposition that “it serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries”;⁵⁰⁹ and second, the “commonsense notion that Congress generally legislates with domestic concerns in mind.”⁵¹⁰ But the Court has not justified the changes it has made to the presumption since 2010. *Morrison* denied that anything had changed.⁵¹¹ *RJR Nabisco* acknowledged that the Court had “honed” the presumption but did not try to justify the changes.⁵¹²

Section II.E argued that the new presumption against extraterritoriality is a decided improvement over prior versions. The clarification that the presumption is not a clear statement rule gives courts flexibility to find a clear indication of geographic scope not just in the words of the statute but in its context, history, and structure.⁵¹³ The “focus” approach, which acknowledges that Congress may be concerned with something other than conduct, gives courts flexibility to fashion tests of geographic scope that fit the statute’s purpose.⁵¹⁴ The fact that the new presumption combines both textualism and purposivism may account for its popularity on a Court dominated by these two approaches.⁵¹⁵ The formal structure of the two-step framework is also attuned to the limitations of courts in calibrating the geographic scope of statutes as well as to the limitation of the Supreme Court in supervising lower federal courts.⁵¹⁶ Because the new presumption against extraterritoriality is normatively superior to the *Aramco* version, there is no reason the

⁵⁰⁹ *RJR Nabisco*, 136 S. Ct. at 2100; see also *Aramco*, 499 U.S. 244, 248 (1991) (noting that the presumption “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord”); *supra* p. 1598.

⁵¹⁰ *RJR Nabisco*, 136 S. Ct. at 2100 (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)); see also *Aramco*, 499 U.S. at 248 (presuming that Congress “is primarily concerned with domestic conditions” (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949))); *supra* p. 1598.

⁵¹¹ See *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 261 (2010).

⁵¹² See *RJR Nabisco*, 136 S. Ct. at 2110.

⁵¹³ See *supra* notes 391–97 and accompanying text.

⁵¹⁴ See *supra* notes 398–404 and accompanying text.

⁵¹⁵ See *supra* notes 442–54 and accompanying text.

⁵¹⁶ See *supra* notes 422–40 and accompanying text.

Supreme Court should have to sneak these changes in through the back door.

2. *Explaining the Need for Change.* — In addition to providing normative justification for the changed canon itself, it is appropriate for the Supreme Court to explain why change was needed. The fact that the changed canon is normatively superior may not be enough. To the extent that canons of interpretation act as background rules that allow Congress, courts, and parties to predict how statutes will be interpreted, “[i]t is not so important to choose the best convention as it is to choose one convention and stick to it.”⁵¹⁷ Of course, the burden of explaining the need for change will be less if the canon is one that does not engender much reliance.⁵¹⁸ But the Supreme Court can take account of differences in reliance as part of its analysis of the need for change.⁵¹⁹

As noted above, decisions about interpretive method generally do not carry stare decisis effect.⁵²⁰ But because canons aim in part to bring stability and predictability to statutory interpretation,⁵²¹ it seems appropriate in deciding whether to change a canon for the Court to consider the same factors that it would in deciding whether to abandon a precedent. To the extent that the new presumption against extraterritoriality — like *Chevron*’s regime of deference to administrative agencies — actually does operate as a precedent in practice,⁵²² the burden on the Court to justify the need for change should be correspondingly greater.⁵²³

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁵²⁴ the Court identified four factors as relevant to whether a prior constitutional decision should be overruled: (1) “whether the rule has proven to be intolerable simply in defying practical workability”; (2) “whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation”; (3) “whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine”; and (4) “whether facts have so changed, or come to be seen so

⁵¹⁷ ESKRIDGE, *supra* note 37, at 277; *cf.* *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right.”).

⁵¹⁸ See generally Gluck & Bressman, *supra* note 494 (showing that Congress relies on some canons of interpretation and not on others).

⁵¹⁹ See *infra* notes 530–536 and accompanying text.

⁵²⁰ See *supra* note 431 and accompanying text.

⁵²¹ See *supra* note 3 and accompanying text.

⁵²² See *supra* notes 431–440 and accompanying text.

⁵²³ *But cf.* KOZEL, *supra* note 508, at 153–57 (arguing against stare decisis effect for interpretive methodologies, including *Chevron*).

⁵²⁴ 505 U.S. 833 (1992).

differently, as to have robbed the old rule of significant application or justification.”⁵²⁵

In the case of the presumption against extraterritoriality, it is lack of workability that justified abandoning *Aramco*’s version in favor of the new presumption. At first glance, the *Aramco* version seemed easy to apply, because it required a clear statement of extraterritoriality and turned exclusively on the location of the conduct. The problem was that it led to unacceptable results when statutes were focused on something other than conduct, such as preventing injury in the United States in the case of antitrust laws,⁵²⁶ or protecting domestic transactions in the case of securities laws.⁵²⁷ This led the Supreme Court to ignore the *Aramco* presumption to avoid bad results,⁵²⁸ just as the Court had often ignored the *American Banana* version of the presumption during the first half of the twentieth century.⁵²⁹ The *Aramco* presumption was unworkable because it could not be applied consistently — at least not without incurring unacceptable costs.

A second factor to consider is reliance, both by private parties and by Congress. The Supreme Court has suggested that reliance by private parties weighs most heavily in favor of following precedent “in the commercial context, where advance planning of great precision is most obviously a necessity.”⁵³⁰ The geographic scope of federal statutes, such as antitrust and securities laws, often arises in a commercial context. Certainly, private parties rely on decisions construing the geographic scope of specific statutes in planning their affairs. But those reliance interests are already protected by the strong rule of *stare decisis* that applies to statutory precedents.⁵³¹ Private parties are less likely to rely

⁵²⁵ *Id.* at 854–55. More recent cases have also emphasized the quality of the precedent’s reasoning. *See, e.g., Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478–79 (2018) (“Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of [the past decision’s] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.”).

⁵²⁶ *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) (noting that antitrust laws “reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused”).

⁵²⁷ *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010) (“[W]e think that the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States.”).

⁵²⁸ *See supra* notes 147–51, 164–72 and accompanying text.

⁵²⁹ *See supra* notes 68–74 and accompanying text.

⁵³⁰ *Casey*, 505 U.S. at 855–56 (citation omitted); *see also Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . .”).

⁵³¹ *See Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015) (“[*S*]tare decisis carries enhanced force when a decision . . . interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.”).

on particular versions of the presumption against extraterritoriality as a canon of interpretation that might be applied in the future to federal statutes whose geographic scope is unclear. In the case of the *Aramco* presumption, the Supreme Court's inconsistency in applying it further undermined the reliance interests of private parties.⁵³²

The Supreme Court has treated legislative reliance inconsistently when it comes to *stare decisis*.⁵³³ In considering changes to interpretive canons, the weight given to legislative reliance ought to vary depending on whether Congress is aware of the canon or drafts legislation with similar principles in mind. Professors Abbe Gluck and Lisa Bressman have shown that some canons of interpretation reflect how Congress drafts legislation, but that Congress is either unaware of other canons or affirmatively rejects them.⁵³⁴ Gluck and Bressman did not ask their respondents about the presumption against extraterritoriality. But they did find that Congress was generally unaware of clear statement rules,⁵³⁵ which suggests that legislative reliance on the *Aramco* version of the presumption against extraterritoriality may have been weak. Finally, there are other ways to account for legislative reliance in the context of the presumption against extraterritoriality, for example by giving effect to congressional expectations about geographic scope when one statute borrows language from another or by treating a prior version of the presumption as part of the interpretive context.⁵³⁶

In the context of *stare decisis*, the Supreme Court also considers changes in related principles of law and changes in facts. Both seek to determine whether a precedent has become an "anachronism."⁵³⁷ Certainly, there have been points in the history of the presumption against extraterritoriality when it would have been reasonable to conclude that changes in law or facts justified its abandonment. The Court could have abandoned the presumption in 1909 because changes in the customary

⁵³² Cf. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2484 (2018) (citing fact that parties had been "on notice for years regarding this Court's misgivings about" a precedent as weakening reliance).

⁵³³ Compare *id.* at 2485 n.27 (stating that legislative reliance should not be treated as compelling because otherwise, "legislative acts could prevent us from overruling our own precedents" (quoting *Citizens United v. FEC*, 558 U.S. 310, 365 (2010))), with *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) ("*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response."). See also KOZEL, *supra* note 508, at 116–17 (discussing legislative reliance).

⁵³⁴ See Gluck & Bressman, *supra* note 494, at 1016.

⁵³⁵ *Id.* at 945–46.

⁵³⁶ See *infra* notes 555–68 and accompanying text.

⁵³⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992); see also *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015) (asking whether a decision had become a "doctrinal dinosaur").

international law of jurisdiction had undermined its validity.⁵³⁸ The Court could have refused to resurrect the presumption in 1991 because changing theories in the conflict of laws and new approaches to extraterritoriality in the federal courts had rendered the presumption an anachronism.⁵³⁹ By contrast, it would have been difficult to conclude in 2010 that anything had changed, legally or factually, since *Aramco* that required modification of the presumption.

The need to change the presumption in 2010 arose instead from the *Aramco* presumption's lack of workability, as demonstrated by its inconsistent application between 1991 and 2010. The reliance interests of private parties and Congress also seem to have been weak — and, in any event, could be protected by other means.⁵⁴⁰ It is therefore possible not only to justify the new presumption itself in normative terms but also to explain the need for the changes that the Court made. Of course, one might disagree that change was necessary or that the new presumption against extraterritoriality is an improvement. But the possibility of disagreement is all the more reason for the Supreme Court to be transparent about the process of change in order to facilitate debate. Such transparency would be far better than pretending that no change has occurred⁵⁴¹ or acknowledging changes without giving reasons.⁵⁴²

3. *Mitigating Transition Costs.* — Even when the Supreme Court can justify a changed canon in normative terms and explain the need for change, there may be “transition costs.”⁵⁴³ These costs generally track the extent of reliance on the prior regime.⁵⁴⁴ Thus, transition costs may be higher for changes in the treatment of legislative history on which Congress relies heavily⁵⁴⁵ than for changes in the presumption against extraterritoriality.

Transition costs will also tend to be higher when the change from the prior regime is more abrupt. Recall Eskridge's criticism of *Aramco* as “a game of bait and switch.”⁵⁴⁶ By changing the presumption against extraterritoriality abruptly, the Court not only defeated Congress's expectations with respect to Title VII but also showed itself to be an

⁵³⁸ See *supra* notes 54–58 and accompanying text.

⁵³⁹ See Kramer, *supra* note 123, at 202 (criticizing *Aramco* for adopting a “strict territorial definition of jurisdiction . . . that has been abandoned in every area in which it was employed”).

⁵⁴⁰ See *infra* section III.C.3, pp. 1649–53.

⁵⁴¹ See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 261 (2010) (asserting that the presumption “preserv[es] a stable background against which Congress can legislate with predictable effects”).

⁵⁴² See *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2110 (2016) (noting that the Court had “honed [its] extraterritoriality jurisprudence in *Morrison*”).

⁵⁴³ Frickey, *supra* note 4, at 1982.

⁵⁴⁴ See *supra* notes 488–89 and accompanying text.

⁵⁴⁵ See Frickey, *supra* note 4, at 1982–83 (discussing example of legislative history); see also Gluck & Bressman, *supra* note 494, at 965 (“[L]egislative history was emphatically viewed by almost all of our respondents . . . as the *most important* drafting and interpretive tool apart from text.”).

⁵⁴⁶ ESKRIDGE, *supra* note 37, at 284; see *supra* notes 490–94 and accompanying text.

untrustworthy partner in interpretation.⁵⁴⁷ The costs of transitioning from the *Aramco* presumption to the new, post-2010 presumption should be lower because the changes are more incremental. Indeed, the new presumption seems to occupy a middle ground between *Aramco*'s conduct-focused, clear statement rule and the period of the presumption's disuse that preceded it. Like the *Aramco* presumption, the new presumption requires a clear indication of extraterritoriality, but it is more flexible about how that requirement may be satisfied.⁵⁴⁸ Like the *Aramco* presumption, the new presumption considers the location of the conduct when conduct is the focus of the statute, but it is willing to consider the possibility that something other than conduct may have been the focus of congressional concern.⁵⁴⁹ Thus, the transition costs of applying the new presumption retroactively to statutes enacted both before and after *Aramco* are likely to be lower than the costs of applying the *Aramco* presumption to previously enacted statutes.

To the extent that applying a changed canon retroactively does create transition costs, the Supreme Court has several ways to mitigate those costs. First, the Court should stand by prior interpretations of specific statutes — including prior interpretations of geographic scope — despite their inconsistency with the changed canon. As noted above, private parties are more likely to have relied on interpretations of particular statutes than particular versions of canons of interpretation.⁵⁵⁰ *Stare decisis* also has “special force in the area of statutory interpretation” because Congress can amend the statute.⁵⁵¹ The Supreme Court has generally refused to overturn statutory precedents in light of new rules of interpretation.⁵⁵² Dissenting in *Hartford*, Justice Scalia declined to apply the *Aramco* presumption to the Sherman Act because the question was “governed by precedent.”⁵⁵³ Although Justice Scalia was wrong about the existence of precedent in that instance,⁵⁵⁴ he was right about the principle that changes in the presumption against extraterritoriality do not justify overturning past interpretations.

⁵⁴⁷ See ESKRIDGE, *supra* note 37, at 284 (noting that “Congress may be chary of trusting the Court to be consistent over time, much as the dupe burned in a game of bait and switch may be chary of playing again”).

⁵⁴⁸ See *supra* notes 391–97 and accompanying text.

⁵⁴⁹ See *supra* notes 398–404 and accompanying text.

⁵⁵⁰ See *supra* notes 530–32 and accompanying text.

⁵⁵¹ *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

⁵⁵² See, e.g., *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137, 139 (2008) (noting new presumption with respect to tolling of statutes of limitations but refusing to overturn prior interpretation); see also *Kisor v. Wilkie*, 139 S. Ct. 2400, 2447 (2019) (Gorsuch, J., concurring in the judgment) (noting that “decisions construing particular statutes continue to command respect even when the interpretive methods that led to those constructions fall out of favor”).

⁵⁵³ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting).

⁵⁵⁴ See *supra* note 154 and accompanying text.

Second, when Congress has borrowed language from another statute that has received authoritative construction under a prior interpretive regime, the Supreme Court should give that language the same construction in the new statute despite changes in the interpretive regime.⁵⁵⁵ The Court typically justifies this approach as honoring Congress's expectations.⁵⁵⁶ An example involving geographic scope is RICO's private right of action, which was modeled on section 4 of the Clayton Act.⁵⁵⁷ In 1962, before RICO's enactment, the Supreme Court had construed the Clayton Act to permit recovery for injuries to business or property outside the United States.⁵⁵⁸ In *RJR Nabisco*, Justice Ginsburg would have honored Congress's expectations with respect to the borrowed language by giving RICO's private right of action the same geographic scope as the Clayton Act's.⁵⁵⁹ But the majority chose instead to give priority to the Court's "current extraterritoriality doctrine."⁵⁶⁰ Under the approach outlined here, that was a mistake.

Third, the Supreme Court might consider the prior interpretive regime as part of the context in applying a changed canon if the changed canon permits it to do so. A good example of this is the Court's application of its new test for implied causes of action in *Cannon v. University of Chicago*.⁵⁶¹ *Cannon* applied the stricter test that the Court had adopted in 1975⁵⁶² to Title IX of the 1964 Civil Rights Act, which

⁵⁵⁵ Both Eskridge on the one hand and Justice Scalia and Professor Bryan Garner on the other recognize this principle of interpretation, though under different names. See ESKRIDGE, *supra* note 1, at 182–85 (discussing the "borrowed act canon"); SCALIA & GARNER, *supra* note 1, at 322–26 (discussing the "prior-construction canon").

⁵⁵⁶ See *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."); *Shapiro v. United States*, 335 U.S. 1, 16 (1948) ("In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.'" (quoting *Hecht v. Malley*, 265 U.S. 144, 153 (1924))).

⁵⁵⁷ Compare 18 U.S.C. § 1964(c) (2018) ("Any person injured in his business or property by reason of a violation of [RICO] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . ."), with 15 U.S.C. § 15(a) (2018) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.").

⁵⁵⁸ See *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707–08 (1962) (allowing a Clayton Act section 4 suit for injuries in Canada to proceed).

⁵⁵⁹ *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2113–14 (2016) (Ginsburg, J., concurring in part, dissenting in part, and dissenting from the judgment) (discussing prior interpretation of the Clayton Act). Under the new presumption against extraterritoriality, courts may consider the "historical background" of a provision in determining its geographic scope. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 119 (2013).

⁵⁶⁰ *RJR Nabisco*, 136 S. Ct. at 2111.

⁵⁶¹ 441 U.S. 677 (1979).

⁵⁶² See *Cort v. Ash*, 422 U.S. 66, 78 (1975) (articulating a four-part test).

Congress added in 1972. But the new test called for the Court to consider whether there is “any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one,”⁵⁶³ and *Cannon* expressly looked to the previous interpretive regime to gauge Congress’s expectations.⁵⁶⁴ It is important to distinguish *Cannon*’s approach from one that would apply changed canons only prospectively. *Cannon* did apply the Court’s new test for implied causes of action retroactively, but in doing so it evaluated Congress’s expectations in light of the prior interpretive regime because the new test permitted it to do so.

The same approach would be possible under the new presumption against extraterritoriality. Recall that the new presumption requires a court to consider a provision’s “context” to determine whether the presumption against extraterritoriality has been rebutted at *RJR Nabisco* step one,⁵⁶⁵ and to determine the provision’s focus at *RJR Nabisco* step two.⁵⁶⁶ A court might look to the version of the presumption against extraterritoriality in effect at the time of a statute’s enactment as part of the “context” at each step of the analysis. But although such an approach is possible, it is not necessarily advisable. Whether the prior interpretive regime is a good guide to Congress’s expectations depends on whether Congress was aware of that regime or drafted the legislation with similar principles in mind. It is not clear that this is true with respect to the presumption against extraterritoriality.⁵⁶⁷ The mere existence of a particular canon of interpretation at the time of a statute’s enactment is certainly a weaker indication of Congress’s expectations than Congress’s borrowing language from another statute to which that canon had been applied.⁵⁶⁸

In summary, the transition costs of applying the new presumption against extraterritoriality retroactively to existing statutes are likely to be low, both because congressional reliance on earlier versions of the presumption was not heavy and because the new presumption is not too abrupt a departure from any of the versions that came before. To the extent that transition costs exist, the Supreme Court may mitigate them

⁵⁶³ *Id.*

⁵⁶⁴ See *Cannon*, 441 U.S. at 698–99 (“We, of course, adhere to the strict approach followed in our recent cases, but our evaluation of congressional action in 1972 must take into account its contemporary legal context.”); see also *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381 (1982) (“In view of the absence of any dispute about the proposition prior to the decision of *Cort v. Ash* in 1975, it is abundantly clear that an implied cause of action under the [Commodity Exchange Act] was a part of the ‘contemporary legal context’ in which Congress legislated in 1974.” (quoting *Cannon*, 441 U.S. at 699)). But see *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (refusing to “revert . . . to the understanding of private causes of action that held sway 40 years ago when Title VI was enacted”).

⁵⁶⁵ *RJR Nabisco*, 136 S. Ct. at 2102; see also *supra* notes 233–38 and accompanying text.

⁵⁶⁶ *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2137 (2018) (“When determining the focus of a statute, we do not analyze the provision at issue in a vacuum.”); see also *supra* notes 264–65 and accompanying text.

⁵⁶⁷ See *supra* note 535 and accompanying text.

⁵⁶⁸ See *supra* notes 555–60 and accompanying text.

by adhering to previous interpretations of geographic scope and by honoring Congress's expectations when it borrows language from other statutes that have been authoritatively construed. Applying the new presumption retroactively is no less an exercise of dynamic statutory interpretation because the transition costs are low and can be mitigated. But it is an exercise of dynamic interpretation that one can live with.

CONCLUSION

In *Morrison* and *RJR Nabisco*, the Supreme Court created a new presumption against extraterritoriality to serve as the principal tool for courts to determine the geographic scope of federal statutes, a question that arises with great frequency in our interdependent world. The new presumption is superior to prior versions in several ways. It permits greater flexibility in deciding whether the presumption has been rebutted and whether application of a provision should be considered domestic, flexibility that will allow courts to come closer to effectuating congressional intent. At the same time, the formalism of the new presumption's two-step framework channels the analysis into a particular set of questions and makes departures from that framework easier to detect. The result is a presumption that can be applied across the board to decide questions of geographic scope and likely will be.

The new presumption against extraterritoriality constitutes an instance of dynamic statutory interpretation on a Supreme Court that is rhetorically committed to some combination of textualism and purposivism. The methodological dynamism represented by changing canons of interpretation seems inevitable in light of the leading role that courts play in statutory interpretation and the difficulty of justifying a purely prospective application of changed canons. The proper response to this inevitable dynamism is first to acknowledge it, and then to assume the responsibilities that come with it, by justifying changed canons in normative terms, by explaining the need for change, and by mitigating transition costs.

The new presumption against extraterritoriality may not be a perfect tool. It may be too blunt in some respects and too manipulable in others. But critics of the presumption must be able to say what they would use instead to answer the questions of geographic scope that repeatedly arise under federal statutes. Ideally, critics would also be able to say how they would convince the Supreme Court to abandon the presumption, which currently enjoys the Court's unanimous support, in favor of their preferred solution.

This Article has chosen to work with the existing doctrine rather than starting from scratch. It has self-consciously tried to articulate the best version of the presumption against extraterritoriality that is consistent with the Supreme Court's post-2010 decisions. When applied impartially, this version of the presumption has the potential to generate

tests for the geographic scope of federal statutory provisions that are both consistent with congressional intent and capable of consistent application.

Whether this potential will ultimately be realized depends on the courts and, in particular, on the U.S. Supreme Court. The Court may sometimes misapply the new presumption, as I believe it did to some extent both in *Kiobel* and in *RJR Nabisco*.⁵⁶⁹ The Court may twist the presumption in undesirable ways, for example by converting it back into a clear statement rule⁵⁷⁰ or by imposing a requirement of conduct in the United States even when the focus of congressional concern is something other than conduct.⁵⁷¹ Such decisions would rightly deserve criticism.

In the end, the new presumption against extraterritoriality is simply a tool of statutory interpretation. Tools may be misused, bent, and broken. In such instances, one should aim the criticism not at the tools but at those who wield them.

⁵⁶⁹ See *supra* notes 216–25 and accompanying text (criticizing *Kiobel*); *supra* notes 252–57, 555–60 and accompanying text (criticizing *RJR Nabisco*).

⁵⁷⁰ See Kavanaugh, *supra* note 29, at 2156 (proposing to make the presumption a “plain statement rule”).

⁵⁷¹ See *supra* notes 246–51 and accompanying text (criticizing such a conduct requirement).