THE SOMETIMES "CRAVEN WATCHDOG": THE DISPARATE CRIMINAL-CIVIL APPLICATION OF THE PRESUMPTION AGAINST EXTRATERRITORIALITY

S. NATHAN WILLIAMS†

ABSTRACT

Increasingly, courts must decide whether U.S. law applies extraterritorially. Courts largely resolve questions of extraterritorial scope using tools of statutory construction. Of these tools, the presumption against extraterritoriality has been ascendant. However, this presumption is subject to two divergent lines of cases: Morrison v. National Australia Bank Ltd. *affirmed the strict operation of the presumption in civil cases, but* United States v. Bowman *continues to govern the presumption's looser role in criminal cases, thereby creating a doctrinal asymmetry. This Note furthers the argument that courts should reconcile* Morrison *and* Bowman*, by laying out three arguments for why an expansive* Bowman *exception is problematic and unsustainable. First, the two lines of cases create unjustified doctrinal incoherencies, given the interrelated contexts in which the presumption is applied and the rationales underlying the presumption. Second, an expansive exception to the presumption in criminal contexts undermines the smart allocation of authority between the branches of government. Finally, an expansive* Bowman *exception runs counter to the tradition of offering fair notice of criminal law's prohibitions. This Note asserts that these arguments counsel for the abrogation or, at least, substantial narrowing of the* Bowman *exception, to harmonize it with* Morrison*'s stricter vision of the presumption against extraterritoriality.*

Copyright © 2014 S. Nathan Williams.

† Duke University School of Law, J.D./LL.M. in International and Comparative Law expected 2014; American University, M.A. 2008; La Sierra University, B.A. 2005. I am grateful to Professor Curtis Bradley for his guidance in writing this Note, and enduringly appreciative of the hard work and insightful comments and suggestions of the editorial staff of the *Duke Law Journal*. Without question, I am also thankful for the support provided by my family and friends.

INTRODUCTION

Four men sailing to Brazil hatch a plot on the high seas to defraud their employer.[1] An international civil servant solicits a bribe in Afghanistan.[2] A father sexually abuses his daughter while traveling with her in Europe.[3] A Liberian dictator's son tortures Liberian and Sierra Leonean citizens suspected of opposing his father's rule.[4] Each of these actions is based on actual events, and each violates U.S. criminal law, although none was perpetrated within the United States' territorial boundaries. Extraterritoriality describes the capacity of U.S. law to apply abroad, and, as the previous examples illustrate, it can have, as a feature of legislation, implications for criminal liability, national sovereignty, and international relations.

Although the extension of national law outside national borders has existed for more than two hundred years,[5] the practice of law is witnessing a resurgent invocation of extraterritorial legislation of both modern and historic vintage. The Alien Tort Statute (ATS),[6] a statute originating in the eighteenth century and assigning federal courts jurisdiction to hear civil suits against aliens for violations of international law,[7] has been the subject of argument and reargument at the Supreme Court regarding its application of the ATS to a corporation's alleged support for violence in Africa.[8] Meanwhile, the Foreign Corrupt Practices Act of 1977[9] (FCPA) languished in obscurity for a quarter-century before reemerging as a premier tool for punishing bribery of foreign officials,[10] ensnaring the likes of Wal-

1. *See* United States v. Bowman, 260 U.S. 94, 95–96 (1922).

2. *See* United States v. Campbell, 798 F. Supp. 2d 293, 297 (D.D.C. 2011).

3. *See* United States v. Weingarten, 632 F.3d 60, 62 (2d Cir. 2011).

4. *See* United States v. Belfast, 611 F.3d 783, 793–94 (11th Cir. 2010).

5. *Cf.* Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116, 127 (1812) ("There is no instance of [a sovereign's laws'] actual extra-territorial operation, except where by fiction of law it is supposed to be territorial, or at most where it exclusively operates upon its own subjects.").

6. Alien Tort Statute, 28 U.S.C. § 1350 (2012).

7. The ATS was originally enacted as part of the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

8. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1663 (2013).

9. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78m, 78dd-1 to 78dd-3, 78ff (2012).

10. Mike Koehler, *The Facade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 909, 913 (2010); *see* FCPA DIGEST: CASES AND REVIEW RELEASES RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977, at v, vii (Philip Urofsky et al. eds., 2012), *available at* http://shearman.symplicity.com/files/68c/68cf1e693fcaa178acbd6d852a86b084.pdf (describing the dramatic increase in enforcement against individuals and companies in the last decade).

Mart Stores, Avon Products, and Siemens AG.[11] Extraterritorial statutes can fulfill important functions in the nation's legal regime—such as achieving foreign policy goals, or closing off loopholes created by the ease of international travel and commerce—just as they can create risks that individuals and companies will be subject to conflicting legal obligations[12] or that other states will be upset by the perceivable intrusion of U.S. legal norms within their own borders.[13]

Although there is no dispute regarding Congress's constitutional competence to legislate beyond the nation's borders,[14] there are serious consequences to such extraterritorial prescription, prompting judicial inquiry into whether Congress intended a law to have far-reaching geographical scope. Courts look to the language of the statute for manifestations of such intent.[15] Yet, when a court must construe a geoambiguous statute—that is, one lacking a clear indication of geographical scope[16]—it invokes the presumption against extraterritoriality. This judicial rule of interpretation construes the lack of express extraterritorial scope as a presumptive indication that Congress intended the statute's prescriptions to be applicable only to domestic activity.[17]

Nevertheless, the approach to applying this statutory canon is not monolithic; rather, two lines of jurisprudence govern the determination of extraterritoriality. The first line of cases—refined in 2010 by *Morrison v. National Australia Bank Ltd.*[18] and discussed in

---

11. Leslie Wayne, *Hits, and Misses, in a War on Bribery*, N.Y. TIMES, Mar. 11, 2012, at BU1.

12. *Cf.* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798 (1993) (holding that a court's refusal to apply domestic law abroad, on the basis of international comity, requires a finding of "true conflict" between national and foreign legislation). *But see id.* at 817 (Scalia, J., dissenting) (eschewing the *Hartford* majority's true-conflict approach and invoking, instead, a less stringent, multifactor analysis based on statutory construction and directed at the "reasonableness" of the legislature's prescriptive jurisdiction).

13. *See* Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 505–06 (1998) (summarizing the legislative and diplomatic reactions to the international reach of U.S. antitrust laws).

14. *See infra* Part I.

15. *See infra* Part II.

16. *See* Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 114 (2010) ("'[G]eoambiguous' laws . . . proscribe or regulate conduct but . . . remain silent about whether they apply to acts that occur outside of the United States.").

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

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

Kiobel v. Royal Dutch Petroleum Co.[19]—embodies the general rule of strictly constraining statutes to domestic application, absent clear and contrary language.[20] The second line of cases—descending from *United States v. Bowman*[21]—employs an "exception" to this general rule for certain classes of criminal offenses.[22] These two cases and their progeny stand in uneasy juxtaposition and evince conflicting principles.[23]

This Note argues in four Parts that, for reasons of doctrinal coherence, smart allocation of governmental authority, and fair notice, the lax *Bowman* exception should be substantially narrowed or eliminated.[24] In terms of the two lines of cases that supposedly form a common doctrine, *Morrison*'s bright-line rule and *Bowman*'s porous standard are conceptually and practically incoherent, especially when they collide, for example, in the context of a statute that imposes criminal and civil liability. Likewise, the asymmetry that courts currently tolerate runs counter to constitutional guidance and prudential considerations as to the allocation of governmental authority and fair notice. With that in mind, Part I discusses the legal foundation for Congress's authority to enact laws with extraterritorial effect. Part II, then, describes how courts have used the presumption against extraterritoriality to limit the scope of civil and criminal statutes, respectively, when Congress has not clearly indicated the statutes' geographic reach. In Part III, this Note explains how *Morrison* recharacterized and refined courts' use of the presumption in civil contexts, and how courts have refused to extend *Morrison*'s holding to criminal cases. Then, in Part IV.A, it examines the recognized rationales behind the presumption against extraterritoriality and, in Part IV.B, advocates on that basis that principles of doctrinal coherence, smart allocation of authority, and fair notice militate against perpetuation of the current asymmetries

19. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

20. *See Arabian Am. Oil*, 499 U.S. at 248 ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 282, 285 (1949))).

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

22. Steele v. Bulova Watch Co., 344 U.S. 280, 291 (1952).

23. *See infra* notes 124–27 and accompanying text.

24. This Note does not address whether conduct captured within the scope of geoambiguous criminal statutes is deserving of punishment. Conceptually, it is beyond the concerns of this Note. Practically, extraterritorial statutes are varied in substance, and such a topic would require more exacting treatment than this Note could give it.

created by the *Bowman* exception. Finally, Part IV.C introduces and, in turn, discounts two alternative proposals to the one advocated in this Note.

I. EXTRATERRITORIALITY: BOUNDED PRESCRIPTIVE AUTHORITY

The U.S. Constitution and international law provide both for extraterritorial authority and ostensible constraints on its boundless exercise. The U.S. Constitution directly confers on Congress the authority to regulate extraterritorial activities in particular respects,[25] and the Supreme Court's modern case law has recognized and repeatedly affirmed such extraterritorial authority.[26] The inherent limits of the constitutional enumerations, affirmative due process restrictions, and deference to international law circumscribe the expansiveness of extraterritorial authority. However, none of these constitutional and international principles vigorously constrains Congress, given the lack of constitutional clarity and the dualistic approach to international law.

The doctrine of enumerated powers structurally constrains the federal government's extraterritorial authority just as it constrains its domestic authority.[27] The enumerations that confer extraterritorial authority are the Define and Punish Clause,[28] the Foreign Commerce

25. U.S. CONST. art I, § 8, cls. 3, 10, 18.

26. *See, e.g.*, Hartford Fire Ins., Co. v. California, 509 U.S. 764, 813–14 (1993) ("Congress has broad power under Article I, § 8, cl. 3, '[t]o regulate Commerce with foreign Nations,' and this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected."); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("Congress has the authority to [extend the force of] its laws beyond the territorial boundaries of the United States."). However, the Supreme Court was initially schizophrenic in its recognition of Congress's extraterritorial authority. *Compare* Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116, 127 (1812) ("There is no instance of [a sovereign's laws'] actual extra-territorial operation, except where by fiction of law it is supposed to be territorial, or at most where it exclusively operates upon its own subjects."), *with* Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234–35 (1804) ("The authority of a nation within its own territory is absolute and exclusive. . . . [I]ts power to secure itself from injury, may certainly be exercised beyond the limits of its territory. . . . [Such exercise of power is acceptable when the means] are such as are reasonable and necessary to secure their laws from violation . . . .").

27. *See generally* CHARLES DOYLE, CONG. RESEARCH SERV., NO. 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 1–3 (2012) (situating federal authority among several discrete, enumerated powers).

28. *See* U.S. CONST. art. I, § 8, cl. 10 (granting Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations").

Clause,[29] and—supplementary to another enumeration—the Necessary and Proper Clause.[30] Neither the Define and Punish Clause nor the Foreign Commerce Clause has received substantial judicial explication. Thus, whereas the Define and Punish Clause is limited by its own terms to acts that offend "the Law of Nations"[31]—encompassing the expressly enumerated "Piracy and Felonies committed on the high Seas"[32]—the Supreme Court's elucidation of the Clause's scope has characterized "the Law of Nations" as international norms—generally accepted, specifically defined, and capable of development.[33] Therefore, the universal crimes subject to its scope may be larger than the examples of the international acts specifically condemned in its text or even those condemned by international norms at the time of the Founding.[34] The Foreign Commerce Clause has been, likewise, neglected by judicial examination.[35] However, an analogy to the Domestic Commerce Clause is irresistible. Therefore, the principal restriction on the Foreign Commerce Power would likely be the condition that the regulated activity demonstrates a substantial effect on U.S. commerce.[36]

---

29. *See id.* art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations").

30. *See id.* art. I, § 8, cl. 18 (granting Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

31. *Id.* art. I, § 8, cl. 10.

32. *Id.*; *see also* Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARVARD INT'L L.J. 121, 137 (2007) (describing piracy as the "paramount offense against the law of nations at the time of the founding").

33. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004) (bounding the scope of the ATS to "any claim based on the present-day law of nations . . . rest[ing] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized"); *see also* Colangelo, *supra* note 32, at 137–38 (describing the ATS as derivative of Congress's Define and Punish power and grounded on "an evolving body of norms").

34. *See* Colangelo, *supra* note 32, at 139–42 (asserting that slavery is one such universally recognized offense and arguing that terrorism should be another).

35. *See* United States v. Clark, 435 F.3d 1100, 1102 (9th Cir. 2006) ("It is not so much that the contours of the Foreign Commerce Clause are crystal clear, but rather that their scope has yet to be subjected to judicial scrutiny."); *id.* ("Cases involving the reach of the Foreign Commerce Clause vis-a-vis congressional authority to regulate our citizens' conduct abroad are few and far between.").

36. Colangelo, *supra* note 32, at 157. The constitutional threshold for invoking the Foreign Commerce Clause is at least as high as (and ostensibly higher than) the threshold for invoking

By comparison, the Necessary and Proper Clause may be the best understood of the three enumerations because its scope has been explored in the domestic context.[37] The Necessary and Proper Clause confers augmentative authority to cure constitutional defects in enactments coming under the auspices of other substantive constitutional powers.[38] Therefore, its relevance may arise in combination with either of the two constitutional provisions described above or others, such as those contained in the Taxing Clause, Treaty Clause, or Raising Armies Clause.[39] Irrespective of the constitutional power that it augments, the Necessary and Proper Clause requires a "means-end fit[] between the legislation and the valid governmental objective."[40]

In contrast, due process is an affirmative constraint on congressional prescriptions, but courts have not provided a clear and consistent approach to effectuating due process limitations abroad.[41] Whereas U.S. citizens are entitled to due process protections, whether at home or abroad,[42] aliens abroad have not been extended the few constitutional protections afforded to resident aliens in the United States.[43] Neither have courts of appeals coalesced around a general

---

the Domestic Commerce Clause; the former governs commerce "with foreign Nations," whereas the latter derives from commerce "among the several States." *Id.* at 147–48 (quoting U.S. CONST. art. I, § 8, cl. 3).

37. For key decisions construing the scope of the Necessary and Proper Clause, see Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2585–93 (2012); Gonzales v. Raich, 545 U.S. 1, 34–37 (2005) (Scalia, J., concurring); and McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 421–23 (1819).

38. *See NFIB*, 132 S. Ct. at 2591 ("[T]he Clause gives Congress authority to 'legislate on that vast mass of incidental powers which must be involved in the constitution' . . . ." (quoting *McCulloch*, 17 U.S. (4 Wheat) at 411)).

39. DOYLE, *supra* note 27, at 3 nn.17–18.

40. Colangelo, *supra* note 32, at 152–53.

41. *See* DOYLE, *supra* note 27, at 5 ("[M]any of the cases do little more than note that due process restrictions mark the frontier of the authority to enact and enforce American law abroad.").

42. J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 468 (2007).

43. *Compare* United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (enumerating the due process entitlements accorded to resident aliens), *with id.* at 269, 274–75 (refusing to extend the Fifth Amendment's privileges to aliens located abroad or to make Fourth Amendment search and seizure protections applicable to aliens without voluntary connections to the United States). The exception may be due process protections accorded to aliens when prosecuted in an Article III court. *See id.* at 278 (Kennedy, J., concurring) ("[When] [t]he United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution[,] . . . the dictates of the Due Process Clause of the Fifth Amendment protect the defendant.").

theory of extraterritorial due process rights,[44] with some concluding that extraterritorial application of U.S. law must "not be arbitrary or fundamentally unfair"[45] and others relying on other principles to limit prosecution of foreign actions.[46]

Finally, international law indirectly constrains extraterritoriality. International law is not dispositive of the United States' prescriptive authority.[47] Legitimacy under international law is, however, a relevant consideration when interpreting U.S. statutes. Absent contrary legislative intent, courts presume that Congress has legislated in conformity with international law.[48] Under international law, a state's regulatory powers are classified according to one of three types of jurisdiction: prescriptive, adjudicatory, and enforcement.[49] The Supreme Court has clarified that extraterritorial application of U.S. law is a function of prescriptive jurisdiction, rather than adjudicatory or enforcement jurisdiction.[50] As a matter of prescriptive jurisdiction, the international legitimacy of a state's prescriptive action is constrained, in turn, by the jurisdictional principles on which a state

44. *See* Colangelo, *supra* note 32, at 162 ("[C]ourts have created a confused and ad hoc jurisprudence in this area [of extraterritorial due process] with different Circuits espousing different requirements . . . .").

45. *E.g.*, United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990).

46. *See, e.g.*, United States v. Ali, 718 F.3d 929, 946 (D.C. Cir. 2013) (pointing to statutory construction as a source of prosecutorial constraint).

47. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 731 (2004) (holding that Congress may expressly contradict international law or do so "implicitly by treaties or statutes that occupy the field").

48. *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 . . . ."); *see also* Harford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) ("Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.").

49. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987).

50. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010) (rejecting lower courts' conclusions that extraterritorial application required a determination of subject matter (that is, adjudicatory) jurisdiction, rather than a determination of a case's merits (that is, prescriptive jurisdiction)). The Court's invocation of the presumption in *Kiobel* to decide the scope of the ATS—a "strictly jurisdictional" statute—should not confuse this point. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013). The Court never questioned Congress's *prescriptive* capacity to enlarge the scope of the ATS. *See id.* at 1665 ("Congress, even in a jurisdictional provision, can indicate that it intends federal law to apply to conduct occurring abroad.").

bases its legislation.[51] Laws regulating activity within a state's own borders or by its own nationals enjoy the strongest legitimacy,[52] whereas principles that are more tangentially related to a state's sovereign concerns yield decreasing support internationally.[53] This legitimacy is translated, via the *Charming Betsy* canon, into a presumptive limitation—albeit rebuttable—on how liberally legislation is construed.[54] In practice, a court will employ the *Charming Betsy* canon to construe a statute in a way that does not violate international law.[55]

Within this framework of constitutional and interpretive constraints, the presumption against extraterritoriality plays its own role. The presumption against extraterritoriality is a judicial canon for construing the law consistent with legislative purpose.[56] So, unlike the express constitutional constraints, the presumption does not halt a determined legislature. However, the constitutional and prudential concerns embodied within the presumption against extraterritoriality may give it greater normative weight than the *Charming Betsy* canon. The presumption establishes a default scope of domestic legislation but gives way to Congress's contrary intent.[57] In that sense, the

---

51. Zachary D. Clopton, Bowman *Lives: The Extraterritorial Application of U.S. Criminal Law After* Morrison v. National Australia Bank, 67 N.Y.U. ANN. SURV. AM. L. 137, 143–45 (2011). International law recognizes five principles: (1) the territorial principle, (2) the nationality principle, (3) the passive-personality principle, (4) the protective principle, and (5) the universal principle. *Id.* For further discussion of these jurisdictional principles, see Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 324; John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 357 (2010).

52. CONVENTION ON JURISDICTION WITH RESPECT TO CRIME (Harvard Research in Int'l Law, Draft 1935), *in* 29 AM. J. INT'L L. (SUPP.) 435, 445 (1935) (explaining that the territorial and nationality principles have universal acceptance among states and offer primary justifications for action).

53. *See id.* at 445 (noting that state acceptance of the protective, universal, and passive-personality principles is lower and generally offers only "auxiliary competence").

54. *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 . . . .").

55. *See, e.g.*, Ali-Bihani v. Obama, 619 F.3d 1, 7 (D.C. Cir. 2010) ("The only generally applicable role for international law in statutory interpretation is the modest one afforded by the *Charming Betsy* canon, which counsels courts, where fairly possible, to construe ambiguous statutes so as not to conflict with international law.").

56. *See* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) (observing that "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation" when statutory text is ambiguous).

57. YULE KIM, CONG. RESEARCH SERV., NO. 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 17–18 (2008), *available at* http://www.fas.org/

presumption against extraterritoriality is largely agnostic as to *what* Congress ultimately says and concerned only with *how* it says it. In particular, the presumption is a rule animated by geoambiguity.

II. THE PRESUMPTION AGAINST EXTRATERRITORIALITY: PRESCRIPTIVE INTENT

The geographical reach of U.S. law, then, is determined by statutory construction,[58] that is, an inquiry into the meaning of an enacted law. The presumption against extraterritoriality describes the interpretive rule that, unless otherwise expressed, statutes are presumed to apply territorially only.[59] Or as Justice Scalia has stated, "When a statute gives no clear indication of an extraterritorial application, it has none."[60] Implicit, yet axiomatic, to the operation of the presumption are two principles. First, the presumption against extraterritoriality is animated when a court is asked to apply a U.S. law outside of U.S. borders. Second, evidence that Congress clearly intended an extended reach for the law can rebut this extraterritorial bar. In practice, the presumption has received various and liberal treatment, varying by statute and context.

Three cases are salient to the presumption's modern heritage. *American Banana Co. v. United Fruit Co.*[61] initiated the extant line of jurisprudence on the presumption, whereas *Morrison* is the Supreme Court's strong reaffirmation and clarification of it.[62] In *United States v. Bowman*, however, the Court drew an analogy to *American Banana* and its civil jurisprudence, reasoning that the presumption against extraterritoriality might not have precisely the same effect in the criminal context.[63] Since then, the presumption has had parallel but distinct applications to civil and criminal statutes, notwithstanding the occasional hat tip to the other line of jurisprudence.[64]

---

sgp/crs/misc/97-589.pdf (noting that although some canons "favor particular substantive results," Congress can rebut these presumptions by being clear in its contrary intent).

58. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("Whether Congress has in fact exercised that authority in these cases is a matter of statutory construction.").

59. Through this presumption, courts constrain ambiguous legislation to the territorial principle of prescriptive jurisdiction.

60. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878 (2010).

61. Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

62. *See infra* Part III.

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

64. *See, e.g.*, United States v. Belfast, 611 F.3d 783, 811 (11th Cir. 2010) (citing *Morrison* to support the proposition that absent clear intent, a statute has no extraterritorial application).

A. Civil Application

In 1909 Justice Holmes, writing for the Court, employed the presumption against extraterritoriality in an antitrust dispute between the American Banana Company and the United Fruit Company.[65] The Court, in setting the matter outside the scope of the Sherman Act,[66] emphasized the wholly foreign events of the dispute and "the improbability of the United States attempting to make acts done in Panama or Costa Rica [unlawful]."[67] The two key elements of the inquiry for the presumption against extraterritoriality can be discerned in Holmes's words: congressional intent and the situational triggers of the presumption.

First, the congressional intent sufficient to rebut the presumption has been understood to require more than "boilerplate" language[68] or negative inference,[69] but it has not been deemed to require a "clear statement rule"[70]—as opposed to a "clear indication" of extraterritoriality.[71] Consistent with conventional judicial approaches to statutory construction, courts have recourse to statutory context to find intent, absent an express statement of geographic scope.[72] However, merely "possible" or "plausible" congressional intent

---

But see United States v. Campbell, 798 F. Supp. 2d 293, 302–03 (D.D.C. 2011) (relying on *Morrison* in the same manner, but explicitly refusing to extend *Morrison*'s civil application to the criminal context).

65. *See Am. Banana*, 213 U.S. at 353, 357 ("'All legislation is *prima facie* territorial.'" (quoting *Ex parte* Blain, (1879) 12 Ch.D. 522 (C.A.) at 528 (Eng.))).

66. Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2012)).

67. *Am. Banana*, 213 U.S. at 357. In fact, United Fruit allegedly induced Costa Rican soldiers to seize a Panamanian plantation owned by American Banana. *Id.* at 354–55.

68. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 252 (1991) ("Title VII's more limited, boilerplate 'commerce' language does not support such an expansive construction of congressional intent.").

69. *See* Smith v. United States, 507 U.S. 197, 204 (1993) (noting that the presumption is not rebutted when the statute "specifically addresses the issue of extraterritorial application in [an] exception").

70. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2883 (2010).

71. *Id.* at 2878. The distinction between a clear-statement rule and a clear-indication rule is subtle but, as Justice Marshall emphasized, it determines the tools of statutory interpretation available to a court. *See Arabian Am. Oil*, 499 U.S. at 261 (Marshall, J., dissenting) (noting that a clear-statement rule "relieves a court of the duty to give effect to all available indicia of the legislative will," as compared to clear indication, which permits access to "traditional tools" of statutory construction).

72. *See id.* at 2883 ("Assuredly context can be consulted as well.").

proves insufficient to rebut the presumption.[73] Second, courts historically employed one of three tests—the conduct test, effects test, or conduct-and-effects test—to determine whether any given set of circumstances invoked the presumption's operation, considering the presumption's inherent yet circumscribed application to *extraterritorial* cases.

The conduct test was popularly associated with Justice Holmes's opinion in *American Banana*, wherein he advocated application of the presumption whenever the relevant conduct occurred outside U.S. borders.[74] Conversely, the effects test suspended the presumption when the consequent effects were felt domestically, regardless of where the relevant conduct occurred.[75] Having established two

---

73. *See Arabian Am. Oil*, 499 U.S. at 253 ("If we were to permit possible, or even plausible, interpretations . . . , there would be little left of the presumption."); *see also Morrison*, 130 S. Ct. at 2887 (dismissing the argument that an extraterritorial remedy's consistency with customary international law is wholly beside the point of what Congress wanted). Some pre-*Morrison* courts, though, delved into whether Congress *would have* wanted a particular statute to govern a particular case's facts, that is, into the possible and plausible. *See, e.g.*, Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975) ("[In a case of predominately foreign transactions, a court] must seek to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries."); *cf. In re* Alstom, 406 F. Supp. 2d 346, 375 (S.D.N.Y. 2005) (positing that the inquiry into extraterritorial intent is a policy-based determination constrained only by reasonableness). Notwithstanding some critical admonishments of such an elastic approach, courts demonstrated significant deference to the "preeminent" jurisprudence of the Second Circuit that permitted such speculative analyses. *See Morrison*, 130 S. Ct. at 2880 (citing Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 32 (1987), *abrogated by Morrison*, 130 S. Ct. 2869) (observing the D.C. Circuit's concern that the Second Circuit's approach constituted a process of divination (citing Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 32 (1987), *abrogated by Morrison*, 130 S. Ct. 2869)).

74. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."). The Second Circuit famously applied the conduct test to the antifraud provisions of the Securities Exchange Act of 1934 (Exchange Act) to withhold statutory remedies when neither the fraudulent acts nor the securities transactions occurred domestically. Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972). The Ninth Circuit also utilized the conduct test to constrain application of federal copyright law to U.S.-based infringement, whereas the U.S. Bankruptcy Court for the Southern District of New York similarly reasoned that U.S. bankruptcy law did not permit a debtor to claw back assets that had been preferentially transferred to creditors in England. William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 106–07 (1998).

75. Kelley Morris White, Note, *Is Extraterritorial Jurisdiction Still Alive? Determining the Scope of U.S. Extraterritorial Jurisdiction in Securities Cases in the Aftermath of* Morrison v. National Australia Bank, 37 N.C. J. INT'L L. & COM. REG. 1187, 1206 (2012). The Second Circuit set out the effects test in *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968), *abrogated by Morrison*, 130 S. Ct. 2869, as it attempted to determine whether the Exchange Act's antifraud provisions applied to misrepresentations by a Canadian company whose foreign

inverse methods for identifying extraterritorial cases, the Second Circuit combined the mutually independent conduct test and effects test to establish a third—the conduct-and-effects test[76]—following which courts liberalized the presumption in two significant ways. First, the two-pronged conduct-and-effects test provided for extraterritorial application of domestic law when *either* the conduct or the effect was territorial,[77] thereby permitting courts to find sufficient territoriality to avoid invocation of the presumption, although the territorial connection would not have been sufficient under either the conduct test or the effects test independently.[78] Second, the test, as applied by many courts, undermined the force of the presumption as a per se rule.[79] The Supreme Court's decision in *Morrison* ultimately disabused lower courts of this variegated approach to the presumption,[80] but in the meantime the presumption acquired a different tone in the criminal context.

B. Criminal Application

The extraterritorial application of geoambiguous criminal statutes has developed parallel to civil litigation, but it has operated under a distinctive set of principles. *Bowman* suggested that geoambiguous criminal statutes are exceptions to the rule and may surmount the presumption more easily when certain types of offenses are implicated.[81] In *Bowman* the Supreme Court was presented with facts alleging that four sailors conspired to submit fraudulent invoices charging the Fleet Corporation—in which the United States was the

---

conduct had the ultimate effects of reducing its share value on a domestic exchange and, in turn, harming investors. *Id.* at 208–09.

76. *See* Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1045 (2d Cir. 1983), *abrogated by Morrison*, 130 S. Ct. 2869.

77. *See id.* (considering the *Schoenbaum* effects test and the *Leasco* conduct test as independent and equally viable avenues for applying § 10(b) of the Exchange Act).

78. *See* Itoba Ltd. v. Lep Grp. PLC, 54 F.3d 118, 124 (2d Cir. 1995), *abrogated by Morrison*, 130 S. Ct. 2869 ("[W]e hold that a sufficient combination of ingredients of the conduct and effects tests is present in the instant case to justify the exercise of jurisdiction by the district court.").

79. The *Schoenbaum* opinion went even further, diminishing the presumption and converting it into evidence of legislative intent to rebut countervailing policy imperatives. *See Schoenbaum*, 405 F.2d at 206 ("[T]he usual presumption against extraterritorial application of legislation . . . [does not] show Congressional intent to preclude application of the Exchange Act . . . , when extraterritorial application of the Act is necessary to protect American investors.").

80. *See infra* note 111 and accompanying text.

81. *See infra* note 85 and accompanying text.

sole stockholder—for delivery of oil to Rio de Janeiro, Brazil, although it had not actually been delivered in the amount described.[82] The criminal conspiracy was alleged to have occurred variously on the high seas and in the port and city of Rio de Janeiro.[83] Because the relevant section of the Criminal Code did not expressly identify a geographic scope, the Court was tasked with construing the statute's extraterritorial applicability.[84] Chief Justice Taft, writing for the Court, simultaneously acknowledged the background operation of the presumption against extraterritoriality and asserted its inapplicability to a class of criminal statutes, like those presented in the case: fraud or obstruction directed against the government.[85] Instead, the Court concluded that Congress's intent to criminalize extraterritorial perpetration of those acts by U.S. citizens was inherent in the "nature of the offense."[86]

The Court in *Bowman* provided only a terse explanation of what characteristics the relevant crimes might share as a class, referencing (1) obstruction and fraud offenses, (2) the perpetration of which is not dependent on any given location, and (3) for which the potency and value of the statute would suffer from strict territoriality.[87] Subsequent applications of the *Bowman* exception to the presumption against extraterritoriality have emphasized or expanded, to varying degrees, these enumerated characteristics.[88] These varying approaches can be classified under a threefold taxonomy. In some cases the exception has been applied only to crimes against the government directly, such as corruption, theft of government property, assault on federal agents, and conspiracy to kill U.S. officials.[89] In other cases, criminal offenses exempted from strict application of the presumption were those that impinged on governmental interests, like inducement and encouragement of

82. United States v. Bowman, 260 U.S. 94, 95–96 (1922).

83. *Id.* at 96.

84. *Id.* at 97.

85. *See id.* at 98 ("[T]he same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents.").

86. *Id.*

87. *Id.*

88. Clopton, *supra* note 51, at 168.

89. *Id.* at 168–69 n.126 (citing, *e.g.*, United States v. Layton, 855 F.2d 1388 (9th Cir. 1988); United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984)).

unlawful immigration or fraudulent transfers in bankruptcy.[90] Finally, courts have found that some crimes are so inherently transnational as to deserve the blessing of the *Bowman* exception.[91] Typical crimes in this final category include trafficking (human or drug) and racketeering.[92]

Beyond the types of crimes to which *Bowman* reasoning has been applied, courts have innovated also with the manner in which *Bowman* acts as an exception. The D.C. Circuit considered an adequate rebuttal of the presumption to be a statutory implication that the instant crime can be punished, not because of the locus of commission, but because of the government's inherent right to defend itself against a class of crimes.[93] The Second Circuit dispensed with the clear-indication requirement when *Bowman* applies.[94] The Ninth Circuit concluded that the nature-of-the-offense inquiry allowed it to engage in speculative reasoning[95]—effectively bootstrapping intent based on the nature of the offense.

* * *

Until 2010, the civil and criminal lines of jurisprudence on the presumption against extraterritoriality were weak constraints on the effective scope of U.S. law, each in their own respect. The conduct-and-effects test, in civil cases, allowed courts to redefine whether a law was really being applied extraterritorially, whereas the nature-of-the-offense inquiry, in criminal cases, gave courts license to sanction foreign violations. In this context, plaintiff-petitioners Russell Leslie Owen, Brian Silverlock, and Geraldine Silverlock urged the Supreme

90. *Id.* at 169 n.129 (citing, *e.g.*, United States v. Castillo-Felix, 539 F.2d 9 (9th Cir. 1976); Stegeman v. United States, 425 F.2d 984 (9th Cir. 1970)).

91. *See id.* at 170 ("The 'nature of the offense' approach is commonly applied to crimes that frequently manifest in transborder conduct or effects . . . .").

92. *Id.* at 170 nn.136–38 (citing, *e.g.*, United States v. Strevell, 185 F. App'x 841 (11th Cir. 2006) (per curiam); United States v. Plummer, 221 F.3d 1298 (11th Cir. 2000); United States v. Vasquez-Velasco, 15 F.3d 833 (9th Cir. 1994)).

93. *See* United States v. Campbell, 798 F. Supp. 2d 293, 304 (D.D.C. 2011) (citing Bowman v. United States, 260 U.S. 94, 98 (1922)).

94. *See* United States v. Gatlin, 216 F.3d 207, 211 n.5 (2d Cir. 2000) (asserting that the lack of "clear evidence" of congressional intent is not dispositive of whether a statute should be applied extraterritorially).

95. *See Vasquez-Velasco*, 15 F.3d at 841 ("Congress would have intended that [the crime] be applied extraterritorially to cases involving the murder of DEA agents abroad.").

Court to reverse the district court and Second Circuit in dismissing their suit against National Australia Bank.[96]

III. *MORRISON*: THE PRESUMPTION, REAFFIRMED AND STREAMLINED

In *Morrison* the Court reaffirmed the importance of the presumption against extraterritoriality and redirected the course of its jurisprudence. The Court readdressed the long-lived debate about congressional intent and situational triggers by advancing (1) a strict approach to construing congressional intent and (2) a new test for identifying the relevant situational triggers.[97] The question before the *Morrison* Court was whether U.S. federal courts had jurisdiction to resolve the Australian plaintiffs' complaint that an Australian defendant, National Australia Bank (National), and several others deceived investors regarding the value of a U.S. subsidiary's assets, which National was forced eventually to write down.[98] Although National listed a number of American Depositary Receipts on the New York Stock Exchange, the plaintiffs purchased their common stock of National on a foreign securities exchange.[99] The district court granted—and the Second Circuit affirmed—the defendants' motion to dismiss for lack of subject matter jurisdiction, given the at-most tenuous link between the domestic conduct and the largely foreign, fraudulent scheme.[100]

Although the Supreme Court agreed that the plaintiffs could not successfully sue National, it fundamentally disagreed with the lower courts' reasoning. The *Morrison* opinion began by disabusing the lower courts of the belief that the presumption against extraterritoriality was a function of a technical determination based on subject matter jurisdiction, rather than a merits determination based on an application of the law to particular facts.[101] Moreover, the

96. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2876 (2010).

97. *See infra* notes 104–10 and accompanying text.

98. *Morrison*, 130 S. Ct. at 2875–76. The *Morrison* plaintiffs sued National, Florida-based mortgage company HomeSide Lending, National's chief executive officer, and three of HomeSide's executives. *Id.* at 2876.

99. *See id.* ("[National's] Ordinary Shares . . . are traded on the Australian Stock Exchange Limited and on other foreign securities exchanges, but not on any exchange in the United States. . . . As relevant here, [the plaintiffs] purchased National's Ordinary Shares in 2000 and 2001 . . . .").

100. *Id.* at 2876.

101. *Id.* at 2877.

Court stated that the lower courts' application of the presumption was fundamentally flawed, thus recharacterizing both when the presumption is animated and how the presumption is rebutted.[102]

The Court in *Morrison* introduced a two-step test. At the first step, the Court asked the threshold question of whether Congress intended the Securities Exchange Act of 1934 (Exchange Act)[103] to apply abroad.[104] As the Court firmly stated, "When a statute gives no clear indication of an extraterritorial application, it has none."[105] In *Morrison*, the Court concluded that the Exchange Act had solely domestic application, finding "no affirmative indication" that the relevant statutory sections were intended to apply abroad.[106] At the second step, the Court inquired as to whether the *Morrison* facts could be characterized as extraterritorial.[107] This second element was important because the presumption becomes a moot legal prohibition if the relevant aspects of the dispute could be characterized as having occurred domestically. The Court answered this question by turning to the statutory focus in § 10(b) of the Exchange Act, and by concluding that Congress's primary concern was "not upon the place where the deception originated, but upon purchases and sales of securities in the United States."[108] Therefore, notwithstanding the plaintiffs' assertions that certain substantive acts of the fraudulent scheme occurred in the United States,[109] the relevant aspects of the matter—the transactions themselves—occurred outside of the United States.[110]

On its face *Morrison* strongly reaffirms the presumption against extraterritoriality and provides some clear guidelines for its application. First, the traditional tests are dead, and, in their stead, a

---

102. *See id.* at 2883–84 (noting that "*some* domestic activity" does not make the presumption inapplicable if that activity is not the "focus" of the statute, and that the presumption is not rebutted without a "clear indication" that Congress intended extraterritorial effect).

103. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78pp (2012).

104. *See Morrison*, 130 S. Ct. at 2884 n.9 ("If § 10(b) did apply abroad, we would not need to determine which transnational fraud it applied to; it would apply to all of them (barring some other limitation).").

105. *Id.* at 2878.

106. *Id.* at 2883.

107. *Id.* at 2884.

108. *Id.*

109. *Id.* at 2883–84.

110. *See id.* at 2888 ("This case involves no securities listed on a domestic exchange, and all aspects of the purchases complained of . . . occurred outside the United States.").

much narrower test based on a statutory "focus" has been blessed.[111] Second, although the Court gave space for inquiries into legislative intent, it admonished against speculation as to what Congress *would have* intended had it considered the present facts.[112] The extent to which this test precludes a purposivist finding of extraterritorial intent is unclear,[113] but it does suggest the need for a textual hook based on more than "possible interpretations," boilerplate language, or negative inferences from statutory exceptions.[114]

However, it also leaves some important issues unresolved or ambiguous on closer examination. For example, there is little indication of how far *Morrison*'s two-step analysis applies beyond the Exchange Act.[115] Even if it is generalizable to other statutes, *Morrison* left open questions on how to determine a statute's "focus." In the aftermath of *Morrison*, courts have struggled with the key components of its directive: resolving a statute's geoambiguity and identifying the statutory focus. On this count, the Racketeer Influenced and Corrupt Organizations (RICO) Act[116] has proved to

111. *See id.* at 2886. The Court has not clearly addressed whether the "focus" test can be characterized as a reincarnation of one of the former traditional tests. *Compare* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (speaking in terms of extraterritorial "conduct"), *and id.* at 1670 (Alito, J., concurring) (emphasizing the centrality of the "event or relationship" of congressional focus), *with* William S. Dodge, Morrison*'s Effects Test*, 40 SW. L. REV. 687, 690–92 (2011) ("Under *Morrison* . . . the location of the conduct is irrelevant. . . . What is relevant instead is the location of the transaction affected by the fraudulent conduct—in other words, the location of the effects. . . . *Morrison* substituted a narrower effects test that turns solely on the location of the specific transaction affected by the fraud."). Rather, the relevance of conduct or effect likely turns on how an extraterritorial statute characterizes the proscribed matter.

112. *See Morrison*, 130 S. Ct. at 2881 ("The results of judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court—demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, we apply the presumption in all cases . . . .").

113. *See Kiobel*, 133 S. Ct. at 1666 (examining the "historical background" of the ATS for rebuttal evidence of extraterritorial application).

114. *See Morrison*, 130 S. Ct. at 2882–83.

115. The Court partially answered this question in *Kiobel* by applying the presumption to the ATS, but its ambiguous reference to the presumption's *principles*—rather than the presumption itself—and the ATS's status as a jurisdictional statute leave some room for debate. *See Kiobel*, 133 S. Ct. at 1664 (invoking the presumption to constrain the ATS because of "the principles underlying the canon of interpretation similarly constrain courts . . . under the ATS").

116. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (2012). The RICO Act is a hybrid statute that combats organized crime by imposing criminal and civil liability for individuals or entities who engage in racketeering—a broadly inclusive set of predicate acts characteristic of organized crime, *see* 18 U.S.C. § 1961(1)—and provides a private right of action. Gideon Mark, *RICO's Extraterritoriality*, 50 AM. BUS. L.J. 543, 547–48 (2013).

be a fertile ground for post-*Morrison* litigation. In at least one case, a court has had to reexamine the RICO Act's geographical scope.[117] Similarly, courts have struggled to accurately determine whether the circumstances implicating the statutory focus were extraterritorial. The U.S. District Court for the Southern District of New York has found, in seemingly incongruous fashion, that the focus of the RICO Act is the racketeering *activity*[118] and, on another occasion, that its focus is the racketeering *enterprise*.[119]

More significant for present discussion, the court did not discuss the holding's implication for the *Bowman* exception. Courts have been substantially less willing to consider how far to extend *Morrison* beyond the civil context in which its strict holding is nested. In fact, *Morrison* appears to have had little effect on determinations of criminal liability: courts have consistently indicated, expressly or implicitly, that *Bowman* survives *Morrison*.[120]

IV. THE *BOWMAN* DOCTRINE'S FLAWED EXCEPTIONALISM AFTER *MORRISON*

The Supreme Court in *Morrison* strongly reaffirmed the presumption against extraterritoriality. That reaffirmation has had considerable impact on the extraterritoriality of civil statutes,[121] whereas the effect has been less than substantial with respect to criminal statutes, as to which the *Bowman* exception continues to play a dominant role.[122] Specifically, courts have been unwilling to recognize in *Morrison* a restrictive or invalidating effect on

117. *See* Sorota v. Sosa, 842 F. Supp. 2d 1345, 1348–49 (S.D. Fla. 2012) (holding that *Morrison* abrogated the Eleventh Circuit's prior holding that the RICO Act has extraterritorial effect).

118. Chevron Corp. v. Donziger, 871 F. Supp. 2d 229, 243–45 (S.D.N.Y. 2012).

119. Cedeño v. Intech Grp., Inc., 733 F. Supp. 2d 471, 474 (S.D.N.Y. 2010).

120. *See, e.g.*, United States v. Weingarten, 632 F.3d 60, 66 (2d Cir. 2011) (disregarding *Morrison* in favor of the reasoning in *Bowman*); United States v. Singhal, 876 F. Supp. 2d 82, 97 (D.D.C. 2012) (declining to extend *Morrison* beyond § 10(b), instead applying *Bowman* to allegations of mail fraud); United States v. Carson, No. SACR 09-00077-JVS, 2011 WL 7416975, at *7 (C.D. Cal. Sept. 20, 2011) ("*Morrison* does not mention *Bowman,* nor does it explicitly overrule it."); United States v. Campbell, 798 F. Supp. 2d 293, 303 (D.D.C. 2011) ("Despite the emphasis of *Morrison* that the presumption against extraterritoriality applies 'in all cases,' recent Supreme Court jurisprudence has developed with nary a mention of *Bowman* . . . ." (citation omitted)).

121. *See supra* notes 117–19 and accompanying text.

122. *See supra* note 120 and accompanying text.

Bowman.[123] Nevertheless, *Bowman* stands uneasily next to *Morrison*. The latter offers a bright-line rule and is juxtaposed against the former's porous standard. *Morrison* espoused a strong disdain for policy-based inquiries into whether extraterritorial application is appropriate;[124] *Bowman* appears to be premised on such an inquiry.[125] Whereas the *Morrison* opinion lacks any intimation that the Court was concerned about the functioning of securities regulation when it constrained the effect of the Exchange Act,[126] application of *Bowman* sometimes explicitly assesses the integral role that extraterritorial application plays in a regulatory regime.[127]

Not only do the circumstances call for courts to reconcile the relationship between *Morrison* and *Bowman*, but there is also a strong case for narrowing the influence of *Bowman* in statutory interpretation of federal criminal law. The *Bowman* exception is arguably a defunct doctrine in Supreme Court jurisprudence, at least to the extent that it justifies a liberal inference of congressional intent. Since establishing this exception to the presumption, members of the Court have cited to *Bowman* for precedent on extraterritoriality fourteen times,[128] most recently in Justice Scalia's dissent in *Hartford Fire Insurance Co. v. California*.[129] Of those fourteen citations, however, fewer than half can be (even generously) construed to rely on *Bowman* for the proposition that extraterritorial application is

---

123. *See supra* note 120 and accompanying text.

124. *See supra* note 112.

125. *See, e.g.*, United States v. Vasquez-Velasco, 15 F.3d 833, 841 (9th Cir. 1994) ("Congress would have intended that [the crime] be applied extraterritorially to cases involving the murder of DEA agents abroad.").

126. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2894 n.12 (2010) (Stevens, J., concurring) (concluding that the Court's decision may not extend to Securities and Exchange Commission (SEC) enforcement action).

127. *See* United States v. Weingarten, 632 F.3d 60, 66 (2d Cir. 2011) ("'Congress is presumed to *intend* extraterritorial application of criminal statutes where . . . restricting the statute to United States territory would severely diminish the statute's effectiveness.'" (quoting United States v. Yousef, 327 F.3d 56, 87 (2d Cir. 2003))).

128. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814 (1993); Reid v. Covert, 354 U.S. 1, 12 (1957); United States v. Quarles, 350 U.S. 11, 21 (1955); Steele v. Bulova Watch Co., 344 U.S. 280, 291 (1952); Foley Bros. v. Filardo, 336 U.S. 281, 284 (1949); Vermilya-Brown Co. v. Connell, 335 U.S. 377, 381 (1948); United States v. Anderson, 328 U.S. 699, 703 (1946); Skiriotes v. Florida, 313 U.S. 69, 73–74 (1941); United States v. Flores, 289 U.S. 137, 141, 143 (1933); Cook v. United States, 288 U.S. 102, 122 (1933); Goldsmith v. Zerbst, 1 RAPP 18, 19 (U.S. Nov. 18, 1932) (Cardozo, J., in chambers); Blackmer v. United States, 284 U.S. 421, 425, 429, 437, 438 (1932); Maul v. United States, 274 U.S. 501, 511, 513, 520 (1927); New York Cent. R.R. Co. v. Chisholm, 268 U.S. 29, 31 (1925).

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

justified by the nature of the offense, rather than by clear indication of congressional intent.[130] In fact, the Court has not used *Bowman* for that latter purpose since 1952—in a dissenting opinion.[131] Justice Scalia's own reference to *Bowman*, in *Hartford Fire*, was merely to bolster the proposition that Congress has the constitutional authority to extend U.S. laws extraterritorially.[132]

This Part lays out the case for constraining the *Bowman* exception, first, by describing the reasons why the Court repeatedly invokes the presumption against extraterritoriality, and, then, by arguing that, rather than permitting the *Bowman* exception to operate effectively as an inverse presumption, courts should subject extraterritorial application of federal criminal law to the strict principles of *Morrison*, either by constraining the *Bowman* exception to the facts of the original case or by abrogating the *Bowman*-style reasoning completely. Finally, it challenges the two primary, alternative approaches for reconciling *Bowman* and *Morrison*, showing that restriction or invalidation is the better approach.

A. Rationales for the Presumption Against Extraterritoriality

Professor William S. Dodge identifies six discrete arguments that have been advanced to rationalize the presumption.[133] The first rationale conceives of the presumption as a product of a customary international law prohibition against extraterritorial laws and a canonical disfavor for interpretations of domestic law that violate

---

130. *See Bulova Watch*, 344 U.S. at 291 (Reed, J., dissenting) ("There are . . . cases in which a statement of specific contrary intent will not be deemed so necessary."); *Anderson*, 328 U.S. at 703 ("Since the statute does not indicate where Congress considered the place of committing the crime to be, the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." (citations omitted)); *Skiriotes*, 313 U.S. at 73–74 ("[A] criminal statute dealing with acts that are directly injurious to the government, and are capable of perpetration without regard to particular locality, is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect."); *Maul*, 274 U.S. at 520 n.21 (referring to a list of "offenses . . . which usually take place on the high seas"); *Chisholm*, 268 U.S. at 31 ("It contains no words which definitely disclose an intention to give it extraterritorial effect, nor do the circumstances require an inference of such purpose.").

131. *See Bulova Watch*, 344 U.S. at 291 (Reed, J., dissenting) ("Where the case involves the construction of a criminal statute 'enacted because of the right of the Government to defend itself against obstruction, or fraud . . . committed by its own citizens,' it is not necessary for Congress to make specific provisions that the law 'shall include the high seas and foreign countries.'" (quoting United States v. Bowman, 260 U.S. 94, 98 (1922))).

132. *See Hartford Fire*, 509 U.S. at 813–14 (Scalia, J., dissenting).

133. Dodge, *supra* note 74, at 112–23.

international law.[134] Second, the conflict-of-laws basis asserts that the law governing a controversy should be that of the forum wherein the act occurred.[135] Third, just as Congress presumably desires to avoid conflict with international law, it is presumed to want to promote international comity among foreign nations.[136] According to that rationale, the presumption acts as a conflict-avoidance tool.[137] Relatedly, the fourth rationale, separation of powers, grounds itself in an argument about institutional competency; that is, courts are not institutionally suited to assess the consequences of antagonistic domestic law on foreign relations.[138] Fifth, the presumption can act as a signal to Congress about how courts will interpret statutes, thereby providing a background rule on how to draft legislation that will achieve the legislature's intent.[139] The final rationale assumes that Congress is primarily concerned with domestic conditions, and that, when Congress turns its legislative eye abroad, it is the exception that proves the rule.[140]

Dodge ultimately concludes that Congress's domestic focus is the only valid justification for the presumption against extraterritoriality.[141] However, *Morrison*'s strong reaffirmation of the presumption provided evidence that the canon is justified not only due to Congress's domestic focus,[142] but also because of the advantage in providing Congress with stable background principles[143] and the

134. *Id.* at 113–14. Dodge reasons that this has been undermined by evolution of international law that sanctions geographic expansiveness of domestic law in certain situations. *Id.*

135. *Id.* at 114–15. As the strength of Justice Holmes's theory of vested rights eroded, so has the strength of this rationale. *See id.* at 115 (observing that the conflict-of-laws jurisprudence has changed since Justice Holmes's time and that "one cannot say there is a prevailing theory of conflicts").

136. *Id.* However, Dodge questions the empirical basis for assuming that conflict between domestic and foreign laws has a negative effect and whether Supreme Court jurisprudence has consistently supported this rationale. *Id.* at 116–17.

137. *Id.* at 115.

138. *Id.* at 120.

139. *Id.* at 122.

140. *Id.* at 118.

141. *See id.* at 113 ("Only the notion that Congress generally legislates with domestic concerns in mind is a valid reason for the presumption today.").

142. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010) ("[The presumption] rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters.").

143. *See id.* at 2881 ("[W]e apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.").

importance of maintaining prescriptive comity.[144] Doctrinal coherence, smart allocation of governmental authority, and fair notice complement and strengthen the goals evinced by these three rationales.

B. The Case for Narrowing the Bowman *Exception*

The Supreme Court should be dissuaded from perpetuating the simultaneous and divergent doctrines embodied by *Morrison* and *Bowman*.[145] If the Court is to be believed that the presumption against extraterritoriality is justified by Congress's domestic focus, the desirability of affording the legislature a stable interpretive background, and the importance of prescriptive comity, then those principles are best served, in turn, by doctrinal coherence, smart allocation of governmental authority, and fair notice. The first of these reasons raises relational considerations between civil and criminal applications, whereas the latter two reasons address concerns following from an expansive exception.

1. *Doctrinal Coherence*. There is an intuitive desirability of imposing doctrinal coherence on the presumption against extraterritoriality. There is also strong evidence within the *Morrison* decision that the Court shares this sense. Justice Scalia's opinion in *Morrison* espouses a strong bright-line rule favoring the application of the presumption, employing characteristically colorful metaphors to convey his point: "[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case."[146] Not only does constraining the *Morrison* rule to civil contexts leave

144. *See id.* at 2885 ("The probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application 'it would have addressed the subject of conflicts with foreign laws and procedures.'" (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256 (1991))).

145. This Note is not the first to consider the asymmetries of the presumption against extraterritoriality. Zachary Clopton, a former federal prosecutor, similarly discusses how *Bowman* could be reconciled to *Morrison*'s stricter approach. *See* Clopton, *supra* note 51, at 185–91. However, he misses the opportunity to seriously address the reasons why reconciliation is warranted, and he fails to propound a recommendation that sets the doctrines on equal footing. *See id.* at 187 (recommending the possibility of "a softer presumption in criminal cases").

146. *Morrison*, 130 S. Ct. at 2884.

criminal counterparts messy[147] and rob criminal statutory construction of the exacting direction afforded civil statutory construction, but it also ignores the interrelationship between criminal and civil statutes that makes a coherent approach to statutory interpretation appealing.

The doctrine's current asymmetry and its drawbacks are readily apparent. First, the extant formulation of the *Bowman* exception causes unwieldy application of the presumption to criminal statutes. It carries the potential to eviscerate any geographic limitation on geoambiguous laws when the realities of a globalized and digital society make enforcement more difficult.[148] If a key element of the standard is whether the nature of the offense makes unnecessary any express, statutory reference to geographical scope,[149] the number of criminal offenses that could conceivably fall into that category grows as technological advancement makes proximity less germane. This argument does not belittle the importance, or understate the number, of offenses dependent on geographic proximity, on the one hand. Neither does it ignore the need for robust jurisdiction to counteract increasingly transnational crime, on the other. In fact, courts recognize that the *criminal* moniker does not talismanically invoke *Bowman*'s blessing.[150] Rather, such de jure asymmetry is concerning, in this regard, because *Bowman*'s porous standard increasingly becomes the exception that swallows the rule. Although the *Bowman* exception has other relevant constraints—for example, *Bowman* addressed fraud and obstruction[151]—*Bowman*'s reasoning has been more favored and permitted an expansive approach to the exception.[152] It is only slightly facetious to suggest that "street crime" against private citizens may be one of the few categories of offenses not excepted by *Bowman*.[153] Moreover, if statutes are to be construed

147. *See* Clopton, *supra* note 51, at 168 (describing various degrees of breadth given to the *Bowman* exception).

148. *See* Ellen S. Podgor & Daniel M. Filler, *International Criminal Jurisdiction in the Twenty-First Century: Rediscovering* United States v. Bowman, 44 SAN DIEGO L. REV. 585, 592 (2007) (observing that expansive criminal decisions based on *Bowman* "are deeply problematic on a policy level, particularly in an era of globalization where many countries may seek to enforce their respective interests both at home and abroad").

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

150. *See, e.g.*, United States v. Leija-Sanchez, 602 F.3d 797, 799 (7th Cir. 2010) ("*Bowman* does not hold that criminal statutes *always* apply extraterritorially.").

151. *Bowman*, 260 U.S. at 98.

152. *See supra* notes 89–92 and accompanying text.

153. *See Bowman*, 260 U.S. at 98 ("Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which

in a geographically inconsistent manner, Congress should take the lead.[154]

Second, the paradigmatic civil and criminal cases governed by *Morrison* and *Bowman*, respectively, are not so mutually independent as to offer a compelling justification for why different standards should apply. In fact, the two doctrines manifest salient interrelationships. After all, the criminal cases based on *Bowman* developed on the back of *American Banana*, a civil case.[155] And, despite refusals to overlay *Morrison*'s restrictive precepts on criminal statutes, those opinions borrow generally from the civil context to otherwise support their propositions.[156]

Hybrid statutes best exemplify the interrelationships between civil and criminal law. Many statutes—for example, the Sherman Act, the RICO Act, and the FCPA—have criminal and civil liability components. Imposition of a doctrinal distinction as a matter of law[157] could create incoherent application of these hybrid statutes,[158] at least insofar as the court is construing statutory provisions common to both criminal and civil application.[159] In *FCC v. American Broadcasting Co.*,[160] the Court refused to allow the Federal Communications Commission (FCC) to interpret the Communications Act of 1934[161] for civil regulatory purposes using a different standard than that used

---

affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it.").

154. *See infra* notes 206–16 and accompanying text.

155. *See Bowman*, 260 U.S. at 98 (justifying its locus-based exception with reference to *American Banana*, given that, although the case was a civil matter, the cause of action was based on a hybrid statute with criminal and civil components); *see also supra* notes 63, 65–67 and accompanying text.

156. *See, e.g.*, United States v. Belfast, 611 F.3d 783, 813–15 (11th Cir. 2010) (building a legal argument from precepts described in, for example, *Morrison*, *Arabian Am. Oil*, and *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993)—all Supreme Court resolutions of civil disputes).

157. *See infra* Part IV.C.

158. *Cf.* Jonathan Marx, Note, *How To Construe a Hybrid Statute*, 93 VA. L. REV. 235, 268 (2007) ("[T]he use of identical words is meaningful, and as such statutes employing identical words should be construed consistently. Thus, if the civil and criminal provisions of a hybrid statute are to have different scopes, it must be due to statutory mens rea . . . and not because some conduct is within the scope of civil liability but does not also fulfill the actus reus elements of the crime.").

159. *Id.* at 241. *But see* Clopton, *supra* note 51, at 189 (dismissing the problems posed by hybrid statutes because they are "the exception, rather than the rule").

160. FCC v. Am. Broad. Co., 347 U.S. 284 (1954).

161. Communications Act of 1934, Pub. L. No. 416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

in criminal prosecutions brought by the Department of Justice.[162] It would be anomalous to interpret a single statute in different ways, according to the nature of the case or the parties involved,[163] without a clear indication that such an approach was intended by the legislature.[164] Professor Margaret Sachs has identified four reasons justifying unified interpretations: congressional silence as to judicial authority to apply different standards for civil and criminal purposes; the presence of a single, undistinguished predicate wrong that forms the basis of civil and criminal liability; the interpretive practice of construing similar language similarly; and the difficulty in maintaining constructive distinctions as to the same statutory text.[165] In fact, because of the unwillingness to extend *Morrison* to criminal contexts, the same statute might be subject to two divergent rules of statutory interpretation.

The Computer Fraud and Abuse Act[166] (CFAA) offers a relevant example of how *Morrison* and *Bowman* could create inconsistent enforcement of the same legislation. For example, the United States criminalizes several forms of computer-related fraud[167] and provides for civil recovery by injured parties.[168] Although multiple offenses within the CFAA expressly identify "foreign commerce" as a jurisdictional hook,[169] the boilerplate quality of some of the language makes it unclear whether such provisions would pass the Court's clear-indication requirement for civil suit.[170] Thus, private parties

162. *See Am. Broad. Co.*, 347 U.S. at 296 ("It is true . . . that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the [FCC] and another for the Department of Justice. If we should give [the statute] the broad construction urged by the [FCC], the same construction would likewise apply in criminal cases.").

163. *See* Marx, *supra* note 158, at 267 ("The fact that the same statutory language *could* bear one meaning were civil canons applied to it, and another meaning were criminal canons applied to it, does not mean that it can bear *both*.").

164. *Id.* at 269.

165. Margaret V. Sachs, *Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934*, 2001 U. ILL. L. REV. 1025, 1031–33.

166. Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2012).

167. *Id.* §§ 1030(a)–(f).

168. *Id.* § 1030(g).

169. *E.g.*, *id.* §§ 1030(a)(6)–(7).

170. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 252 (1991) ("[B]oilerplate 'commerce' language does not support such an expansive construction of congressional intent."); *cf.* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting) (questioning whether the Sherman Act's boilerplate jurisdictional language identifying commerce with foreign nations would be sufficient, if the Act's extraterritoriality were not controlled by precedent).

suffering real injury from the perpetration of computer fraud might be barred by *Morrison*'s strict construction of intent. However, under a liberal reading of *Bowman*, such a perpetrator might be subject to criminal prosecution because of the lower threshold for finding extraterritorial intent. Rather than applying different rules of interpretation pursuant to the nature of the statute's subject matter, courts should utilize one form of the presumption—the one espoused by the *Morrison* Court.

Returning to the Court's justifications for the presumption, the three rationales seem meaningful irrespective of the civil or criminal context in which the presumption is being considered.[171] There is no a priori reason to believe that a domestic focus is more pressing when drafting civil laws than criminal laws. If courts presume Congress to be concerned primarily with the domestic effect of misconduct,[172] advocates of a strong *Bowman* exception are hard pressed to show, without more, that Congress's default inward focus is suspended when addressing criminal penalties. Extraterritorial criminal enforcement is similarly likely to endanger international comity. In fact, criminal enforcement raises greater concerns for international comity because it carries official imprimatur. Finally, given the variegated and inconsistent manner in which courts have applied the *Bowman* exception, important strides are made toward providing a stable interpretive background for Congress if the presumption against extraterritoriality were collapsed into a unified doctrine.

2. *Allocation of Authority*. Wrapped within the discussion of an exception to the presumption against extraterritoriality is an argument regarding allocation of authority. In some settings such allocation may be discussed in terms of nondelegation or deliberative government. Of course, *Bowman* did not speak in these terms. However, whatever the terminology, the presumption against extraterritoriality tends to force careful consideration before expanding the breadth of the government's sanctioning power. By contrast, without a consistent rule for approaching statutory ambiguity, unclear provisions have the potential to transfer lawmaking power to the interpreting body. Traditional application of

171. *See supra* notes 142–44 and accompanying text.

172. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010) ("[The presumption] rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters.").

the presumption against extraterritoriality might be understood, in one sense, as the judiciary's refusal to accept latent authority to broadly construe geoambiguous statutes.

In nondelegation terms the exception to the presumption, then, reverses that approach by normalizing the acceptability of delegation-by-ambiguity to the courts or the executive. At the extreme, delegation-by-ambiguity can run afoul of the constitutional principle of separation of powers: the Constitution's procedural safeguards are weakened;[173] the public is robbed of the meaningful input of both political branches of government;[174] and, in the case of executive interpretation, executive interests in robust enforcement and fair interpretation stand in conflict.[175] This Note does not make the argument that the *Bowman* exception suborns unconstitutional delegation. At one level, such an argument is not a winning one.[176] Pragmatically, though, the better argument approaches the asymmetry from a higher level of generality: prudential and constitutional considerations of smart allocation of authority to define a statute's scope militate against assigning such authority to the executive branch. Three corollaries follow: First, geoambiguity—as a form of congressional silence on a statute's geographic scope—should not be understood as a presumptive transfer of authority to the executive. Second, ingrained legal principles belie the prudence of de facto—if not de jure—transfer of interpretive authority. Finally, under the specter of single-branch expansion of criminal statutes, the canon of constitutional avoidance should prevent liberal constructions of geoambiguous statutes absent congressional input.

Important scholarship by Professors Eric Posner and Cass Sunstein has taken the contrary position, asserting that courts should defer to the executive in interpreting geoambiguous criminal statutes.[177] This scholarship rests heavily on the Supreme Court's own

173. *See infra* note 206 and accompanying text.

174. *See infra* notes 207–09 and accompanying text.

175. *See infra* notes 210–12 and accompanying text.

176. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) ("We might say that the conventional [nondelegation] doctrine has had one good year, and [now 224] bad ones (and counting).").

177. *See* Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1173 (2007) ("[C]ourts should . . . draw on established principles of administrative law to permit executive interpretations of ambiguous statutory terms to overcome the international relations doctrines.").

recognition of the presumption's basis in international comity.[178] At first blush, the prescriptive-comity argument appears to run counter to this Note's recommendations. Prescriptive comity is concerned, after all, that extraterritorial laws may inadvertently cause foreign-relations frictions.[179] The presumption, as a court-imposed kill switch, prevents accidental frictions of international proportions. The clear indication of extraterritorial application—required to rebut the presumption—signals that the political branches have weighed the risks to foreign relations and made a deliberate determination that a law's global enforcement has transcendent value.[180]

The Posner-Sunstein proposal would assign sufficient weight to the executive branch's interpretations to override international relations doctrines,[181] such as the presumption against extraterritoriality.[182] The executive branch has certain structural advantages over Congress when it comes to weighing the risks of extraterritorial application of law against the advantages.[183] After all, the executive branch has the benefit of (1) access to information due to being on the frontline of enforcement and having a dedicated bureaucratic cadre assessing foreign relations and legal matters, and (2) timely action and a unified front.

Essentially disagreeing with the first two corollaries described earlier, Posner and Sunstein have advocated for courts to defer to the executive branch on the application of foreign-relations doctrines to the same degree that courts accord deference to administrative agencies under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[184]—either under formal *Chevron* analysis or by analogy

178. *See id.* (characterizing the discussed doctrines as the "international comity doctrines").

179. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.").

180. *Cf.* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2885 (2010) ("The probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application 'it would have addressed the subject of conflicts with foreign laws and procedures.'" (quoting *Arabian Am. Oil Co.*, 499 U.S. at 256)).

181. *See* Posner & Sunstein, *supra* note 177, at 1173 ("Our more ambitious goal is to suggest that courts should generally draw on established principles of administrative law to permit executive interpretations of ambiguous statutory terms to overcome the international relations doctrines.").

182. *See id.* at 1179 (categorizing the presumption against extraterritoriality as a comity doctrine).

183. *Id.* at 1202, 1205.

184. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

to *Chevron* principles.[185] They build their argument upon the concepts of executive competence and "constitutional warrant" for balancing policy interests and foreign relations considerations in the absence of a clear congressional mandate.[186] According to such a *Chevron*-based argument, deference would follow from delegation because "courts presume that, when Congress charges an agency with administering an ambiguous statute, Congress is *delegating* lawmaking power to the agency."[187] Applying the two-step *Chevron* inquiry, the presumption against extraterritoriality would not stand as an automatic bar when a court cannot clearly discern whether Congress expressed a preference for the statute's geographical scope.[188] In such cases, Posner and Sunstein would say that courts should defer to the government's interpretations of geographical scope, so long as they were reasonable.[189] In the alternative, the Posner-Sunstein proposal would be to ascribe such deference to the executive branch's institutional competence as to surmount the presumption against extraterritoriality in any case.[190] This deference theory effectively rationalizes the approach already preferred by many courts when interpreting *Bowman*.[191] It is the wrong approach for several reasons.

First, despite the appeal to competence and accountability, presumptive delegation through *Chevron* deference is an inappropriate approach to reconciling the *Bowman* exception and *Morrison*. A pro-deference argument grounded in *Chevron*'s theory of presumptive delegation must first pass the wrinkle added by *United States v. Mead Corp*.[192] In the wake of *Chevron*, deference to agency resolution of statutory ambiguity was understood to be based upon a legal fiction that ambiguity was an implied delegation of interpretive

185. Posner & Sunstein, *supra* note 177, at 1204–05.

186. *Id.* at 1177. They bolster their advocacy by attacking the value of international comity doctrines; that the benefits of deference to foreign regulations do not always outweigh the costs. *Id.* at 1185.

187. Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 670 (2000).

188. *See* Posner & Sunstein, *supra* note 177, at 1198 ("The international relations doctrines should not operate as constraints on the executive under *Chevron* Step One.").

189. *See id.* ("If the executive's interpretation is unreasonable, of course, it will be invalid under Step Two . . . .").

190. *Id.* at 1205.

191. *See supra* notes 93–95, 120 and accompanying text.

192. United States v. Mead Corp., 533 U.S. 218 (2001).

authority.[193] *Mead*, not precluding the possibility of implied delegation, imposed a threshold determination of actual legislative intent to delegate interpretive authority before applying *Chevron* deference.[194] That determination is based, namely, on indications that Congress delegated the agency to act with the force of law and that the agency acted pursuant to that authority.[195] The *Mead* Court identified, as a touchstone of legislative intent, the statutorily enumerated administrative procedure by which an agency was to act: statutory mandate to engage in adjudication or notice-and-comment rulemaking being a sufficient example of such delegation.[196] Such formal administrative or notice-and-comment procedures are notably absent from criminal prosecutions for extraterritorial conduct. Criminal statutes typically do not direct or authorize the Attorney General to engage in formalized procedures—drawing on public input—to prosecute violations of the statutes' prescripts. Rather, federal prosecutors satisfy their statutory responsibilities through the interpretative and adjudicative authority of the judicial branch. Absent this determination, *Mead* should assign merely persuasive authority, rather than *Chevron*'s dispositive authority, to the government's interpretation of geoambiguous statutes.[197]

Second, even if executive branch interpretations have persuasive authority—as Posner and Sunstein argue in the alternative[198]—a practical flaw with the competence argument undermines the reasonableness of prioritizing prescriptive comity. There is plausible foundation to believe that the executive branch, as a whole, has

193. *See id.* at 240 (Scalia, J., dissenting) (observing that *Chevron* was previously justified by "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency" (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996))).

194. *See id.* at 237 (majority opinion) (justifying use of *Chevron* deference when there are indications of *actual* congressional intent to delegate legally binding authority).

195. *See id.* at 226–27 ("[Agency action] qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.").

196. *See id.* at 227 ("Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.").

197. *See id.* at 228, 237 (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), as the default deference standard).

198. *See* Posner & Sunstein, *supra* note 177, at 1205 ("[I]n the domain of foreign relations, the approach signaled in *Chevron* should apply even if the executive is not exercising delegated authority to make rules or conduct adjudications.").

greater institutional competence than the legislative or judicial branch when it comes to foreign relations. However, it does not follow necessarily that any particular enforcement agency has greater institutional competence in foreign relations or that it will even consider implications for foreign relations when prosecuting extraterritorial misconduct.[199] Moreover, Professors Derek Jinks and Neal Kumar Katyal have rejected the Posner-Sunstein proposal by disputing that the executive branch's legal positions enjoy any comparative advantage of institutional competence and accountability, absent assurances that bureaucratic expertise was actually involved in the development of those positions.[200]

Third, although the presumption against extraterritoriality is concerned with international comity, harmony is not its exclusive rationale.[201] Multiple Supreme Court opinions have employed the presumption using the premise that Congress legislates primarily with a concern for domestic matters.[202] Moreover, the presumption is also a manifestation of the Court's disdain for judicial speculation.[203] It sets out for Congress a "background rule"—a reliable expectation—against which legislation can be drafted to achieve what Congress actually intends.[204] Therefore, the presumption is now at least as much about faithful agency as it is about achieving desirable outcomes. The Posner-Sunstein argument unjustifiably prioritizes prescriptive comity, to the exclusion of the presumption's other goals.

---

199. *See* Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1280 (2007) ("[W]hen claims of a 'unitary executive' become so strong that they permit a President to compress or eliminate agency processes through political influence, and to bypass interagency debate altogether, deference is not being awarded on the basis of expertise. . . . To be sure, the President has a State Department, a Defense Department, law-of-war experts, and the Judge Advocates General at his disposal, but each of these entities can be cut out under streamlined presidential decision-making.").

200. *See id.* at 1281 ("To be sure, the President has accountability advantages (and comparative expertise advantages vis-à-vis the judiciary), but he does not possess those same advantages over Congress. In a case . . . in which the claims pit the powers of Congress against those of the President, deference to the latter can be appropriate, at most, only when the executive can present the argument as the product of deliberative and sober bureaucratic decision-making.").

201. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877–78 (2010) ("The canon or presumption applies regardless of whether there is a risk of conflict between [an] American statute and a foreign law . . . .").

202. *Id.* at 2877; Smith v. United States, 507 U.S. 197, 204 n.5 (1993); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

203. *See Morrison*, 130 S. Ct. at 2881 (observing the per se nature of the presumption against extraterritoriality as an advantage over "judicial-speculation-made-law").

204. *Id.*

Fourth, the executive branch, empowered with the authority to enforce the law, has important and inherent discretion to decline enforcement in a given case.[205] If the executive branch, generally, and the statutory enforcement agencies, like the Securities and Exchange Commission (SEC) or Department of Justice, specifically, enjoy a comparative advantage in institutional competence in foreign relations, it is an advantage better expressed by discrete executive decisions not to enforce the law, rather than a one-time decision to categorically extend an offense's prescriptive scope. It is a much less controversial principle to permit discretionary, instance-specific nonenforcement of *express* statutory prohibitions, than to permit discretionary, wholesale expansion of a geoambiguous statute with the potential to cause international friction. The latter undermines the theory that the executive branch is actually developing a statutory interpretation with vagarious and sensitive international concerns in mind. Therefore, rather than justifying presumptive recourse to executive interpretation, existing law and the Court's concern with international law suggest that the motivating principles behind a strict, civil presumption against extraterritoriality are similarly applicable to the presumption's criminal function.

Captured within this discussion of the appropriate allocation of authority is an argument for using the presumption against extraterritoriality to catalyze a constitutional preference for a deliberative government, as both a protection for weak and disfavored groups—of which criminals seemingly are included—and as a check on the executive branch's power. In that regard, the current dichotomy of a presumption against extraterritoriality applying robustly in the civil context but markedly less so in the criminal context is concerning. Some statutory-interpretation principles are rooted in the concept of providing procedural protections to groups subject to harsh treatment,[206] such as criminals. In this regard, interpretive canons—like the presumption against

205. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) ("The Attorney General and United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws." (quoting Wayte v. United States, 470 U.S. 598, 607 (1985))). "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether *or not to prosecute*, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (emphasis added).

206. *See* Sunstein, *supra* note 176, at 334 (noting a principle underlying some canons of construction that "require[s] a congressional judgment if a group perceived as weak or deserving is going to be treated harshly").

extraterritoriality—play a beneficial role in ensuring that important decisions are made with the input of both political branches. As Sunstein argues: "[T]he nondelegation canons have the salutary function of ensuring that certain important rights and interests will not be compromised unless Congress has expressly decided to compromise them. Thus . . . it is entirely reasonable to think that for certain kinds of decisions, merely executive decisions are not enough."[207] Sunstein considers the interpretive canons to be the "modern nondelegation" doctrine.[208] The canons espouse a preference for the involvement of *both* political branches in sensitive decisions, such as ones that would apply criminal laws beyond U.S. borders.[209] If Congress is responsible for enacting the statute, it is reasonable to expect it to have a role in determining the scope of the risk its legislation poses to foreign relations.

Returning to the matter of deference to the executive branch, Jinks and Katyal express concern that deference to agency expertise in interpreting ambiguous statutory terms, especially in the criminal context, is a one-way ratchet;[210] enforcement agencies will always interpret a geoambiguous statute expansively, especially given their subsequent discretion as to whether to prosecute any particular violation. Even Posner and Sunstein acknowledge this concern regarding self-serving interpretation, observing that deference may not be deserved when the interpretation is the product of a "mere litigation position."[211] As a matter of course, the legal proposition that an ambiguous federal criminal statute should be interpreted as enforceable abroad is likely to arise almost exclusively in the course of litigation or comparable adversarial contexts. There is a weaker argument that permitting the executive branch to determine the geographical scope of an ambiguous criminal statute allows the executive to aggrandize both legislative power to prescribe the scope of a statute—when it has not clearly and narrowly assigned that

207. *Id.* at 338.

208. *Id.* at 342.

209. *See id.* at 333 ("If statutes are to receive extraterritorial application, it must be as a result of a deliberate congressional judgment to this effect. The central notion here is that extraterritorial application calls for extremely sensitive judgments involving international relations; such judgments must be made via the ordinary lawmaking process (in which the President of course participates). The executive may not make this decision on its own.").

210. *See* Jinks & Katyal, *supra* note 199, at 1266 n.132 ("What undergirds the traditional reluctance is the fear of presidential self-dealing—that a President can interpret a statute to expand his own power over individuals.").

211. Posner & Sunstein, *supra* note 177, at 1214–15.

discretion to the executive—and judicial power to interpret congressional intent.[212]

Moreover, the asymmetric application of the presumption against extraterritoriality raises serious constitutional concerns related to due process[213] and the separation of powers.[214] These concerns should cause courts, at a minimum, to reconsider an across-the-board application of the *Bowman* exception. Channeling the words of Chief Justice Burger in *National Labor Relations Board v. Catholic Bishop of Chicago*,[215] "[I]n the absence of a clear expression of Congress' intent . . . , we decline to construe [an] [a]ct in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the [Constitution]."[216] Given the far-reaching implications of deciding a case with latent constitutional questions, a narrow construction of a statute raising such questions has at least two benefits. First, it avoids the creation of precedent on a constitutional matter that was neither directly addressed nor fully developed by the case. Second, it forces Congress to deliberate on the precise issue of whether a given statute was enacted with extraterritorial effect.

Nevertheless, a tool of constitutional avoidance is a blunt instrument. Although using the presumption to avoid difficult constitutional questions may ensure that constitutional rights are not burdened by hard-to-reverse interpretations, it also has the potential for "distorting . . . policy choices" and thwarting the democratic will of Congress.[217] For that reason, the Court has insisted that the constitutional avoidance canon not be employed to construe a statute in such a way as to impose a policy that is disingenuous or not plausible on the statute's face.[218] A criminal mirror to *Morrison*'s strict presumption against extraterritoriality would have the additional

212. *Cf.* Mistretta v. United States, 488 U.S. 361, 382 (1989) ("It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence . . . . Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.").

213. *See infra* Part IV.B.3.

214. *See supra* notes 205–12.

215. NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979).

216. *Id.* at 507.

217. David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1, 16 (2002).

218. *See* Miller v. French, 530 U.S. 327, 341 (2000) (noting that "the saving construction" may not be disingenuous to a statute's plain meaning).

salutary effect of acting as a proxy canon of constitutional avoidance. That is, geoambiguous statutes that can plausibly be interpreted as having no extraterritorial effect would have none and, thereby, would avoid the constitutional questions of due process and separation of powers. The criminal statutes at issue do not raise the Court's concern for "disingenuous evasion" of the statutes' policies.[219] Rather, these statutes are facially ambiguous as to geographical scope; that is, their express provisions do not definitively resolve the reach of the statutes' prescriptions. Application of *Morrison*'s narrow test would ensure that a court engages in a statute-by-statute examination of the criminal provisions to determine whether the focus of those provisions is domestic or extraterritorial.

The circumstances in which the presumption against extraterritoriality is considered do not justify accepting as dispositive the government's interpretation of geoambiguity. The presumption against extraterritoriality is not solely concerned with foreign relations. Neither is it obvious that the executive has, in practice, a clear comparative advantage in weighing the costs and benefits of foreign enforcement. Rather, even if it does, such a cost-benefit determination is best expressed in selective nonenforcement. Moreover, foreign-relations risks posed by legislation should be considered and resolved through the input of both political branches.

3. *Fair Notice*. The final legal point that supports subordination of the *Bowman* exception to *Morrison* is not complex, but it is nonetheless weighty. The Supreme Court has repeatedly affirmed a principle of fair notice when criminal statutes contain ambiguous or inconsistent terms.[220] This concept of fair notice—often manifesting as the rule of lenity—is, at its heart, a policy animated by due process and concerned with forcing the legislature to clearly condemn conduct as criminal as to afford law-abiding citizens the opportunity to bring their behavior into conformity.[221] Although the Court has

219. *Id.* (quoting United States v. Locke, 471 U.S. 84, 96 (1985)).

220. *See, e.g.*, Chapman v. United States, 500 U.S. 453, 463 (1991) (describing the rule of lenity as a basis for construing a criminal statute favorably to the defendant when all attempts to identify congressional intent still result in "'grievous ambiguity or uncertainty in the language and structure of the Act'" (quoting Huddleston v. United States, 415 U.S. 814, 831 (1974)); United States v. Bass, 404 U.S. 336, 347 (1971) ("'[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" (quoting Rewis v. United States, 401 U.S. 808, 812 (1971))).

221. *See Bass*, 404 U.S. at 348.

constrained the use of the defendant-friendly rule of lenity,[222] judicial regard for fair notice, generally, thrives. Moreover, the potential for extraterritorial application of a criminal statute with intractably geoambiguous scope to raise due process claims is glaring. When courts applying the *Bowman* exception circumvent findings of congressional intent by resorting to speculative judgments of how Congress *would have* wanted a statute to apply,[223] such application would seem to be premised on the type of "grievous ambiguity or uncertainty" that the Supreme Court considers a precondition before enforcement yields to the rule of lenity.[224]

The presumption against extraterritoriality, when applied consistently, operates as a lenity-rule proxy by construing geoambiguous statutes against the government. Harking back to the earlier discussion of doctrinal consistency and coherence, the protection that due process principles afford to criminal defendants would be manifestly inverted if *Bowman* and its progeny were distinguished from *Morrison* according to subject matter or actor. Given the default assumption that Congress legislates primarily with a domestic focus,[225] principles of due process should demand that a law—civil or criminal—provide fair notice of departure from that baseline. The presumption against extraterritoriality enforces that requirement for civil statutes by way of its clear-indication requirement.[226] However, *Bowman* watered down such notice by asserting, as a matter of law, that nature-of-the-offense inquiries do not require a strained construction of statutory intent.[227]

Given the greater consequences of criminal sanction and the presence of higher persuasion standards in criminal trials, it would be

---

222. *See, e.g.*, Muscarello v. United States, 524 U.S. 125, 138 (1998) (rejecting a rule-of-lenity argument over the dissent's claims that robust dispute within the Court over the meaning of "carry" inherently implied residual ambiguity that should be resolved in favor of the defendant); *Chapman*, 500 U.S. at 463–64 (suggesting that, absent an "absurd or glaringly unjust" statutory construction, there is no "reasonable doubt" of Congress's intent sufficient to invoke the rule of lenity).

223. *See* United States v. Vasquez-Velasco, 15 F.3d 833, 841 (9th Cir. 1994) ("Congress *would have intended* that [the crime] be applied extraterritorially to cases involving the murder of DEA agents abroad." (emphasis added)).

224. *See Chapman*, 500 U.S. at 463 (quoting *Huddleston*, 415 U.S. at 831) (quotation mark omitted).

225. *See supra* notes 140–42 and accompanying text.

226. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none.").

227. Clopton, *supra* note 51, at 191.

an unusual doctrine that provided for extraterritorial application of geoambiguous criminal laws using less stringent indications of congressional intent than similar civil laws.[228] Similarly, permitting public actors greater leeway than private actors with respect to extending the application of statutes with geoambiguous scope may provide for greater recognition and promotion of government interests, but it provides little support for the proposition that a potential violator of statutory provisions will be on notice as to a law's extraterritorial application.

C. *Distinction-Based Alternatives to Narrowing the* Bowman *Exception*

Although the foregoing arguments march toward the conclusion that *Morrison* and the *Bowman* exception should be reconciled through the latter's restriction or abrogation, its subordination to *Morrison* is not the only option. Courts could perpetuate the *Bowman* exception by distinguishing *Morrison* on the grounds that either (1) criminal subject matter warrants special statutory rules, or (2) public actors deserve greater latitude than private actors to pursue statutory violations abroad. As this Section demonstrates, however, these alternatives do not withstand scrutiny.

1. *Criminal-Civil Distinctions*. One option for a *Bowman-Morrison* distinction is on the basis of criminal and civil subject matters. Others have observed that "[w]hile *Morrison* has the potential to extend to criminal cases, . . . the broad spectrum of cases to which *Morrison* may be extended will probably not include criminal cases."[229] This distinction could establish the *Bowman* exception as a subject-matter exception to *Morrison*'s general presumption[230] or it could doctrinally sever the relationship between civil and criminal applications of the statutory interpretation of extraterritorial application. The latter option finds support in some courts' opinions post-*Morrison*.

228. *See* Marx, *supra* note 158, at 244–45 (noting the dual purposes of the rule of lenity to be "prevent[ing] excessive delegation of criminal lawmaking power to the judiciary" and "[s]kewing statutory construction toward under- rather than overcriminalization [to] help[] ensure that no defendant is convicted for behavior that the legislature did not intend to criminalize").

229. White, *supra* note 75, at 1237.

230. Clopton, *supra* note 51, at 181.

The U.S. District Court for the District of Columbia dismissed *Morrison*-type reasoning in favor of the *Bowman*-based exception in *United States v. Campbell*.[231] In that case, Neil Campbell, an Australian national indicted for soliciting a bribe from a subcontractor on a U.S. government–funded project in Afghanistan, moved to dismiss his indictment because the substantive statute lacked explicit extraterritorial application.[232] The district court denied the motion, concluding that, notwithstanding the per se application of the *Morrison* presumption, the Court's opinion applied directly to civil matters and lacked any indication of consequence to criminal cases.[233]

The Second Circuit substantially agreed with this position in affirming the conviction of a man charged with sexually abusing his minor daughter in conjunction with travel between the United States and Belgium.[234] Although the court concluded that the textual reference to "foreign commerce" and the statute's grammatical structure provided sufficient evidence of extraterritorial intent,[235] the court questioned whether the presumption against extraterritoriality should apply at all.[236] Instead, the court cited sister-circuit precedent to suggest that the presumption against extraterritoriality is either weaker or nonexistent in the criminal context.[237]

The most important rejoinder to the alternative, criminal-civil proposition is that the resulting doctrine would be to formalize the status quo; it would necessarily continue to ignore all of the foregoing concerns regarding the existing doctrinal asymmetries. Additionally, it would functionally liberalize the *Bowman* exception beyond how it is currently applied. *Bowman*, by its terms, does not apply to all

---

231. United States v. Campbell, 798 F. Supp. 2d 293 (D.D.C. 2011).

232. *Id.* at 296–97. Campbell was indicted for violation of 18 U.S.C. § 666(a)(1)(B) for "solicitation of a bribe by an agent of an organization receiving more than $10,000 in federal funds." *Id.* at 296.

233. *See id.* at 303 ("Despite the emphasis of *Morrison* that the presumption against extraterritoriality applies 'in all cases,' recent Supreme Court jurisprudence has developed with nary a mention of *Bowman* and has predominately involved civil statutes." (citation omitted)).

234. *See* United States v. Weingarten, 632 F.3d 60, 62–63 (2d Cir. 2011).

235. *Id.* at 65–66.

236. *Id.* at 66.

237. *See id.* ("[T]here is reason to doubt that the presumption against extraterritoriality applies [here] at all. . . . '*Bowman* does not hold that criminal statutes *always* apply extraterritorially' and instead requires 'judges . . . [to] consider the language and function of the prohibition' . . . ." (second and third alterations in original) (quoting United States v. Leija-Sanchez, 602 F.3d 797, 799 (7th Cir. 2010))).

criminal statutes,[238] and, though some courts have generously construed *Bowman*'s applicability, even those progressive applications have not made the exception completely coextensive with the criminal context.[239] The inadvertent result of such a doctrinal division could be that a number of new classes of criminal offenses could be afforded extraterritorial effect.

2. *Public-Private Actor Distinctions*. The second option, a public-private actor distinction, transcends the criminal-civil divide by recognizing that many civil-enforcement agencies share relevant characteristics with criminal-enforcement authorities.[240] This alternative manner of preserving the *Bowman* exception and distinguishing *Morrison* finds support in *Morrison* itself in the final footnote of Justice Stevens's concurring opinion. Hidden in his disparagement of the Court's transactional test,[241] the concurring Justice alerted the reader to the fact that "[t]he Court's opinion does not . . . foreclose the [SEC] from bringing enforcement actions in additional circumstances, as no issue concerning the Commission's authority is presented by this case."[242]

According to Justice Stevens's ostensibly narrow interpretation of *Morrison*'s holding, the SEC may have been able to bring the same case in the plaintiffs' stead with a different result.[243] Justice Stevens cites two reasons for distinguishing private suits from public enforcement of the Exchange Act: a public actor's sensitivity to international comity[244] and the fewer restrictions on how it effectuates the statute's prohibitions.[245] This public-private actor distinction has

238. *See supra* note 87 and accompanying text.

239. *See supra* notes 88–92 and accompanying text.

240. For example, the SEC pursues civil enforcement of securities law violations.

241. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2895 (2010) (Stevens, J., concurring) ("[W]hile the clarity and simplicity of the Court's test may have some salutary consequences, like all bright-line rules it also has drawbacks.").

242. *Id.* at 2894 n.12.

243. *Id.*

244. *Id.* at 2891–92 & n.7 (citing F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 171 (2004)). "'[P]rivate plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government.'" *Empagran*, 542 U.S. at 171 (alteration in original) (quoting Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 194 (1999)).

245. *See Morrison*, 130 S. Ct. at 2894 n.12 ("The Commission's enforcement proceedings . . . differ from private § 10(b) actions in numerous potentially relevant respects . . . ."); *see also* Brief for the United States as Amicus Curiae Supporting Respondents at 12–13, *Morrison*, 130 S. Ct. 2869 (No. 08-1191), 2010 WL 719337 ("[T]he SEC's enforcement

received greater support since passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[246] which amended the Exchange Act to expressly permit government agencies to bring securities-fraud cases premised on extraterritorial jurisdiction.[247] Anecdotally, this amendment—a response to *Morrison*[248]—supports the argument that, if Congress had to clarify its intent that a statute should operate differently for public actors than private actors, courts should adjust their interpretive guidelines accordingly.

Nevertheless, this alternative proposal is imprudent, too. Ascribing *Bowman*'s lax prohibition on extraterritorial application to public actors does not resolve the difficulties associated with fair notice and assigning different statutory constructions to the same text. Moreover, it only exacerbates concerns regarding appropriate allocation of governmental authority, as more public agencies would enjoy the *Bowman* exception's more easily surmounted presumption against extraterritoriality.

Both the subject-matter-based and actor-based approaches to preserving the *Bowman* exception and distinguishing *Morrison* have at least anecdotal support in law. However, perpetuating the broad *Bowman* exception, in either the criminal or public-actor context, is not the best approach to clarifying the presumption against extraterritoriality. Although these alternative proposals impose distinctions that do not currently exist, they are quite literally distinctions without a difference: the presumption against extraterritoriality under either proposal would exhibit all of the same problems identified in this Note without offering marginal benefits. It would behoove courts to address the existing doctrinal inconsistencies by narrowing or abrogating the *Bowman* exception, rather than making an artificial distinction.

---

activities are not limited by the additional constraints that apply to private suits. Unlike private plaintiffs, . . . the Commission is not required to prove that any investor actually relied on the misrepresentations or that the misrepresentations caused any investors to lose money. . . . The SEC has similarly broad and unqualified authority to bring an action for injunctive relief . . . .").

246. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

247. White, *supra* note 75, at 1228–29 (citing Dodd-Frank Wall Street Reform and Consumer Protection Act § 929P(b)(2) (codified at 15 U.S.C. § 78aa (2012))).

248. *Id.*

CONCLUSION

Extraterritoriality is a common and robust characteristic of U.S. law. Yet, no branch of government should ignore the consequences of the extraterritorial application of domestic law. Justice Brennan noted one scholar's—assumedly tongue-in-cheek—observation that "our country's three largest exports are now 'rock music, blue jeans, and United States law.'"[249] However, the Court has clearly stated and affirmed that such "legal exports" are not a given; sole domesticity is a hurdle to be surmounted only by clear legislative indication.

For the reasons described—namely doctrinal coherence, smart allocation of government authority, and fair notice concerns—that hurdle should not be lower in the criminal context than in the civil one. *Morrison* provides a strong roadmap for construing geoambiguous statutes, and, although its precedent is currently binding only in the civil context, its principles and analysis should be extended to the criminal context, as well, thereby narrowing or abrogating the *Bowman* exception. Absent from the *Bowman* line of cases are persuasive reasons for relaxing the constraints of the presumption against extraterritoriality. That absence is problematic. And, in light of the reasons given in this Note, that absence should be fatal.

249. United States v. Verdugo-Urquidez, 494 U.S. 259, 281 (1990) (Brennan, J., dissenting) (quoting V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L LAW. 257, 257 (1980)).