EVADING LEGISLATIVE JURISDICTION

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In the last few years, and mostly unnoticed, courts have adopted a different approach to issues of legislative jurisdiction. Instead of grappling with the difficult question of whether Congress intended a law to reach beyond U.S. borders, some courts have side-stepped it entirely. Courts have done so by redefining extraterritoriality. Significant and contentious decisions in the Ninth and D.C. Circuits paved the way by holding that not all regulation of overseas foreign conduct is extraterritorial. And then suddenly, in 2010, the U.S. Supreme Court may have unintentionally breathed life into the practice. In its landmark Morrison v. National Australia Bank *decision, the Court suggested that legislation focused on domestic conditions may not be extraterritorial, even if the legislation regulates overseas foreign activity.*

This Essay laments the birth of this troubling new approach, where established law is jettisoned and legislative jurisdiction analysis is evaded. The Essay's aim is largely descriptive: it summarizes an important development and reveals how courts have lapsed into error. But it goes beyond the descriptive to also critique the new practice. Redefining extraterritoriality not only subverts established doctrine, it removes an important safeguard to the difficulties that extraterritorial regulation creates. More problematically, the practice undercuts principles that have been foundational in both domestic and international law.

INTRODUCTION

At one time, the fundamentals of the law of legislative jurisdiction were mostly settled. As a general matter, the law shielded each state from the intrusion of others, ensuring that each could pursue its own economic and social objectives. Extraterritorial regulation—the regu-

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lation of foreign conduct outside the United States—although tolerated under certain circumstances, was disfavored and in tension with basic international law principles. To be sure, significant and vigorous debate existed at the margins over the extent to which constitutional provisions constrained congressional action and over how courts should interpret a statute's geographic reach in the face of congressional silence. But while those debates played out at the periphery, the core doctrine remained untouched.[1] Even when globalization rendered territorial limits to law less important as a descriptive matter, the heart of the doctrinal analysis remained intact. Absent contrary evidence, Congress was presumed to have exercised only its territorial jurisdiction.

What once was set, however, has softened. In the last few years, and largely unnoticed, courts have taken a different tack. Instead of wrestling with the difficult questions of whether Congress intended a law to apply to foreign conduct and, if so, whether doing so is constitutional or consistent with international law, some courts have sidestepped the issue of legislative jurisdiction entirely. They have done so by redefining extraterritoriality itself. Significant decisions in the Ninth and the D.C. Circuits paved the way by holding that not all regulation of overseas foreign conduct is extraterritorial.[2] And then in 2010, perhaps unintentionally, the U.S. Supreme Court seemed to breathe life into the practice. The Court suggested that legislation "focus[ed]" on domestic conditions is not extraterritorial, even if the legislation regulates foreign activity.[3]

This Essay laments the birth of this troubling new approach. Unlike a number of recent articles that have sought to develop com-

1 This description of legislative jurisdiction calls to mind Ernest Gellner's assessment of a Kokoschka painting: discerning a clear pattern in the details is difficult, even though the picture as a whole can be easily recognized. *Cf.* ERNEST GELLNER, NATIONS AND NATIONALISM 139 (1983) (famously comparing the pre-modern, pre-nationalism map to a Kokoschka painting: a "riot of colours," with no clear pattern in the detail, though with a clear overall pattern of diversity, plurality, and complexity).

2 *See* United States v. Philip Morris USA Inc., 566 F.3d 1095 (D.C. Cir. 2009); Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066 (9th Cir. 2006).

3 *See* Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 2884–85 (2010); *see also* 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, 138–39 (2011) (describing how *Morrison* permits "a new approach" that would permit extraterritorial application of criminal law without considering the presumption against extraterritoriality); William S. Dodge, Morrison *'s Effects Test*, 40 S.W. U. L. REV. 687 (2011) (arguing that *Morrison* changes the presumption against extraterritoriality so that the presumption does not apply when effects of conduct are felt in the United States).

prehensive frameworks for addressing extraterritorial regulation[4] or to refashion this area of law,[5] the Essay's goal is more modest. It seeks to limn an important development and reveal how courts have lapsed into error. In so doing, it also aims to clear away some of the confusion that has festered in the lower courts. Part I summarizes the law of legislative jurisdiction and the doctrinal principles that courts use to determine whether Congress intended to regulate conduct occurring outside U.S. borders. Part II then describes how courts have circumvented doctrine through redefining extraterritoriality. Part II ends with a critique of this new practice and explains why redefining extraterritoriality obscures an already difficult analysis. Finally, in Part III, the Essay suggests that a return to well-established law would correct some of the excesses of transnational litigation. It explains why redefining extraterritoriality to evade legislative jurisdiction analysis not only subverts the territorial principle, but removes an important safeguard to the problems that extraterritorial regulation engenders. More problematically, the redefinition marks a sharp departure from foundational principles that have defined the international legal system. It is a departure that, if embraced, threatens to increase global conflict, frustrate multilateralism, and undermine American interests.

A point to stress before proceeding: the doctrinal sleight of hand where courts avoid the thorny issues surrounding legislative jurisdiction is not merely of academic concern. The extension of federal law to activity outside the United States has dramatically increased in the last decade and promises to continue.[6] The way courts approach leg-

4 For a few recent examples, see Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019 (2011); John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 351–52, 396 (2010); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 164–79 (2010).

5 *See, e.g.*, Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 490–511 (2002) (attacking territorial theories of jurisdiction and proposing a "cosmopolitan pluralist" theory); William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 141, 154 (1998) (arguing for a new approach favoring the application of U.S. law whenever conduct abroad causes substantial and foreseeable effects that the U.S. law was intended to prevent); Ralf Michaels, *Territorial Jurisdiction After Territoriality*, *in* GLOBALISATION AND JURISDICTION 105 (Piet Jan Slot & Mielle Bulterman eds., 2004) (describing globalization's challenges to territoriality and describing a variety of possible responses in conceptualizing jurisdiction).

6 *See generally* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (5th ed. 2011) (analyzing the different elements of international civil law cases in U.S. courts); VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS (2d ed. 2008) (establishing, in a multi-volume treatise, the current landscape of transnational litigation for practition-

islative jurisdiction determines, in part, how quickly these sorts of transnational cases will multiply. Indicative of the trend, legislative jurisdiction cases have become a common fixture on the Supreme Court's docket.[7] Not surprisingly, as the world flattens, and people and markets become more interconnected,[8] courts are pressed to provide a forum for malfeasance wherever it occurs.[9] Legislative jurisdiction analysis, however, has a broader significance. It is the doctrinal plane upon which ongoing and significant debates are waged: the importance of national courts in global governance,[10] the role that territoriality should play in law,[11] as well as the extent to which domes-

ers). *See also* Report of the Int'l Law Comm'n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, Annex E, at 516, U.N. Doc. A/61/10 (2006), *available at* http://untreaty.un.org/ilc/reports/2006/2006report.htm (describing and providing examples of how U.S. domestic laws that regulate foreign conduct are becoming "increasingly common"); Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 846–48 (2009) (listing contexts in which U.S. laws have been applied extraterritorially, from antitrust, to copyright, to securities regulation, to trademark, to corporate law and governance, to bankruptcy and tax, to criminal, environmental, civil rights, and labor laws).

7 For some prominent recent examples, see *Morrison*, 130 S. Ct. at 2869; Shady Grove Orthopedic Assoc. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010); Boumediene v. Bush, 553 U.S. 723 (2008); Microsoft v. AT&T Corp., 550 U.S. 437 (2007); Small v. United States, 544 U.S. 385 (2005); Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119 (2005); Pasquantino v. United States, 544 U.S. 349 (2005); Rasul v. Bush, 542 U.S. 466 (2004); F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

8 *See generally* THOMAS L. FRIEDMAN, THE WORLD IS FLAT (2007) (describing how globalization and technological change has led to an interconnected world).

9 *See* INTERNATIONAL BAR ASSOCIATION REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 5 (2009) (hereinafter IBA REPORT), *available at* ibanet.org ("[B]usinesses and individuals are increasingly acting, and producing effects, across state boundaries. In doing so, they enliven the desire of states to assert their laws extraterritorially.").

10 *See, e.g.*, Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59 (2009) (describing how national courts are beginning to more aggressively engage in the interpretation and application of international law); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 217–18 (2003) (describing a world of transnational judicial relations); Melissa A. Waters, *Normativity in the "New" Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts*, 32 YALE J. INT'L L. 455, 459–62 (2007) (describing the role of domestic courts in creating international norms); Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67, 96–115 (2009) (systematically analyzing the global impact of domestic courts). For a well-known early exploration of the role of national courts, see RICHARD A. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (1964).

11 *See, e.g.*, KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? (2009) (analyzing how fundamental changes in American politics have altered the territorial system of American law); TERRITORIALITY AND CONFLICT IN AN ERA OF GLOBALIZATION

tic law, as contrasted with international law, should address transnational challenges.[12] For these reasons, it serves as a cornerstone for a distinct field of law.[13]

I. WELL-ESTABLISHED DOCTRINE?

Legislative jurisdiction refers to Congress's authority to prescribe or regulate conduct.[14] Congress's power to apply its law to occur-

(Miles Kahler & Barbara F. Walter eds., 2006) (discussing the various cause-and-effect relationships among territoriality, conflict, and globalization); *see also* John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L ORG. 139, 174 (1993) (famously noting how little the concept of territoriality has been studied); *cf.* LEGAL BORDERLANDS (Mary L. Dudziak and Leti Volpp, eds., 2006) (examining the role of law in the construction of U.S. borders and the impact that globalization has had on American studies scholarship). A significant debate also plays out in the context of the U.S. Constitution's extraterritorial reach. *See generally* Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 973 (2009) (noting how "[q]uestions concerning the extraterritorial applicability of the Constitution have come to the fore" in recent years in the context of the war on terror).

12 For an overview of these debates, see Parrish, *supra* note 6. *See also* Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 244–47 (2010) (describing the role of international law in the context of extraterritorial constitutional application); Tonya L. Putnam, *Courts Without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere*, 63 INT'L ORG. 459 (2009) (describing the role of domestic courts in transnational regulation); Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 HARV. INT'L L.J. 327, 350 (2006) (arguing that international law must harness the power of national institutions to achieve global objectives). R

13 *See* PHILIP C. JESSUP, TRANSNATIONAL LAW (1956) (reprinting the author's Storrs Lectures, delivered at Yale Law School in February 1956) (coining the term "transnational law" and arguing that the world needed a field of law in this area). For recent discussion, see generally Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301 (2008) (describing transnationalism); Linda Silberman, *Transnational Litigation: Is There a "Field"? A Tribute to Hal Maier*, 39 VAND. J. TRANSNAT'L L. 1427 (2006) (arguing that transnational litigation is a field meriting autonomous treatment). Increasingly, law schools have focused on integrating transnational law into their curriculum. *See* Anita Bernstein, *On Nourishing the Curriculum with a Transnational Law Lagniappe*, 56 J. LEGAL EDUC. 578, 578–79 (2006) (describing integration of transnational law into the curriculum and noting the Association of American Law Schools' announcement that "it is important for first-year law students to gain experience in transnational law" (quoting American Association of Law Schools, 2006 Annual Meeting Program Brochure, "What is Transnational Law and Why Does it Matter?")); Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN. ST. INT'L L. REV. 745, 751–52 (2006) (describing how and why law schools include transnational law in the first-year curriculum).

14 *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 401 (1987); *see also* Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1587

rences in the United States, within constitutional limits, is uncontested.[15] Legislative jurisdiction comes into play when a state attempts to apply its law to the foreign acts of non-nationals. When the United States attempts to formally project its laws outside U.S. borders, issues of extraterritoriality come to the fore. While some of these issues are the subject of spirited debate, many of the precepts are settled.

A. Extraterritoriality Defined

One of the long-settled precepts is the definition of "extraterritoriality." Both courts and commentators refer to extraterritorial legislation the same way: domestic law that regulates conduct abroad.[16] For the U.S. Supreme Court, territorial jurisdiction involves "places over which the United States has sovereignty or has some measure of legislative control."[17] In a similar vein, Black's Law Dictionary defines "jurisdiction" as "[a] government's general power to exercise authority over all persons and things within its territory," while it defines "extraterritorial jurisdiction" as "a court's ability to exercise power

(1978) (defining legislative jurisdiction as "the power of the state to apply its law to create or affect legal interests"). Legislative jurisdiction is often distinguished from adjudicative or judicial jurisdiction, which is the court's power to subject particular persons or things to the judicial process. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 401(b)–(c).

15 *See* IBA REPORT, *supra* note 9, at 11 ("The starting point for jurisdiction is that all states have competence over events occurring and persons . . . present in their territory. This principle, known as the 'principle of territoriality,' is the most common and least controversial basis for jurisdiction."); *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 297 (6th ed. 2003) (describing territorial jurisdiction as non-controversial).

16 *See* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1218 n.3 (1992) (explaining that a case "involves extraterritoriality when at least one relevant event occurs in another nation"); Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631, 636 (2009) ("Historically, in its strictest sense, the concept [of territorial jurisdiction] referred to the exclusive authority of a state to regulate events occurring within its borders."); Jane C. Ginsburg, *Extraterritoriality and Multiterritoriality in Copyright Infringement*, 37 VA. J. INT'L L. 587, 588 (1997) (defining extraterritoriality as "the application of one country's laws to events occurring outside that country's borders"); Meyer, *supra* note 4, at 123 (explaining that "a law is extra- R territorial if it governs acts that occur outside the nation-state's borders, even if committed by the nation's own citizens").

17 EEOC v. Arabian Am. Oil Co. ("Aramco"), 499 U.S. 244, 248 (1991); *see also* Pasquantino v. United States, 544 U.S. 349, 371 (2005) (explaining that the presumption against extraterritoriality does not apply when conduct occurs in the United States); Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993) ("By definition, an extraterritorial application of a statute involves the regulation of conduct beyond U.S. borders.").

beyond its territorial limits."[18] This is not to say that extraterritorial regulation is forbidden or necessarily even of dubious legality. On the contrary, international law permits states to regulate overseas conduct in a number of contexts, such as regulating the conduct of its own citizens.[19] But when Congress uses a basis of jurisdiction other than territorial jurisdiction, Congress has regulated extraterritorially.

This understanding—that extraterritoriality is implicated whenever a state exercises jurisdiction on a basis other than territorial jurisdiction—is consistent with the doctrine's historical underpinnings. Limiting a state's regulatory authority to activities within its borders was at one time beyond dispute. In the personal jurisdiction, choice of law, and international law contexts, rules had territorial limits.[20] As Justice Story famously declared, "every nation possesses an exclusive sovereignty and jurisdiction within its own territory," and "it would be wholly incompatible with equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory."[21] Beale summarized the universally agreed upon rule the same way: "Since the power of a state is supreme within its own territory, no other state can exercise power there . . . . It follows generally that no statute has force to affect any person, thing, or act, outside the territory of the state that passed it."[22] These understandings were widely held.[23] And even when strict territorial approaches eventually gave way in other areas of

18 BLACK'S LAW DICTIONARY 929 (9th ed. 2009).

19 Under international law, states may regulate foreign conduct under generally five bases of jurisdiction: territoriality, nationality, protective principle, passive personality, and universality. *See* A. SHEARER, STARKE'S INTERNATIONAL LAW 183–212 (11th ed. 1994). More controversial is whether international law permits extraterritorial regulation under the effects test. *See* Austen L. Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455 (2008); *see also* BORN & RUTLEDGE, *supra* note 6, at 599–601, 680 (describing the "nationality doctrine").

20 *See, e.g.*, Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356–57 (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.") (legislative jurisdiction); Pennoyer v. Neff, 95 U.S. 714, 720 (1878) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.") (adjudicatory jurisdiction); The Apollon, 22 U.S. 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens.") (legislative jurisdiction); Schooner Exch. v. McFadden, 11 U.S. (7 Cranch) 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute.").

21 JOSEPH STORY, COMMENTARIES ON THE CONFLICTS OF LAWS 19, 21 (Hilliard, Gray & Co., 1834).

22 1 JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS 311–12 (1935); *see also Am. Banana Co.*, 213 U.S. at 356 (explaining that statutes must be construed "to be

the law,[24] states were still cautious about extending law beyond the water's edge. Congress would be presumed to usually regulate only activity in U.S. territory or under American control.

A limited exception to the notion that foreign conduct was beyond a state's territorial jurisdiction was known as the "objective" application of the territorial principle. In situations where a crime's effects were so much part of the act that produced them "that their separation [would render] the offense non-existent," courts found territorial jurisdiction implicated even though the conduct that commenced the crime occurred abroad.[25] Simply that a crime's effects were felt within a state, however, was insufficient. Rather, jurisdiction existed only when the crime's nature meant that the crime was consummated in the place where the direct effect of the criminal act took place (i.e., when those effects were a constituent element of the crime).[26] Hence, when a person fired a gun across a border and

confined in . . . operation and effect to the territorial limits over which the lawmaker has general and legitimate power").

23 *See* S.S. "Lotus" (Fr. V. Turk.), 1927 P.C.I.J. (sr. A) No. 10, at 45 (Judgment of Sept. 7) ("The first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial . . . ."); *id.* at 204 (Lord Finlay) ("A country is no more entitled to assume jurisdiction over foreigners than it would be to annex a bit of territory which happened to be very convenient for it."); *see also* 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 236 (1906) ("There is no principle better settled than that the penal laws of a country have no extraterritorial force."); Research in International Law, Harvard Law School, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SUPP. 435, 480–84 (1935) [hereinafter *Harvard Research*] (describing territorial jurisdiction and settled tenets).

24 *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 318–20 (1950) (replacing territorial-based notice rules with rules focused on fairness); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (moving away from a territorial theory of jurisdiction in the personal jurisdiction context). In the conflicts-of-law context, various theories were advanced to replace territorial rules. *See, e.g.*, DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS (1965) (attempting to create a "rational analytical framework" for conflict-of-law controversies); BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963) (analyzing the various issues of conflicts-of-laws); ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS (1962) (analyzing the history and policy backgrounds in conflicts-of-law cases). For a description of this move away from territorial theories, see Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts of Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 379 (1966) (describing how legal realists attacked territorial approaches to conflicts of law).

25 *S.S. "Lotus,"* 1927 P.C.I.J., at 86.

26 *See id.* (noting that the effect must constitute a constituent element of the crime); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 18(b) (1965) (explaining the effect must constitute a constituent element of the crime); *Harvard Research, supra* note 23, at 480, 494–95 (explaining for the objective applica- R

killed another in a neighboring state, the crime was said to have occurred within the neighboring state.[27] As a leading American authority once put it: "The principle that a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil was done, is recognized in the criminal jurisprudence of all countries."[28]

But this exception—or, perhaps, qualification—to the common concept of territorial jurisdiction was narrow. It was generally limited to the criminal context; the effects had to be substantial and direct, if not immediate; and the effects also had to form a part of the *actus reus*, so that the crime would be considered completed in the territory claiming jurisdiction.[29] Only a few crimes met these requirements.[30] And even if the requirements were met, the crime had to be an offense "which the community of civilized nations ha[d] come to regard as justifying a modification of the strict territorial principle."[31]

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tion of the territoriality principle, the effect must be indistinguishable from the act, as an "essential constituent element" or "part" of the crime); *see also* R.Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146, 159–60 (1957) (describing the objective territorial principle); *cf.* Strassheim v. Daily, 221 U.S. 280 (1911) (articulating an effects test).

27 *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 18, Illus. 2; *see also* Simpson v. State, 17 S.E. 984, 985 (Ga. 1893) ("[I]f a man in the State of South Carolina criminally fires a ball into the State of Georgia, the law regards him as accompanying the ball, and as being represented by it, up to the point where it strikes.").

28 *See* Jennings, *supra* note 26, at 157 (quoting 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 244 (1906)). R

29 *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE U.S. § 18(b); *see also* Jennings, *supra* note 26, at 160 (analyzing limiting factors in an effects test for extraterritorial jurisdiction); *Harvard Research*, *supra* note 23, at 487–94 (arguing that a state should have jurisdiction if any part of the crime is committed within those borders). R R

30 The United States had "rarely sought to prosecute for crimes committed outside its territorial jurisdiction." Note, *Extraterritorial Jurisdiction—Criminal Law*, 13 HARV. INT'L L.J. 346, 347 (1972); *see also* Note, *Extraterritorial Application of the Antitrust Law: A Conflict of Law Approach*, 70 YALE L.J. 259, 266–68 (1960) (describing the prohibition against extraterritorial enforcement of penal laws). In 1970, the National Commission on Reform of Federal Criminal Laws reported that "the issue of the extraterritorial application of the federal criminal law is one which does not arise frequently." NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT 21 (1971). And when legislation was proposed to obviate the need for courts to ascertain the extraterritorial implications of federal criminal law legislation, jurisdiction over activity having substantial effects in the United States was notably absent. Criminal Justice Reform Act of 1975, S.1, 94th Cong., 1st Sess. § 204 (1975).

31 George Winthrop Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639, 643–44 (1954).

The objective territorial principle was in many ways then simply a restatement of the understanding that "a crime is committed wherever an essential element of the crime is accomplished."[32] Of course, it had to be this way. If all acts—criminal or otherwise—invoked territorial jurisdiction wherever effects were felt, "[it] would permit a practically unlimited extension of [the objective territorial] principle to cover almost any conceivable situation."[33] This once obvious observation was near definitional, for "[i]t would be absurd, indeed, if an almost unlimited extraterritorial jurisdiction could be ostensibly based upon a territorial principle of jurisdiction."[34]

Admittedly, Congress does not always legislate using its territorial jurisdiction. From time to time, Congress regulates foreign conduct exercising a different basis of jurisdiction. But when Congress has done so, it has always considered the regulation extraterritorial. Even when some courts controversially began applying an expansive effects approach, to allow jurisdiction over conduct having substantial effects within the United States,[35] courts and policymakers nevertheless described the regulation as extraterritorial. The well-studied antitrust context underscores the point. While the U.S. antitrust laws have prescribed certain foreign activity since the 1940s, those laws have always been treated as extraterritorial regulation.[36] Many have criticized the

32 *Harvard Research*, *supra* note 23, at 494; *see also* David J. Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INT'L L. 185, 195–98 (1984) (explaining that objective territoriality applies where the criminal act was consummated, i.e., where the consequences of the act were localized). R

33 Jennings, *supra* note 26, at 160. R

34 *Id.*; *see also* Christopher L. Blakesley, *Extraterritorial Jurisdiction*, *in* INTERNATIONAL CRIMINAL LAW 106–08 (M. Cherif Bassiouni ed., 3d ed. 2008) (describing how the object territorial theory was expanded liberally and impermissibly in some contexts); G.W. Haight, *Antitrust Laws and the Territorial Principle*, 11 VAND. L. REV. 27, 35 (1957) (noting that *S.S. Lotus* did not intend an "obliteration of territoriality" and quoting Justice Story that "[t]he absurd results of such a state of things need not be dwelt upon"). For a detailed recent description of the objective territoriality principle and its subsequent development into a more expansive effects doctrine in the United States and Germany, see Buxbaum, *supra* note 16, at 638–42. R

35 *See* Steele v. Bulova Watch Co., 344 U.S. 280, 288 (1952) (applying trademark law to foreign activity with U.S. effects); United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945) (describing jurisdiction based on effects); *see also* Buxbaum, *supra* note 16, at 639 (describing how the objective territoriality principle was dramatically expanded with an effects approach); Gerber, *supra* note 32, at 195–96 (distinguishing objective territoriality from an effects approach). For a description of the effects test, its development, and its problems, see Parrish, *supra* note 19. R R R

36 For some prominent examples, see Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159 (1999); Haight, *supra* note 31; John Byron Sandage, Forum Non Conveniens *and the Extraterritorial Application of the United States Antitrust Law*, 94 YALE L.J. 1693 (1985); Russell J. Weintraub, *The Extrater-* R

antitrust laws for aggressively reaching out beyond U.S. borders, while others find the regulation essential. But neither courts, scholars, nor practitioners take the position that the antitrust laws are just business as usual: a plain, vanilla exercise of territorial jurisdiction.[37]

B. Determining the Reach of Domestic Laws

While the definition of extraterritoriality is generally well-understood, in broad-brush, so too is the doctrinal analysis. Traditionally, courts approach assertions of extraterritorial regulation with a two-pronged inquiry. First, does Congress have the power to enact the law? Second, did Congress exercise that power? On occasion, courts have infused a third, judicial-restraint assessment into the analysis.

The first prong, although well-accepted, is often overlooked or simply assumed to be met. The U.S. Constitution and international law impose limits on Congress's ability to regulate foreign conduct. The Fifth Amendment's Due Process Clause[38] and other constitutional provisions[39] provide some limitation on Congress's ability to regulate conduct with little connection to the United States.[40] Under

ritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach, 70 TEX. L. REV. 1799 (1992); *see also* Note, *Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach*, 70 YALE L.J. 259 (1960) (discussing the importance of extraterritorial applications of antitrust law).

37 That extraterritoriality is implicated when a domestic law seeks to regulate the conduct of foreigners abroad is consistent with how that term is used in determining the reach of the U.S. Constitution. The U.S. Constitution has been held to constrain government action within the United States' territory or control. While the Constitution may or may not follow the flag, constitutional rights and protections are generally not afforded to foreigners on foreign soil. *See* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991).

38 *See* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992). *But see* A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379 (1997) (arguing against due process limits to extraterritorial regulation). For a discussion of due process limitations domestically, see Reese, *supra* note 14, at 1589. R

39 *See* Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 951–58 (2010) (describing limits imposed by the foreign commerce clause). For a discussion of limits in the criminal law context, see Eugene Kontorovich, *Beyond the Article I Horizon, Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1219–23 (2009); Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149 (2009).

40 Professor Lea Brilmayer is probably the best known for championing the position, in the adjudicatory and legislative jurisdiction contexts, that some relationship between the defendant and the United States must exist for a state's exercise of authority to be politically legitimate. *See, e.g.*, Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 86–87 (1980); Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293, 294

international law, a state only has the power to regulate within one of the traditional categories of jurisdiction.[41] Because of these constitutional and international law limitations, courts avoid reading statutes in a way that would raise significant constitutional concerns[42] or in a way that would violate international law.[43]

When Congress has authority to regulate foreign conduct, courts must still assess whether Congress intended to exercise that authority. This is the second prong of the analysis. In the face of legislative silence or ambiguity, courts generally presume that Congress does not intend to regulate extraterritorial conduct.[44] The nature and amount

(1987); Lea Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 FLA. ST. U. L. REV. 389, 391 (1987); Brilmayer & Norchi, *supra* note 38. R

41 *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 299–307 (7th ed. 2008) (setting out the bases of jurisdiction under international law).

42 Edward J. DeBartolo Corp. v. Fl. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress."). For recent analysis and overviews of the doctrine, see Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181 (2009); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006). For the classic critique of canons of construction, see Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

43 "[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains." Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 115 cmt. a (1987) (noting that "[i]t is generally assumed that Congress does not intend to repudiate an international obligation"). The "practice of using international law to limit the extraterritorial reach of statutes" is not a new approach, but "firmly established in [the U.S. Supreme Court's] jurisprudence." Hartford Fire Ins. Co. v. California, 509 U.S. 764, 818 (1993) (Scalia, J., dissenting); *see also* F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) (courts "must assume" that "Congress ordinarily seeks to follow . . . principles of customary international law"); Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (quoting *Murray*, 6 U.S. (2 Cranch) at 118 ("[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.")). *See generally* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998) (analyzing *Charming Betsy* doctrine and changes in international law since the outcome of that case); Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990) (discussing international law generally and within the context of the *Charming Betsy* case).

44 *See* Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869 (2010) (reaffirming the presumption against extraterritoriality); Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 545 (2007) (affirming the presumption and noting that "foreign conduct is [generally] the domain of foreign law"); Small v. United States, 544 U.S. 385, 388–89

of evidence sufficient to overcome the presumption admittedly is hazy,[45] but the need to ascertain congressional intent is always the starting point for the analysis.[46] This two-step approach is consistent with how courts assess Congress's use of jurisdiction in other contexts. Courts commonly conclude that Congress has not exercised its full power and interpret statutes to fall well within constitutional or international law limits.[47]

Even if Congress authorized extraterritorial regulation, at times courts exercise discretion and for prudential reasons decline to hear a case.[48] Although the basis for such abstention is not entirely clear, generally this sort of abstention falls under the umbrella of "interna-

(2005) (affirming the presumption); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)) (affirming the presumption); *see also* CURTIS BRADLEY & JACK GOLDSMITH, FOREIGN RELATIONS LAW 625 (2d ed. 2005) (noting that "[t]he Supreme Court has applied a presumption against extraterritoriality since early in the nation's history")

45 *See Morrison*, 130 S. Ct. at 2869. A significant amount of scholarship has recently debated the benefits and detriment of clear statement rules. *See, e.g.*, John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 417–23 (2010) (providing an overview of the "wide-ranging debate" about clear statement rules). *Compare* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 612–29 (1992) (criticizing clear statement rules), *with* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1585–93 (2000) (defending clear statement rules).

46 *See Hartford Fire Ins. Co.*, 509 U.S. at 813–14 (Scalia, J., dissenting) ("[T]he extraterritorial reach of the Sherman Act . . . turn[s] on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct."); *cf.* Pasquantino v. United States, 544 U.S. 349, 379 (2005) (Ginsburg, J., dissenting) ("Congress . . . has the sole authority to determine the extraterritorial reach of domestic laws."); *Arabian Am. Oil Co.*, 499 U.S. at 248 ("It is our task to determine whether Congress intended the protections of Title VII to apply to United States citizens employed by American employers outside of the United States."), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1071, 1077 (codified as amended at 42 U.S.C. § 2000e(f) (2006)).

47 *See, e.g.*, Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152–53 (1908) (interpreting the statutory grant of federal question jurisdiction to be narrower than what is constitutionally permitted); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (Marshall, C.J.) (interpreting the statutory grant of diversity jurisdiction to be narrower than constitutional limits).

48 *See, e.g.*, Lauritzen v. Larsen, 345 U.S. 571, 583–92 (1953) (looking towards principles of international law and adopting a multi-factor balancing approach); *see also* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297–98 (3d Cir. 1979) (applying a balancing of interests approach); Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 613–14 (9th Cir. 1976) (limiting the effects test through a rule of reason or interest balancing approach that accounts for international comity concerns).

tional comity."[49] Employing comity, courts consider a host of factors to determine whether the exercise of jurisdiction would be reasonable.[50] Comity in the legislative jurisdiction area is thus used in a way akin to its use in judicial abstention,[51] forum non conveniens,[52] parallel proceedings,[53] and in other related contexts.[54] In general, courts balance the interests of the United States in having the claim heard in a U.S. court against the international comity ramifications of doing

49 Hilton v. Guyot, 159 U.S. 113, 163–64 (1895) (defining international comity); *see also* Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 11 (2010) (discussing comity as a limit on assertions of jurisdiction).

50 *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) (explaining that a court should "ordinarily construe . . . ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations"); *see also* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS 228 (1996) (describing the rule of reason/international comity approach); Max Huffman, *A Retrospective of Twenty-Five Years on the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 298–300 (2007) (describing the factors courts consider in comity analysis).

51 *See* Younger v. Harris, 401 U.S. 37, 44–48 (1971) (*Younger* abstention); La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28–29 (1959) (*Thibodaux* abstention); Burford v. Sun Oil Co., 319 U.S. 315, 333–34 (1943) (*Burford* abstention); R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941) (*Pullman* abstention). *See generally* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1186–1212 (5th ed. 2003) (summarizing the various abstention doctrines).

52 *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 238 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507–09 (1947). For an early overview of the doctrine, see Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947).

53 *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 805–06 (1976); Landis v. N. Am. Co., 299 U.S. 248, 254–55 (1936); *cf.* Turner Entm't Co. v. Degeto Film GmbH, 25 F.3d 1512, 1518–23 (11th Cir. 2004) (describing international abstention). For a discussion of abstention in the context of parallel proceedings, see Austen L. Parrish, *Duplicative Foreign Litigation*, 78 GEO. WASH. L. REV. 237, 247–51 (2010) (describing different approaches to declining jurisdiction in the face of concurrent, duplicative foreign proceedings).

54 For the seminal article arguing that courts have discretion to decline to exercise jurisdiction, see David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985). For earlier discussions, see Hon. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982); Nathan Isaacs, *The Limits of Judicial Discretion*, 32 YALE L.J. 339 (1923).

so.[55] Invoking comity to decline jurisdiction, however, is controversial, in disfavor, and now infrequent.[56]

To say that the core principles surrounding the law of legislative jurisdiction are settled does not mean that this area of law is free from dispute. The law of legislative jurisdiction is notorious for being badly fragmented and in disarray on the margins. Scholarly tussles are common and court decisions often reflect a degree of confusion.[57] Significant disagreement exists, for example, over the application of different canons of construction. The Supreme Court has not resolved what exactly is required to overcome the presumption against extraterritoriality, nor do the justices agree on the role of clear statement rules in statutory interpretation.[58]

55 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 403 (1987); *see also* LOWENFELD, *supra* note 50, at 228 (describing the approach); Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 86–90 (1992) (arguing for jurisdiction based on whether the U.S. has greatest connection to the disputes); Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the* Insurance Antitrust Case, 89 AM. J. INT'L L. 42, 48–50 (1995) (describing interest-balancing approach). R

56 *See* Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 229–37 (2001) (describing the rise and fall of interest balancing); *see also* Phillip R. Trimble, *The Supreme Court and International Law: The Demise of* Restatement *Section 403*, 89 AM. J. INT'L L. 53, 57 (1995) (arguing that the international comity approach has lost any influence); Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563, 564–65 (2000) (explaining how the *Hartford Fire* case "dealt comity a near death blow" and that "comity as a legal doctrine in the courts has seen better days and will rarely be successful").

57 *See* Colangelo, *supra* note 4, at 1021 (noting that "[a]cademic debate has raged for decades" and the area is "badly fragmented and confused"); Knox, *supra* note 4, at 351–53 (describing inconsistency in the Court's jurisprudence leading to confusion); Meyer, *supra* note 4, at 114–19 (describing scholarly debates and different approaches—unilateral, territorial, and interest-balancing). R R

58 *See* Knox, *supra* note 4, at 351–53. From time to time, scholars have invited courts to ignore the presumption against extraterritoriality and to dramatically expand extraterritorial jurisdiction. *See, e.g.*, William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 90 (1998) (arguing that the effects test should negate the presumption against extraterritoriality); Larry Kramer, *Extraterritorial Application of American Law After the* Insurance Antitrust *Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT'L L. 750, 752 (1995) (arguing for application of U.S. law over foreign conduct that produces substantial effects within the United States). While some lower courts have toyed with this idea, the Supreme Court has consistently declined the invitation. *See supra* note 44. R R

C. The History of American Extraterritoriality

Before continuing, a brief, albeit overly simplified, description of the reasons behind the growth in extraterritorial regulation may be helpful to appreciate the current pressure on courts to redefine extraterritoriality. At the turn of the nineteenth century, the United States was in its nascent stages as a world power.[59] While some important exceptions existed, particularly when dealing with the southern border,[60] the United States was nervous about broadly extending its law's reach. This was understandable. Extraterritorial laws were viewed as empire building and the province of great powers. Reciprocity was also a concern. The United States did not want European powers meddling in its internal affairs, and extraterritorial laws conjured reminders of the "taxation without representation" that the early colonists railed against.[61]

After the Second World War, however, the calculus changed. Extraterritorial regulation in the commercial arena became an important weapon in the Cold War. It was a way for a dominant power in a bipolar world to promote liberal capitalist democracy and free markets, while checking Soviet ambition. First with antitrust and then with securities regulation, the United States sought to expand international influence through the unilateral application of domestic law. Changes in other areas of the law also made the use of extraterritorial regulation more acceptable. Territorial limits in choice-of-law, personal jurisdiction, and other areas had given way in the domestic context (albeit for different reasons), which provided a superficial

59 *See* RAUSTIALA, *supra* note 11, at 57 (explaining how, "[a]s a weak nation, with an uncertain relationship to the great powers of the day, the early United States was unsurprisingly drawn to the principle of complete sovereign control within demarcated geographic borders"); *see also* BARTHOLOMEW SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE (2006); WALTER LAFEBER, THE NEW EMPIRE (1963). R

60 *See* DANIEL S. MARGOLIES, SPACES OF LAW IN AMERICAN FOREIGN RELATIONS 140–75 (Univ. of Ga. Press, 2011) (describing U.S. border actions); *see also* Daniel S. Margolies, *The "Ill-Defined Fiction" of Extraterritoriality and Sovereign Exception in Late Nineteenth Century U.S. Foreign Relations*, 40 SW. L. REV. 575 (2011) (discussing extraterritoriality in the Nineteenth Century).

61 *See* DANIEL A. SMITH, TAX CRUSADERS AND THE POLITICS OF DIRECT DEMOCRACY 21–23 (1998) (describing how Boston politician James Otis rephrased the English "No Taxation Without Legislation" phrase that became the leading slogan of the American revolution); Judge Grant Dorfman, *The Founder's Legal Case: "No Taxation Without Representation" Versus* Taxation No Tyranny, 44 HOUS. L. REV. 1377, 1377–81 (2008) (describing the history behind the phrase); James Otis, *The Rights of the British Colonies Asserted and Proved (1764), reprinted in* 2 COLONIES TO NATION 28, 30 (Jack P. Greene ed., 1967).

justification for making territoriality less important when addressing transboundary disputes.[62] Legal realism's influence on the courts in the post-War period[63] similarly made the bright-line rules and classic legal thought that girded legislative jurisdiction analysis more suspect, tempting courts to employ more flexible standards and balancing tests.[64] And lastly, the development of the modern administrative state after the New Deal meant that extraterritorial regulation was just one component of other dramatic changes that promoted comprehensive regulation.[65]

A second wave of extraterritoriality was seen almost fifty years later. At the Cold War's conclusion in the early 1990s, extraterritorial regulation became important in a way different than it had been before. Domestic regulation, applied to foreign conduct, became a more palatable way to exert global influence than traditional empire building.[66] While commercial laws—following in the steps of antitrust and securities—had often been applied to regulate foreign conduct, non-commercial laws had tended to be more constrained.[67] For many scholars, it was time to change that. From human rights, to environmental regulation, to labor and employment law, the projection of American law was a way for U.S. interest groups to solidify domestic

62 *See* BORN & RUTLEDGE, *supra* note 6, at 84–88, 724–88; *see also infra* note 64.

63 *See* MICHAEL KARAYANNI, FORUM NON CONVENIENS IN THE MODERN AGE 114–25 (2004) (describing the impact of legal realism on jurisdictional rules after the Second World War).

64 *See, e.g.*, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 317–24 (1950) (replacing territorial-based notice rules with rules focused on fairness); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (replacing territorial rules with rules focused on fairness in the personal jurisdiction context). *See generally* George Rutherglen, International Shoe *and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 347 (2001) (describing how the law of personal and legislative jurisdiction and the related fields of venue and choice of law were "swept clear of nearly all rules, at least those that [could] be applied in more of less determinate fashion").

65 *See* Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 12–13 (2002) (describing how "[i]n the New Deal and immediate postwar eras, domestic regulatory law expanded markedly in the U.S. and across the globe"); Anne-Marie Slaughter & David T. Zaring, *Extraterritoriality in a Globalized World*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=39380 (connecting the growth of extraterritoriality with the rise of the regulatory state).

66 *See* Nico Krisch, *More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 135, 156 (Michael Byers & Georg Nolte eds., 2003) (describing the U.S. shift from international law to domestic law as a tool of foreign policy).

67 *See* Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598 (1990) (describing a different treatment in market and non-market cases).

power, while at the same time promoting American liberal values.[68] Globalization, changes in communication and technology, and the well-publicized unsavory practices of some multinational corporations gave greater urgency to regulate malfeasance, wherever it occurred. After 2001, the extraterritorial application of U.S. criminal law also became an expeditious way to counter terrorism.[69]

Increased extraterritorial regulation was also consistent with intellectual trends as legal scholars from both the right and left of the political spectrum withdrew from traditional, state-based, international law.[70] For neo-realist or sovereigntists scholars, extraterritorial regulation was a way to exert foreign influence, while avoiding international obligations. For constructivists, pluralists, and liberal internationalists, extraterritorial regulation fit nicely with emerging theories of transnational legal process, transnational networks, and the idea that national courts are part of pluralistic cross-border dialogues. For many, the growth of extraterritorial regulation appeared consistent with, and appeared "logically responsive" to, globalization, the declining power of the sovereign nation-state, and the rise of non-state and sub-state actors.[71]

68 *Cf.* YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS 61–72 (2002) (describing how the human rights movement in the United States was closely allied with domestic politics); Yves Dezalay & Bryant Garth, *Legitimating the New Legal Orthodoxy*, *in* GLOBAL PRESCRIPTIONS 310 (2002) (explaining how "labor unions and environmental groups in the United States today take their fights for influence over domestic policy into transnational arenas" because "[s]uccess in the transnational arena helps particular groups build domestic legitimacy and protect their domestic power and influence from erosion through transnational decision making and rule construction").

69 *See* RAUSTIALA, *supra* note 11, at 187; *see also* Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121 (2007) (discussing the implications of extraterritorial criminal law); Charles Doyle, CONG. RESEARCH SERV., Rep. No. 7-5700, *Extraterritorial Application of American Criminal Law* 1 (Mar. 26, 2010) (describing how a "surprising number of federal criminal statutes have extraterritorial application"). R

70 For an overview, see Bryant G. Garth, *Rebuilding International Law After the September 11th Attack: Contrasting Agendas of High Priests and Legal Realists*, 4 LOY. U. CHI. INT'L L. REV. 3 (2007); *see also* Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1404–14 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005)). *See generally* Parrish, *supra* note 6, at 822–32 (discussing shifts away from traditional state-centric positions). R

71 *See, e.g.*, Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 329–70 (2002) (arguing that globalization has challenged territorial based rules for jurisdiction); Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 184 (suggesting that "the world in which a presumption against extraterritoriality made sense is gone"); Saskia Sassen, *Territory and Territoriality*

As certain groups embraced extraterritoriality for instrumental reasons in the late 1990s, cases involving legislative jurisdiction also became the backdrop against which the U.S. Supreme Court would debate other issues—the role of federal courts in resolving global challenges, the appropriateness of clear-statement rules, the use of canons of construction, and whether rules should be preferred over standards.[72] Often Supreme Court cases addressing legislative jurisdiction served as convenient vehicles for the justices to explore these other issues, with the significant problems of extraterritoriality not taking center stage.[73] And as the recent Court redefined itself, legislative jurisdiction cases became a convenient canvas on which the Court could advance its vision of legislative primacy and its constrained approach to statutory construction.[74] While law schools continued to focus on doctrines of personal jurisdiction, subject-matter jurisdiction, and *forum non conveniens* as the bread-and-butter of procedure, it was cases implicating legislative jurisdiction that regularly appeared on the U.S. Supreme Court's docket, grabbed national headlines, and wrought significant changes in law and policy.[75]

II. A Dangerous Trend

A new wrinkle has developed that threatens to accelerate the growth of extraterritorial regulation. Courts have begun to seek ways to evade legislative jurisdiction analysis entirely. Decisions in the Ninth and D.C. Circuits exemplify the trend, while the U.S. Supreme Court's recent opinion in *Morrison v. National Australia Bank* may prove to encourage the practice.

A. Evading Extraterritoriality

Over the last few years, a number of high-profile cases have sidestepped the issue of extraterritoriality. One in the Ninth Circuit and

in the Global Economy, 15 Int'l Soc. 372, 373 (2000) (noting that "we are seeing processes of incipient denationalization of sovereignty—the partial detachment of sovereignty from the nation state"). *See generally* Raustiala, *supra* note 11, at 228–30, 241–43 (analyzing changes in the territorial system of American law). R

72 For a recent discussion, see Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 Harv. L. Rev. 1214 (2010).

73 *Morrison* is illustrative, with the justices focusing mostly on debates of legislative primacy. *See* Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869 (2010).

74 *See* Lea Brilmayer, *The New Extraterritoriality:* Morrison v. National Australia Bank*, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 Sw. L. Rev. 655 (2011).

75 *See supra* note 7. R

another in the D.C. Circuit are notable in how far they creatively veered from prior doctrine.

1. Environmental Harm and the Ninth Circuit

First was the Ninth Circuit's landmark decision in *Pakootas v. Teck Cominco Metals, Ltd.*[76] *Pakootas* involved a privately owned Canadian corporation that operates a smelting plant in Trail, British Columbia, Canada, just a few miles north of the American border.[77] For decades, the smelter dumped slag—a fine, sand-like byproduct of the smelting process—into the Columbia River in accordance with Canadian environmental laws and permits.[78] In 2003, after preliminary testing of the upper-Columbia river basin within Washington State, the U.S. Environmental Protection Agency issued a Unilateral Administrative Order demanding that the Canadian corporation conduct a study consistent with the U.S. Superfund (CERCLA) laws.[79] After the Canadian corporation refused to comply, in July 2004 a Native American tribe brought a CERCLA citizen's suit against the Canadian corporation in federal court.[80] The suit sought to enforce the EPA's order and require that the Canadian corporation pay the clean-up costs as a responsible party under CERCLA.[81]

The lawsuit was unprecedented.[82] It represented the first time that a tribal government had filed a petition for preliminary assessment under CERCLA.[83] The lawsuit was also the first time the EPA had taken the extraordinary step of issuing a unilateral order to a Canadian company doing business solely in Canada. Perhaps most significantly, it was the first lawsuit brought under CERCLA that

76 452 F.3d 1066 (9th Cir. 2006), *cert. denied*, 552 U.S. 1095 (2008); *see also* Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363 (2005) (discussing the complaint).

77 *See Pakootas*, 452 F.3d at 1068.

78 *See id.* at 1069; *see also* Parrish, *supra* note 76, at 370–72 (describing the extent of the pollution by the trail smelter in the Columbia River). R

79 *See Pakootas*, 452 F.3d at 1070; *see also* U.S. ENVTL. PROT. AGENCY, UPPER COLUMBIA RIVER EXPANDED SITE INSPECTION REPORT, NE. WASH. 2–11 (2003) (discussing studies and results regarding slag).

80 *See Pakootas*, 452 F.3d at 1070.

81 *See id.*

82 For a detailed description of its unprecedented nature, see Parrish, *supra* note 76, at 367, 379–80, nn.83–85 (citing sources and interviews). R

83 *See* Richard A. Du Bey & Jennifer Sanscrainte, *The Role of the Confederated Tribes of the Colville Reservation in Fighting to Protect and Clean-Up the Boundary Waters of the United States: A Case Study of the Upper Columbia River and Lake Roosevelt Environment*, 12 PENN ST. ENVTL. L. REV. 335, 359 n.161 (2004).

attempted to apply the Superfund laws to a Canadian company for conduct occurring entirely outside the United States.[84] The defendant immediately moved to dismiss the case.[85] The key preliminary issue was whether CERCLA covered the foreign conduct: could the EPA force a Canadian company, governed by Canadian environmental law and operating solely in Canada, to comply with the terms of U.S. domestic environmental regulations?[86]

The reaction was not entirely surprising. The Canadian government bristled at what it perceived to be an impermissible interference with its own domestic environmental policies.[87] Canada pointed to a bilateral treaty—the 1909 Boundary Waters Treaty[88] and its institutions[89]—as the appropriate mechanism for addressing this sort of transboundary dispute.[90] The defendant in turn argued that as a result of the preexisting international agreement covering transboundary water disputes, Congress did not intend CERCLA to apply to foreign conduct.[91] The district court, however, was not persuaded. It found that CERCLA applied extraterritorially because the effects of the pollution (i.e., the slag discharges) were felt in the United States.[92] It also concluded that the presumption against extra-

84 *See Washington State Tribe Sues Canada Smelter Over Pollution*, DOW JONES INT'L NEWS, July 22, 2004 (stating that the case is believed to be "the first case of Americans suing a Canadian company under U.S. Superfund law").

85 *See Pakootas*, 452 F.3d at 1071.

86 *See id.*

87 Brief of the Government of Canada, Amicus Curiae in Support of Petitioner at 2, *Pakootas*, 452 F.3d 1066 (No. 06-1188); *see also EPA Battles Canadian Company Over Columbia River*, U.S. WATER NEWS ONLINE, Dec. 2003, *available at* http://www.uswaternews.com/archives/arcquality/3epabat12.html (noting that "[n]ot since the Pig War of 1859 between the United States and Great Britain has there been such an international brouhaha in the Pacific Northwest").

88 Treaty Relating to the Boundary Waters, U.S.-Can., Jan. 11, 1909, 36 Stat. 2448.

89 *See generally* THE INTERNATIONAL JOINT COMMISSION SEVENTY YEARS ON (Robert Allan Spencer et al. eds., 1981) (describing Canada's institutions).

90 Brief of the Government of Canada, *supra* note 87, at 2–4.

91 *See Pakootas*, 452 F.3d at 1073.

92 *See* Order Denying Motion to Dismiss, Pakootas v. Teck Cominco Metals, Ltd. at 14, No. CV-04-256-AAM (E.D. Wash. Nov. 8, 2004) (order denying motion to dismiss). The district court explained:

> There is no dispute that CERCLA, its provisions and its "sparse" legislative history, do not clearly mention the liability of individuals and corporations located in foreign sovereign nations for contamination they cause within the U.S. At the same time, however, there is no doubt that CERCLA affirmatively expresses a clear intent by Congress to remedy 'domestic conditions' within the territorial jurisdiction of the U.S. That clear intent, combined with the well-established principle that the presumption [against extraterritoriality] is not applied where failure to extend the scope of the statute to a

territoriality does not apply when effects are felt within the United States.[93]

The District Court's decision is difficult to square with the objective territoriality principle, but it is consistent with a line of cases applying a more expansive effects-based approach to jurisdiction.[94] If simply affirmed, the decision would have been unremarkable. The Ninth Circuit, however, neatly avoided the key questions altogether and by doing so broke with even the most far-reaching precedent. Instead of assessing whether Congress intended CERCLA to apply to Canadian conduct, or whether the "effects test" reverses the presumption against extraterritoriality, the Ninth Circuit defined away the problem. Because the clean-up site was in the United States, the court found the application of CERCLA to be purely domestic.[95] Inventing a new and previously unseen approach, the Ninth Circuit found the place where the remedy was sought to be the key question. It explained that "[t]he location where a party arranged for disposal or disposed of hazardous substances is not controlling for purposes of assessing whether CERCLA is being applied extraterritorially."[96] The conclusion was puzzling because liability was based on the conduct of a Canadian company, operating solely in Canada, in accordance with

> foreign setting will result in adverse effects within the United States, leads this court to conclude that extraterritorial application of CERCLA is appropriate in this case.

Id.

93 *Id.* at 21.

94 Parrish, *supra* note 76, at 387–93 (describing effects-based jurisdiction). For an example of the line of cases adopting an expansive effects-approach, see Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 925 (D.C. Cir. 1984); Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968). R

95 *Pakootas*, 452 F.3d at 1078 ("Because the actual or threatened release of hazardous substances triggers CERCLA liability, and because the actual or threatened release here, the leaching of hazardous substances from slag that settled at the Site, took place in the United States, this case involves a domestic application of CERCLA.").

96 *Id.*; *see also id.* at 1079 (holding that CERCLA is not applied extraterritorially "even though the original source of the hazardous substances is located in a foreign country").

Canadian law. The decision's reasoning baffled commentators[97] and was widely criticized.[98]

The Ninth Circuit, however, has not stood alone in its willingness to sidestep the difficult questions legislative jurisdiction raises. A second prominent example of a court evading issues of legislative jurisdiction is the D.C. Circuit's 2009 decision in *United States v. Philip Morris*.[99]

2. Tobacco, Criminal Conspiracies, and the D.C. Circuit

The *Philip Morris* case involved massive litigation between the United States and the tobacco industry.[100] The United States sued nine cigarette manufacturers and two tobacco-related trade organizations under the civil RICO laws, alleging that the defendants had joined together in a decades-long scheme to deceive the American public about the health effects and addictiveness of smoking cigarettes.[101] One of the defendants, however, was a British company that was sued for activity and statements made outside the United States.[102]

97 *See, e.g.*, Jonathan Remy Nash, *The Curious Legal Landscape of Extraterritoriality of U.S. Environmental Laws*, 50 VA. J. INT'L L. 997, 1009 (2010) (noting the ambiguity of the case for extraterritoriality and that it was decided on convoluted grounds); Stephen R. Smerek & Jason C. Hamilton, 1 *Extraterritorial Application of U.S. Law After* Morrison v. National Australia Bank, 5 DISP. RESOL. INT'L 21, 33 (2011) (noting the "Ninth Circuit sidestepped the extraterritorial question" in *Pakootas*).

98 A number of student notes have summarized and criticized the decision. *See, e.g.*, Jennifer S. Addis, Note, *A Missed Opportunity: How* Pakootas v. Teck Cominco Metals, Ltd. *Could Have Clarified the Extraterritoriality Doctrine*, 32 SEATTLE U. L. REV. 1011, 1013, 1026 (2009) (arguing that the Ninth Circuit "disregard[ed] its existing precedent" and describing "flaws" in a "faulty" analysis); Nathan L. Budde, Note, Pakootas v. Teck Cominco Metals, Ltd.*: When Outside the Borders Isn't Extraterritorial, or, Canada Is in Washington, Right?*, 15 TUL. J. INT'L & COMP. L. 675, 686–89 (2007) (arguing that the outcome was correct but that the Ninth Circuit "danc[ed] around," "slipped," and "sidestepped" the extraterritoriality issue); Jordan Diamond, Note, *How CERCLA's Ambiguities Muddled the Question of Extraterritoriality in* Pakootas v. Teck Cominco Metals, Ltd., 34 ECOLOGY L.Q. 1013, 1015, 1035 (2007) (noting that while the "Ninth Circuit's reasoning was not flawed," "the court's holding skirted the important issues at stake" and "failed to address . . . the logical disconnect between holding a Canadian company liable for conduct that occurred entirely in Canada in what it characterized as a domestic application"); Libin Zhang, Comment, Pakootas v. Teck Cominco Metals, Ltd., 31 HARV. ENVTL. L. REV. 545, 545 (2007) (describing the Ninth Circuit as "evad[ing]" the extraterritoriality question and having "strained legal fiction" to create an "uncomfortable precedent").

99 566 F.3d 1095 (D.C. Cir. 2009).

100 *Id.* at 1105–06.

101 *Id.*

102 *Id.* at 1130.

The case therefore asked, among other things, whether Congress intended RICO to apply to the foreign conduct of non-nationals.[103]

The D.C. Circuit failed to tackle the difficult question of RICO's extraterritorial reach—an issue on which the lower courts were divided.[104] As with the Ninth Circuit's *Pakootas* decision, the D.C. Circuit treated regulation of foreign conduct as domestic, *not* extraterritorial, regulation. Without looking at RICO's text, the overall statutory scheme, the legislative purpose or history, or any other benchmark for ascertaining congressional intent, the court concluded that Congress wanted the statute to regulate the foreign conduct of foreign corporations.[105] It did so by designating a new category of statutes with "true extraterritorial reach" and found that the presumption against extraterritoriality solely applies in those "true" cases.[106] The court opined that only statutes that "reach foreign conduct with no impact on the United States" are extraterritorial.[107] Departing from and dramatically expanding the objective territoriality principle without saying so, the D.C. Circuit found that a law is territorial even when the effects are not "elements of mail and wire fraud offenses or associated RICO violations."[108] According to the D.C. Circuit, Congress's regulation of foreign conduct is never extraterritorial, so long as substantial effects are felt within the United States.[109]

The D.C. Circuit's decision was a significant expansion of even that circuit's prior jurisprudence. At one time, effects could never be a basis for jurisdiction, except in the very narrow objective territoriality cases. Then, law and practice appeared to soften to permit countries to regulate foreign conduct when substantial effects were felt within a state's borders. Under this approach, the effects test was used to determine the outer limits of congressional authority.[110] Unless a substantial, foreseeable effect was intended to be felt within the United States, Congress would not have authority to regulate foreign conduct and the courts would avoid reading a statute to do so absent an express statement. Other courts used effects as one factor among

103 *Id.*

104 *Id.*; *see* Brief of the International Association of Defense Counsel, Amicus Curiae in Support of the Petitioner, British Am. Tobacco (Invs.) Ltd., v. United States, *cert. denied*, 130 S. Ct. 3502 (2010) (No. 09-980).

105 *Philip Morris*, 566 F.3d at 1129–30.

106 *Id.* at 1130.

107 *Id.*

108 *Id.*

109 *Id.* ("Congress's regulation of foreign conduct meeting this 'effects' test is '*not* an *extraterritorial* assertion of jurisdiction.'" (citing Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 923 (D.C. Cir. 1984))).

110 *See* Parrish, *supra* note 19, at 1499–1500. R

many in determining legislative intent, while a few outlying decisions expanded the effects test even more to find that when a substantial effect is felt within the United States, the presumption against extraterritoriality no longer applies. The D.C. Circuit's decision in *Philip Morris*, however, went significantly beyond that. It outstripped prior precedent to find that once an effect is felt in the United States no inquiry into congressional intent is necessary at all. It not only reversed the presumption against extraterritoriality, changing it into a presumption in favor of extraterritorial regulation, but used the effects test as a substitute for, and affirmative evidence of, congressional intent.[111] The Ninth and D.C. Circuit cases might be viewed as aberrations and outliers—unfortunate perhaps, but limited to their facts. Yet the U.S. Supreme Court in 2010—in a decision that at least one scholar has described as "the most important decision construing the geographic scope of a statute in almost twenty years"[112]—seemed to open the door for the practice to continue.

B. A New "Focus"

Morrison v. National Australia Bank, Ltd.[113] involved three Australian investors who had bought stock in Australia's largest bank.[114] The investors contended that one of the bank's subsidiaries in Florida had fraudulently miscalculated interest rates on mortgages it was servicing, causing the value of the parent bank's stock to plummet.[115] The investors sued in the United States, pursuing a class-action remedy and claiming that the Florida-based subsidiary had made false and misleading statements to the U.S. Securities and Exchange Commission as well as falsified financial data in Florida.[116] The key issue was whether the anti-fraud provisions of the American securities laws applied to investment deals that occurred abroad when the securities deal involved a company whose stock was not traded in the United States.[117] More specifically, the case asked whether section 10(b) of the 1934 Securities and Exchange Act "provide[d] a cause of action to

111 *Philip Morris*, 566 F.3d at 1130.

112 Dodge, *supra* note 3, at 687; *see also* Brilmayer, *The New Extraterritoriality*, *supra* note 74, at 656–57 (arguing that *Morrison* fundamentally redefined the concept of extraterritoriality); Theresa L. Davis & James Michael Scheupele, *Transnational Fraud Claims and the Extraterritorial Reach of U.S. Securities Laws:* The Beginning of a New Era? 1–2 (2010), *available at* http://www.loeb.com (follow publications). R R

113 130 S. Ct. 2869 (2010).

114 *Id.* at 2875.

115 *Id.* at 2876.

116 *Id.*

117 *Id.*

foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges."[118]

The court unanimously concluded that section 10(b) did not provide a cause of action under these circumstances.[119] The Court did so by reaffirming the presumption against extraterritoriality and finding that insufficient evidence existed that Congress intended the Act to apply to foreign securities.[120] The Court also explained that merely because some of alleged illegal activity occurred in the United States did not mean the Act was only being applied domestically.[121] *Morrison*'s doctrinal breakthrough was how it put an end to so-called "foreign cubed" cases—that is cases brought by foreign claimants against a foreign company in relation to shares bought on a foreign exchange.[122]

In its reasoning, the Court spent considerable ink condemning the circuit court's creation of the "effects" and "conduct" tests. With what some have described as sarcasm,[123] Justice Scalia, writing for the majority, chastised the Second Circuit for having created "judicial-speculation-made law," without putting "forward a textual or even extratextual basis" for the effects or conduct tests.[124] The opinion rejected the argument that domestic effects alone could overcome the presumption against extraterritoriality, colorfully explaining that "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved."[125]

The Court could have stopped there. Instead, however, it went farther to inject a suggestion that the presumption against extraterritoriality only applies to foreign, not domestic, cases.[126] The petitioners asserted that they sought only a domestic application of the Act

118 *Id.* at 2875.

119 *Id.* at 2888.

120 *Id.* at 2883.

121 *Id.* at 2885.

122 *See* Jonathan R. Tuttle et al., Morrison v. National Australia Bank*: Reflecting on Its Impact One Year Later*, 1904 PLI/CORP. 701, 703 (2011) (noting how the case rejected so-called "F-Cubed" cases).

123 *See, e.g.*, Lyle Denniston, *Stock Fraud Law: For U.S. Only*, SCOTUS BLOG (June 24, 2010, 5:43 PM) http://www.scotusblog.com/2010/06/stock-fraud-law-for-u-s-only/ ("With evident sarcasm, Justice Antonin Scalia's opinion for the Court rapped Circuit Courts for having created, by judicial invention, the authority to decide such lawsuits when filed by private investors.").

124 *Morrison*, 130 S. Ct. at 2879–81.

125 *Id.* at 2884.

126 *Id.*

because the conduct they sought to punish occurred in Florida.[127] The Court responded by saying that a court had to assess the "focus" of the Exchange Act. It concluded that the Act's focus was not "upon the place where the deception originated, but upon the purchases and sales of securities in the United States."[128] A focus analysis is a new addition to the landscape of legislative jurisdiction analysis.[129] If a court determines that the statute's focus is on activity within the United States, the presumption becomes irrelevant.[130] In so doing, the Court created an unintended loophole that provides courts leeway to skirt the presumption against extraterritoriality.[131]

C. Critiquing the Evasion

The upshot of *Morrison*'s focus discussion, combined with the Ninth and D.C. Circuit decisions, is not just that it encourages courts to do an end-run around legislative jurisdiction analysis. Treating the regulation of foreign activity as "domestic regulation," simply because an adverse impact is felt in the United States, creates a presumption in favor of extraterritorial jurisdiction.

The impact of eviscerating doctrine this way is at least three-fold. First, it potentially promises to increase the amount of extraterritorial regulation through judicial decisions. In a modern, globalized economy, finding some impact on the United States is always possible.[132] Second, it upsets the background default rules upon which Congress legislates. At the very least, it makes those rules less meaningful.

127 *Id.* at 2883.

128 *Id.* at 2885. This differed from traditional analysis which assumed that Congress's focus was usually territorial unless Congress indicated otherwise. *See* United States v. Bowman, 260 U.S. 94, 97–102 (1922) (describing the locus of criminal laws).

129 *See* Brilmayer, *supra* note 74, at 661 (noting that the focus analysis "is a relative newcomer to the jurisprudence of extraterritoriality").

130 *See id.*

131 *See id.* at 663–64 ("The possibility that the presumption against extraterritorial application of a statute can be circumvented simply by declaring the presumption inapplicable creates a major loophole."). Admittedly, the Court likely did not intend to create such a loophole. The Court declined, however, to accept review in either the D.C. Circuit or Ninth Circuit decisions. Its willingness to let those decisions stand, combined with its discussion of "focus," provides leeway for mischief in the future and has led some commentators to assert that the Supreme Court supports the D.C. and Ninth Circuit's novel approaches. *See* Clopton, *supra* note 3; Dodge, *supra* note 3. R

132 *See* BORN & RUTLEDGE, *supra* note 6, at 573 (questioning whether in today's global economy basing jurisdiction on effects permits almost limitless legislative jurisdiction); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1182 (2007) ("[I]n an electronically connected world the effects of any given action may immediately be felt elsewhere with no relationship to physical geography at all."). R

When a court will apply the presumption against extraterritoriality and when it will choose to ignore it becomes less clear. Third, it encourages more ad hoc decisions and reduces predictability as courts have little guidance as to which rules to follow (at least outside the securities context). In cases where a court is opposed to finding the law applies, the court can invoke a rigorous presumption against extraterritoriality. In cases where a court wishes to provide a remedy, the court can simply define away the problem. Legislative jurisdiction thus becomes overly malleable: providing judges cover to make what otherwise would be tendentious or merits-driven decisions (or, at least, decisions based on other, unwritten considerations).[133] In turn, the presumption against extraterritoriality is rendered too feeble to protect against exorbitant jurisdictional assertions.

Even if a more charitable assessment is made, encouraging courts to sidestep the jurisdictional analysis or engage in a "focus" analysis contributes little but obfuscation to the legislative jurisdiction analysis. It takes a relatively straightforward inquiry into congressional intent and replaces it with a free-wheeling assessment of the legislation's gravitational center. Another problem exists. What courts should consider in determining the "focus" of legislation is uncertain. Presently, the test is so unformed that lower courts have almost no guidance on how to proceed in a principled way. A focused analysis thus may give new life to a broadly-conceived effects test[134]—an approach that the Supreme Court appeared to wish to enter with *Morrison*.

III. A RETURN TO FIRST PRINCIPLES

As stated in the Introduction, this Essay's purpose is not to provide an extensive framework or rubric for deciding legislative jurisdiction cases. Its primary aim is descriptive: to reveal a recent development that, if not checked, may augur a sea change in how courts address legislative jurisdictional issues. The Essay ends, however, by suggesting that courts would do well to return to the well-established tenets of legislative jurisdiction and international law.

133 *See* Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721, 735–41 (1979) (arguing for intellectual honesty and the need for judges to accurately articulate the reasons for their decisions); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737–50 (1987) (arguing that honesty and candor are essential attributes to the judicial process); *see also* Knox, *supra* note 4, at 388 ("Courts should strive to employ interpretative canons that are transparent and coherent enough for Congress, the executive and everyone else concerned to be able to predict whether and how they will be used to construe legislation."). R

134 *See* Dodge, *supra* note 3 (arguing that *Morrison* embraced an effects test despite language in the opinion to the contrary). R

Courts should be skeptical of a litigant's claims that Congress intends a law to apply to the foreign conduct of non-citizens.

A. A Revived Presumption, the End to Effects

In the wake of *Morrison*, lower courts will be tempted to follow one of two paths—either to take to heart the Court's condemnation of the effects test, or instead circumvent it through a focus analysis that finds extraterritoriality not in play if domestic effects are shown. With luck, courts won't be lulled to the wrong path and will more closely hew to the presumption against extraterritorial regulation when dealing with foreign defendants acting abroad.[135] The presumption that Congress only employs its territorial jurisdiction absent a congressional directive is not an arbitrary or hollow canon—it encapsulates important considerations.

Enshrined in the presumption is the recognition that extraterritorial laws regulating foreigners are problematic and should be used with great care. As an initial matter, extraterritorial laws that impose obligations on non-citizens are inherently undemocratic because they impose obligations on individuals and groups who have no formal voice in the political process and who have not consented to those laws.[136] Because of this political-legitimacy deficit, laws that regulate foreign conduct are often perceived to be antithetical to basic notions of fairness and self-governance.[137] Not surprisingly, extraterritorial

135 Adhering to the presumption should present no doctrinal difficulty for courts: the Supreme Court has repeatedly told the courts to follow it. *See id.* In *Morrison*, the Supreme Court reaffirmed the continuing vitality of the presumption. Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 2877–78 (2010).

136 *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."); THE FEDERALIST NO. 39 (James Madison) (emphasizing that the Constitution's authority would derive from popular consent); THE FEDERALIST NO. 52 (James Madison) (arguing that greater exercises of power require more frequent voter participation); *cf.* John Locke, TWO TREATISES OF GOVERNMENT 362 (Peter Laslett ed., 1988) (suggesting that government authority can legitimately derive only from the consent of the governed). The Supreme Court's jurisprudence often underscores the importance of the right to a voice in legislative processes. *See* Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious . . . than that of having a voice in the election of those who make the laws. . . . Other rights, even the most basic, are illusory if the right to vote is undermined."). For an argument that the right to democratic representation is becoming an international norm, see Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

137 *See generally* Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT'L & COMP. L. REV. 297, 312–13 (describing

regulation is barred domestically: the extraterritoriality principle formally prohibits American states from regulating conduct of non-citizens occurring in sister states.[138] Indeed, it is particularly odd that under current jurisprudence American states when joining a federal system purportedly retained greater sovereignty to be free from extraterritorial regulation than foreign countries.[139] While debate exists as to how much sovereignty states retain under the Constitution, no one argues that states secured greater sovereignty by joining the Union.

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the unfairness and undemocratic nature of extraterritorial laws regulating foreigners). Extraterritorial laws are in tension with the universal right under international law to self-government. *See, e.g.*, American Convention on Human Rights art. 23, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; U.N. GAOR, 3d Sess., 183d plen. mtg. at 75, U.N. Doc. A/810 (Dec. 10, 1948); Universal Declaration of Human Rights, G.A. Res. 217A, at 75, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948). Similarly, extraterritorial laws are in tension with the right to self-determination. *See* U.N. Charter art. 2, para. 7 (noting the UN's basic respect for the principle of equal rights and self-determination of peoples); *cf.* Russell A. Miller, *Self-Determination in International Law and the Demise of Democracy?*, 41 COLUM. J. TRANSNAT'L L. 601 (2003) (examining democratic deficiencies that have plagued invocation of the international legal principle of self-determination).

138 The extraterritoriality principle holds that a state may "may not 'project its legislation into [other States].'" Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582–83 (1986) (alteration in original) (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935)); *see also* Healy v. Beer Inst., 491 U.S. 324, 336–37 (1989) (explaining that states may not regulate "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State . . . [if its] practical effect is to control conduct beyond the boundaries of the State," or if it risks creating a problem with "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." (quoting Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982))); Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881) (stating that a state may not legislate "except with reference to its own jurisdiction"). For scholarship describing the extraterritoriality principle in the domestic context, see Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1520–21 (2007) (describing the general prohibition against extraterritorial regulation, but noting that it is formal in nature and not absolute); Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1884–1913 (1987) (describing the extraterritoriality principle). *Cf.* Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1135 (2010) (noting a strand of dormant Commerce Clause jurisprudence that prohibits domestic extraterritorial regulation, but concluding that political processes, not the Constitution, imposes limits on when a state within the United States may regulate conduct occurring in another state).

139 *See* Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1128–29 (2009) (advocating for "within-jurisdiction effects as a basis for regulation" drawn from international cases, while noting that this is not the current law in domestic legislative jurisdiction).

Second, the presumption serves a separation-of-powers function and helps allocate authority. Underlying the presumption is the understanding that Congress, rather than the courts, is better equipped to make the policy and judgment calls as to whether law should apply to foreign conduct.[140] The presumption thus requires that Congress must have actually given the issue of a statute's geographic reach thought: congressional silence is insufficient. It also conveys an allocation-of-authority concept in a different way. The presumption reflects the pragmatic reality that international law, rather than domestic law, is often best suited to address international challenges.[141] Simply put, global challenges usually require comprehensive, harmonized responses, with cooperation and agreement among many states. Unilaterally imposed extraterritorial measures often undermine and hamper those multilateral efforts.

Third, a robust territorial presumption reduces friction with foreign nations, who bristle at what they perceive to be illegitimate assertions of power, if not legal imperialism.[142] Indeed, other countries view jurisdiction based solely on effects with inherent suspicion, if not as outright violative of international law.[143] The result is that foreign countries often attempt to weaken the impact of extraterritorial regulation through diplomatic protests, nonrecognition of judgments, and blocking or clawback statutes.[144] In addition, on the margins, the presumption avoids difficult constitutional and international law issues that can arise with extraterritorial regulation of non-citizens.[145]

140 *See* Bradley, *supra* note 43, at 524–29 (arguing that a central purpose of the *Charming Betsy* canon is to avoid having judges, who are politically unaccountable and inexpert in foreign affairs, erroneously place the United States in violation of international law through their construction of a statute); Knox, *supra* note 4, at 386 ("Courts have no expertise in foreign relations, and whenever possible they should take care not to create political headaches for those with responsibility in this area."). A similar argument is made in the domestic context. *See supra* text accompanying note 138. R R R

141 The concept of a natural forum is familiar in the federal-state context.

142 *See* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 28–29 (1987) (describing how an exorbitant jurisdictional assertion "can readily arouse foreign resentment," "provoke diplomatic protests, trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields").

143 *See* BORN & RUTLEDGE, *supra* note 6, at 569, 573, 648–50 (explaining how "post-War assertions of U.S. legislative jurisdiction often aroused diplomatic protests and legal objections from foreign states"); John B. Sandage, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law*, 94 YALE L.J. 1693, 1698 (1985) (explaining that the effects test was perceived as "Yankee 'jurisdictional jingoism' [that] created wide-spread resentment"). R

144 *See* Parrish, *supra* note 19, at 1491–92 nn.190–93. R

145 *See supra* notes 136–39, 142–43.

To avoid misunderstanding, emphasizing the limits of this Essay's critique is also necessary. Adhering to principles of territoriality on the international arena is not to solve the current debate among the justices as to what is required to show a "clear indication of intent," and to what extent legislative history or other indicia of intent can be accounted for. Believing that countries should avoid using domestic law to regulate the foreign activity of non-citizens is not to necessarily require a strict clear statement rule.[146] But it does mean that domestic effects alone are never a basis for assuming that Congress intended to regulate foreign activity. And it requires that whenever a litigant seeks damages based on foreign activity that a court must ascertain whether Congress intended to regulate that foreign conduct. In this way, the effects test should be constrained, or at least not further expanded. At the very least, it suggests that the reasoning of the Ninth Circuit and D.C. Circuit decisions was wrong.

Another misunderstanding is also common. It is tempting to engage in the conceit that extraterritorial laws are necessary, or at least that courts should rescue Congress from its oversight if it failed to contemplate the issue of geographic scope when it enacted a law. The worry over regulatory-free zones where foreign companies appear liberated from U.S. laws motivates the concern. But while seductive, the concern has always been misleading. First, under the nationality principle, a state has jurisdiction to regulate the conduct of citizens abroad.[147] So while it is true that citizens and U.S. corporations should not be able to escape national regulatory objectives by simply moving certain activities offshore, that truism does not support basing jurisdiction on the effects of foreign conduct. The problems with extraterritoriality do not apply, or are significantly reduced, in situations where the United States holds its own citizens, and its own government, to domestic standards abroad. Second, suggesting that courts should gingerly assume that Congress exercised extraterritorial power is not to argue for no regulation. The opposite is true. In a modern, global economy, transnational activities usually require some level of regulation, if not comprehensive regulation. But there is no reason to assume that the regulation must be, or is appropriately, unilateral and domestic in nature. Instead it is to recognize that interna-

146 Clear statement rules have their drawbacks. *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 959 (1992) (noting the "extraordinary burdens" that clear statement rules impose on the legislative process).

147 *See, e.g.*, The Apollon, 22 U.S. 362, 370 (1824) ("The law of no nation can justly extend beyond its own territory, *except so far as regards to its own citizens.*" (emphasis added)); *see also Harvard Research*, *supra* note 23, at 445 (describing the nationality principle). R

tional law, and the consent-based multilateralism upon which it is based, is better suited to address international disputes.

B. The World in Our Courts, Americans in Foreign Courts

Although the foregoing suggests there are theoretical, doctrinal, and other drawbacks to courts evading legislative jurisdiction analysis, a long-term pragmatic concern is also at stake. The readiness of courts to apply U.S. law to the foreign conduct of non-citizens says much about what form of global governance the U.S. wishes to promote. Will international challenges in the coming decades be resolved comprehensively or in a hodge-podge, piece-meal fashion? Will the world be one governed by multilateral agreement or instead by a free-for-all, where each state is free to impose its own vision and where exceptionalism rather than the rule of law controls?

While the "unilateral-free-for-all" vision has its adherents, how far that vision departs from common understandings of international law is worth underscoring. The international system was structured in a way to encourage cooperation, reduce conflict, and promote democratic self-government.[148] Those ideals are undermined if our national courts sidestep international law to unilaterally regulate.[149] As one circuit court explained the problems with this form of legal imperialism:

> The United States should not impose its own view of [legal standard on a foreign country] . . . with a vastly different standard of living, wealth, resources, level of health care and services, values, morals and beliefs than [its] own. . . . Faced with different need, problems and resources [the foreign country] may, in balancing the pros and cons of a [product's] use, give different weight to various factors that would our society. . . . Should we impose our standard upon them in spite of such differences? We think not.[150]

148 *See, e.g.*, U.N. Charter art. 2.

149 For a discussion of how extraterritorial laws raise concerns, including concerns of democratic legitimacy, see Parrish, *supra* note 19, at 1455, 1482–89; see also Gibney, *supra* note 137, at 312–13 (describing the undemocratic nature of extraterritorial laws); cf. Lea Brilmayer, *Rights, Fairness and Choice of Law*, 98 YALE L.J. 1277 (1989) (setting out a political rights or political theory approach to conflict of laws); Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1059, 1065 (2004) ("[T]he task today is to identify democratic principles appropriate to transnational lawmaking phenomena.").

150 Harrison v. Wyeth Labs. Div. of Am. Home Prods. Corp., 510 F. Supp. 1, 4–5 (E.D. Pa. 1980), *aff'd*, 676 F.2d 685 (3d Cir. 1982); *see also* William L. Reynolds, *The Proper Forum for Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1708–09 (1992) (noting that "[a]ll law repre-

Although we may "cherish the image of our courts as the refuge of all seeking succor,"[151] as one commentator provocatively explains, "it is past time for us to get it through our heads that it is not everyone but us who is out of step."[152]

Yet whether we want foreigners to litigate their claims in our courts is perhaps the wrong question to ask. What's in play is less about entertaining foreign cases in U.S. courts, and more about whether we are prepared to have foreign courts adjudicate the propriety of American conduct occurring in the United States. This reciprocity point bears particular emphasis, although it is absent from many discussions of extraterritoriality. After years of the U.S. being one of the few to apply its laws extraterritorially, other countries have begun to follow suit.[153] The impact has grown as American-style litigation has migrated to other countries.[154] While the idea of a U.S. global policeman may be troubling, equally or perhaps more troubling is the idea that every nation's regulatory system has global reach. U.S. courts should be wary of fostering a system that inherently undermines sovereignty and encourages surrendering control to foreign courts. Those courts are less likely to reach decisions that promote American interests. Hewing to a presumption against extraterritorial jurisdictional assertions thus prevents the further development of a norm that provides other states with authority to attempt to regulate and prescribe American activity within the United States whenever some foreign effect can be alleged.[155]

A final point to end with. This Essay does not suggest that extraterritorial regulation is always a bad idea. That would be a particularly

sents a compromise among many policy objectives," and that "[w]e should at least hesitate before imposing 'our' solutions on 'their' problems").

151 Reynolds, *supra* note 150, at 1710 (arguing that "judicial chauvinism" should be replaced by "judicial comity"). R

152 Russell J. Weintraub, *Methods for Resolving Conflict-of-Law Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 155 (1989).

153 For a detailed discussion of this phenomenon, see Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815 (2009).

154 Some have described the U.S.'s three largest exports as "'rock music, blue jeans, and United States law.'" 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)). For a recent discussion, see Mark A. Behrens et al., *Global Litigation Trends*, 17 MICH. ST. U. COLL. L.J. INT'L L. 165 (2008–09).

155 This issue has arisen prominently in the recent debates over EU privacy laws that purport to apply worldwide. *See* Francine Hardaway, *New EU Data Privacy Laws Affect All of Us*, BUSINESS INSIDER (Jan. 3, 2012, 3:37 PM), http://www.businessinsider.com/new-eu-data-privacy-laws-affect-all-of-us-2012-1.

strong position, and not the position advocated here. In under-regulated areas, extraterritorial regulation can fill a gap. And it may be that extraterritorial regulation can serve as a placeholder before more comprehensive, international agreement can be reached. Sometimes the United States is not able to wait until multilateral negotiation concludes before taking action. At minimum, increased extraterritorial regulation provides more fora where injured plaintiffs can seek a remedy. Indeed, these policy considerations all make extraterritoriality expedient and alluring. For these reasons, it may be that in narrow circumstances Congress will decide the short-term benefits to extraterritorially regulating non-nationals outweigh its long-term costs. But that decision should not to be taken lightly, and one the courts should not simply assume. At least courts should address these considerations head on and not evade the important issues that legislative jurisdiction implicates.

CONCLUSION

In a number of recent, high-profile decisions, circuit courts have evaded legislative jurisdiction analysis by employing the fiction that not all laws that regulate the overseas conduct of foreigners should be considered extraterritorial. The U.S. Supreme Court last term may have unintentionally encouraged this doctrinally odd approach by finding that legislation focused domestically is not extraterritorial, even if foreign conduct is regulated. This Essay has explained why the circuit court decisions and that particular reading of *Morrison* are not defensible doctrinally. It also underscores why these approaches significantly break from previously accepted practice.

But the Essay has attempted to go beyond those descriptive points: more is in play than simply a doctrinal battle. The willingness of courts to find that a law regulates the foreign conduct of non-nationals—even absent any indication that Congress considered the issue—reflects a very different vision of the world than we are traditionally accustomed. Evading legislative jurisdiction analysis and promoting extraterritorial domestic law is to take an approach that privileges and fosters unilateralism while undermining traditional international law-making and the multilateralism upon which it is based. The new approach is troubling. With luck, it will be short lived.