Legislative Jurisdiction, Judicial Canons, and International Law

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ABSTRACT for
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by John H. Knox

From very early in U.S. history, Congress has enacted statutes whose terms have no geographic limit. In deciding how far those statutes reach, courts employ judicial canons, the best-known of which is the presumption against extraterritoriality, which states that “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” Despite the apparent simplicity of this language, the Court has failed to employ it consistently and predictably. It has issued inconsistent decisions on whether the presumption applies to U.S. ships at sea, for example, and to U.S. military bases in foreign countries. It has suggested both that the presumption may be overcome with any evidence of congressional intent and that it may be overcome only by a clear statement in the statute. Making matters worse, the Court’s incoherent jurisprudence has been amplified by lower courts.

This article proposes a new approach: to resolve questions of legislative jurisdiction, the Court should reinvigorate an older judicial canon, the presumption that U.S. laws do not extend beyond the limits on legislative jurisdiction imposed by international law. This presumption against extrajurisdictionality is different from the presumption against extraterritoriality, although judges and scholars have often conflated them and in recent decades the older presumption has been overshadowed by the newer one.

Under the proposal, courts would look to the customary and treaty rules that set out the bases of legislative jurisdiction under international law. If those rules allocated the United States sole or primary jurisdiction (as over its own territory), the court would have a green light to construe the statute without any presumption against its application. If the United States did not have sole or primary jurisdiction, but international law provided it some basis for jurisdiction (as over its nationals abroad, or over foreign acts that cause domestic effects), then the light would turn yellow: the court would employ a soft presumption against application of the statute that could be overcome by any indication of congressional intent to do so. Finally, if the United States had no basis under international law for jurisdiction, the light would be red. There would be a strict presumption against application of the law, which could be overcome only by an inescapably clear statement of congressional intent.

The new canon would be more consistent with the approach the Court took to these questions until the late twentieth century. It would better reflect reasonable assumptions of congressional intent: that Congress normally intends its statutes to address all situations under sole or primary U.S. jurisdiction under international law and to avoid unnecessary conflicts with other countries. And it would provide courts clearer, more predictable guidelines, so that Congress, the Executive, and those affected by the laws could better anticipate their extraterritorial reach.
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How should courts determine the jurisdictional reach of legislation? For example, how should a court decide whether a federal statute applies to foreign actions with domestic effects, to U.S. ships on the high seas, or to foreign ships in U.S. port? If the statute defines its own scope, a court can apply it accordingly.¹ But many statutes use general terms without

¹ Some scholars have suggested that the due process clause should limit the extraterritorial reach of federal statutes in extreme cases. Lea Brilmayer & Charles Norchi, Federal Extraterritoriality and Fifth Amendment Due Process, 105 Harv. L. Rev. 1217 (1992). Others have disagreed. A. Mark Weisburd, Due Process Limits on Federal Extraterritorial
specifying their geographic coverage. In construing those situations, interpretive rules – judicial canons – are necessary. The most important canon the Supreme Court applies to questions of legislative jurisdiction is the presumption against extraterritoriality, according to which courts presume that “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”

Where the presumption against extraterritoriality has no purchase, as in determining the reach of legislation to foreign ships, the Court has tried various other canons, including, most recently, canons aimed at avoiding conflicts with other countries.

In the last two decades, the presumption against extraterritoriality and the conflict-avoidance canons have proved to be spectacular failures. Courts, including the Supreme Court, cannot agree on when they should apply or what evidence is necessary to overcome them. In *Rasul v. Bush*, for example, a five-justice majority of the Court held that the presumption against extraterritoriality does not apply to a U.S. naval base over which the United States has complete control, even though the base is in Cuba, outside U.S. national territory. *Rasul* may or may not be consistent with the presumption as the Court had stated it, but it is certainly not consistent with earlier Court decisions holding that the presumption did apply to a scientific base in Antarctica and a U.S. ship on the high seas, situations in which the degree of U.S. control was as great as in *Rasul*. On the other hand, those decisions were themselves inconsistent with earlier cases in which the Court had held that statutes applied to U.S. ships and bases without applying the presumption. Cases applying the conflict-avoidance canons to foreign-flag ships in U.S. port are rarer but even more incoherent; the most recent decision by the Court fractured into three opinions, none of which was able to command a majority of votes.

This article argues that courts should answer questions concerning the reach of statutes by looking first to the international law of legislative

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*Legislation?*, 35 Colum. J. Trans. L. 379 (1997). In practice, the Supreme Court has not imposed constitutional limits on the geographic scope of federal statutes.


jurisdiction – that is, the customary and treaty rules that set out the bases of state jurisdiction under international law.\footnote{8} The proposal is simple. In resolving a contested application of a U.S. law, a court would ask two questions. First, under international law, does the United States have sole or primary jurisdiction over the situation in question?\footnote{9} If the answer is Yes, then the court should construe the statute without any presumption against its application.\footnote{10} If the answer is No, then the court would examine a second question: does international law provide the United States a basis for any jurisdiction over the situation? If the answer is again No, so that the United States has no claim to jurisdiction over the conduct under international law, then the court should employ a strong presumption against applying the statute, which could be overcome only by an inescapably clear statement of congressional intent that the law should apply. But if the answer to the second question is Yes, so that international law allows the United States to exercise jurisdiction but does not assign it sole or primary jurisdiction, then the court should apply the statute only if it finds some indication, which need not be a clear statement in the statute, that Congress intended it to extend to the conduct.

The test can be analogized to a traffic light. If international law assigns sole or primary jurisdiction to the United States, then the light is green, and the court need not apply any interpretive canon; it proceeds to apply the statute as it normally would. If international law assigns no jurisdiction to

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8 Rather than “legislative jurisdiction,” the Restatement of Foreign Relations Law uses the term “jurisdiction to prescribe,” which it defines as “the authority of a state to make its law apply to persons or activities.” Restatement (Third) of Foreign Relations Law of the United States 231 (1987). The broader term makes clear that it includes not only laws enacted by legislative bodies, but also regulation effected through executive acts or orders, administrative rules, and even court decrees. Id. § 401(a). Because this article focuses on how U.S. courts should construe laws enacted by Congress, it uses the older term.

9 By “sole” jurisdiction, I mean that only one state has a viable claim to jurisdiction over the situation. By “primary” jurisdiction, I mean that one state has a claim that is recognized as the normal or usual basis for jurisdiction, so that any other claims are relatively exceptional or unusual. Territorial jurisdiction is the chief example of such primary jurisdiction. To be clear, I do not mean to suggest that a state with a non-primary claim to jurisdiction would always be required to defer to a state with primary jurisdiction. For a complete explanation, see Part III.B.2 infra.

10 This would not mean that every U.S. statute would apply to every such situation; even in the absence of a presumption against application, a court could decide that the language, context, or history of a statute indicated that Congress did not intend it to apply.
the United States, then the light is red. Congress may decide to violate international law, just as someone may decide to drive through a red light, but the court should strongly presume that Congress does not normally intend to do so. This strict presumption against extrajurisdictional application of a statute may be overcome only if the statute makes clear beyond doubt that Congress intended the statute to apply. Finally, if international law provides a basis for U.S. jurisdiction, but not sole or primary jurisdiction, then the light is yellow. There is a soft presumption against application of the statute, which may be overcome by an indication of Congress’ intent that is less than a clear statement.

The most important example in the yellow-light category would be actions taken in a foreign country and therefore subject to foreign territorial jurisdiction, but which are nevertheless subject to U.S. jurisdiction – for example, because they are taken by U.S. nationals or directly and substantially affect the United States. Because in such situations the United States would have a basis for jurisdiction, even though it would not have sole or primary jurisdiction, then the softer presumption would apply. This softer presumption would also be against extrajurisdictionality, in a sense, insofar as it would be against extension of statutes to situations beyond the sole or primary jurisdiction of the United States. In effect, the presumption would be that Congress does not lightly intend to extend U.S. statutes to situations also within the jurisdiction of another country unless the U.S. jurisdiction is clearly primary.\(^\text{11}\)

Although the explicit adoption of this framework by the Supreme Court would be novel, in many ways the proposal draws on and makes explicit the approach developed and applied by the Court from the early nineteenth century until the late twentieth century, as Part I of this article explains. Beginning in the early 1800s, the Court situated its analysis of questions involving legislative jurisdiction in the context of the international law of legislative jurisdiction. The Court refused to construe laws beyond the limits of international law; conversely, it applied no presumption against

\(^{11}\) The approach suggested in this article for determining the reach of federal statutes might also be applied to the question of whether U.S. constitutional protections should apply extraterritorially. See, e.g., Boumediene v. Bush, 553 U.S. \_ \_ (2008) (constitutional habeas protections apply to detainees at Guantanamo Bay); Reid v. Covert, 354 U.S. 1 (1957) (Article III, § 2, and Fifth and Sixth Amendments apply when U.S. government acts against U.S. citizen overseas). This article does not undertake that analysis, however. Although the two areas share similarities, they also have important differences, and the Court has developed a separate jurisprudence for each. Reconciling the two is beyond the scope of this exercise.
extending laws to those limits. In other words, the Court applied only the strict presumption against extrajurisdictionality. In terms of the traffic light analogy, the Court treated situations as subject to either a green or a red light. That changed in the early twentieth century, as plaintiffs sought to apply U.S. regulatory statutes such as the Sherman Act to situations within foreign countries that were arguably under the jurisdiction of both the foreign government and the United States. In response, and after some initial confusion, the Court developed a new presumption against applying U.S. law to such situations. This canon, which was dubbed the presumption against extraterritoriality, was softer than the strict presumption against extrajurisdictionality; it could be overcome with any evidence of congressional intent, not necessarily a clear statement.

For most of the twentieth century, the Court applied both presumptions: it applied the presumption against extrajurisdictionality to the proposed application of U.S. laws to any situation (whether in a foreign country or anywhere else) that would be outside U.S. jurisdiction under international law, and allowed it to be overcome only with an unavoidably clear indication of congressional intent. It also applied the softer presumption against extraterritoriality, but only to the proposed extension of U.S. laws to situations within the territory and, thus, the primary jurisdiction of a foreign country. In effect, the Court employed the dual presumptions that this article proposes, although it did not do so explicitly or consistently.

As Part II explains, the Rehnquist Court abandoned this approach in a series of cases decided between 1989 and 1993. In a quest to apply U.S. statutes as narrowly as possible, the Court created new barriers to applying U.S. laws outside U.S. sovereign territory. It stopped referring to the international law of legislative jurisdiction, losing the framework that had informed its decisions. Instead, it strengthened the presumption against extraterritoriality, applying it to situations outside U.S. territory but within sole U.S. jurisdiction, such as U.S.-flag ships and U.S. bases in Antarctica, and suggesting that it could be overcome only with a clear statement of congressional intent. Its decisions contradicted the Court’s earlier precedents without overruling or distinguishing them. In the succeeding years, lower courts have failed to reconcile these inconsistencies, instead reflecting and amplifying the Supreme Court’s incoherence. In recent years, the Court has taken some steps to revive the presumption against extrajurisdictionality, but it has again failed to explain how its more recent decisions accord with its older ones, instead adding another layer of inconsistent precedents to its jurisprudence.
The result is that the judicial approach to legislative jurisdiction is in disarray. Courts regularly disagree on whether and how U.S. laws apply beyond U.S. territory and to foreign-flag ships in U.S. port. More fundamentally, they do not agree on which judicial canons they should use or how they should apply them. Part of the blame may be due to Congress, which could avoid these interpretive issues entirely by defining the scope of its laws. But the main responsibility lies with the Supreme Court, which has failed to establish and apply a consistent interpretive approach.

The first two parts of this article establish that the current case law is incoherent and that the current proposal is more consistent with the Court’s pre-1970 jurisprudence. Part III provides two other, more conclusive arguments for the proposal. First, it better comports with reasonable assumptions of congressional intent. Of the various legislative purposes that the Court has suggested undergird its canons on legislative jurisdiction, the only valid ones support taking into account the limits international law places on that jurisdiction. Second, international law would provide courts sufficiently clear guidance to allow them to apply the presumptions predictably in determining the jurisdictional reach of federal statutes, so that those who enact, apply, and interpret U.S. laws could anticipate how the canons might affect those laws whose reach may extend beyond our shores.

I. DEVELOPMENT OF THE PRESUMPTIONS AGAINST EXTRAJURISDICTIONALITY AND EXTRATERRITORIALITY

A common view in modern scholarship is that the Supreme Court adopted a presumption against extraterritoriality in 1818, in *United States v. Palmer*. This view is mistaken. The Court first announced a presumption against extraterritoriality in 1909. Until then, the Court decided questions of legislative scope by looking to see how international law allocated jurisdiction over the situation in question. If international law assigned legislative jurisdiction to the United States, then the Court applied the statute as written, unless there was some reason to believe that Congress intended a less extensive application. If international law did not allocate

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jurisdiction over the situation to the United States, then the Court presumed that the statute was not intended to apply. In other words, the presumption was not against extraterritorial application, but rather against extrajurisdictional application, of U.S. statutes.

This part first describes the introduction of the presumption against extrajurisdictionality in the early nineteenth century and its application to two types of cases raising questions of legislative jurisdiction: those arising on ships (primarily U.S. ships) at sea; and those arising on foreign ships in U.S. territory. The second section of this part describes the development of the presumption against extraterritoriality in the early twentieth century, and how the Court continued to apply both presumptions for the next six decades.

A. The Establishment of a Presumption against Extrajurisdictionality

From the beginning of the Republic, Congress has enacted statutes whose terms have no clear geographic limit, and the Supreme Court has had to decide how to construe those statutes. Throughout the nineteenth century, the Court interpreted the laws in the context of the international law of legislative jurisdiction, reading the statutes to extend no farther than international law allowed. The cases that arose in this period fell into two general categories: those concerning actions on ships at sea; and those concerning foreign ships in U.S. port.

1. The Application of the Presumption to Ships at Sea

The first law whose geographic reach received close attention from the Court was the very first federal criminal statute, enacted by the First Congress on April 30, 1790. Section 8 of the statute provided “that if any person or persons shall commit, upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States, be punishable with death . . . every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death.”13 Although Section 8 was clearly aimed at implementing Congress’ constitutional mandate to

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“define and punish piracies and felonies committed on the high seas,”14 its terms were so broad that it could be read as criminalizing a far greater range of actions, even including common thefts by one foreigner against another on a foreign-flag vessel.

In a series of cases from 1818 to 1820, the Supreme Court was asked to determine the bounds of the statute. It looked to the United States’ legislative jurisdiction under international law. Throughout the cases, the justices agreed that the statute should not extend beyond the limits of that jurisdiction, but they struggled with whether the statute should extend even so far. In the end, the Court took the position urged by the executive branch: that the statute should reach to the full extent of U.S. jurisdiction under international law, but no further than that jurisdiction.

In the first of these cases, United States v. Palmer,15 the three defendants were accused of boarding and robbing a Spanish ship on the high seas. Justice Joseph Story and a district judge, sitting as a circuit court, had referred a certificate of division to the Supreme Court asking for its opinion on a number of issues, including whether robbery committed on the high seas by and against non-U.S. citizens, on a non-U.S. ship, fell within the “true intent and meaning” of Section 8.16 The U.S. attorney prosecuting the case argued on behalf of the United States that the statute should be interpreted to prohibit robbery to the full extent of U.S. jurisdiction under international law: it should apply to robbery committed by U.S. nationals even if on a foreign vessel,17 and to robbery that “amount[s] to piracy, by the law of nations,” committed by any person at all.18 Conversely, the United

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16 Id. at 613. At the time, the two judges comprising a circuit court could seek a Supreme Court opinion on specific issues by issuing a certificate of division listing the issues on which they divided. The certificate did not always reflect genuine disagreement. See G. Edward White, The Marshall Court and International Law: the Piracy Cases, 83 Am. J. Int’l L. 727, 730 n.14 (1989).
17 16 U.S. at 621 (“The crime of robbery committed by a citizen of the United States on the high seas, on board a foreign vessel, or on the person of a foreigner, must be considered as a piracy, under the 8th section of the act; because the jurisdiction of a nation extends to its citizens, wheresoever they may be, except within the territory of a foreign sovereign.”).
18 Id. at 620 (“If the robbery in question amount to piracy, by the law of nations, the words ‘any person, or persons,’ in the 8th section, will embrace the subjects of all nations, who may commit that offence on the high seas, whether on board a foreign vessel, or a vessel belonging to citizens of the United States, as a member of the community of nations, to punish offences committed on the high seas against the law of nations.”).
States argued that the statute extended no further: if a robbery by a non-U.S. citizen did not amount to piracy, then it “cannot be tried by the courts of the United States,” because it would be beyond the jurisdiction of the United States to punish under international law. 19

Chief Justice John Marshall, writing for the Court, agreed that “general words” such as “any person or persons,” which are “broad enough to comprehend every human being,” must be “limited to cases within the jurisdiction of the state.” 20 But he said that they must also be limited “to those objects to which the legislature intended to apply them.” 21 Instead of construing “the jurisdiction of the state” to exclude cases of common theft committed by foreign nationals on foreign ships, Marshall reframed the question as whether Congress intended this broad language to apply at all “to the subjects of a foreign power, who in a foreign ship may commit murder or robbery on the high seas?” 22 Marshall answered the question in the negative. He cited the title of the statute, “An Act for the Punishment of certain Crimes against the United States,” as a sign that “offences against the United States, not offences against the human race, were the crimes which the legislature intended by this law to punish.” 23 He stressed that it was difficult to believe that Congress intended the law to reach acts of foreign nationals on board foreign ships, 24 but rather than adopting the United States’ suggestion that the statute should extend to all cases of piracy as defined by the law of nations, he concluded that the statute did not reach any instances of robbery committed on the high seas, “on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state.” 25

Marshall may have felt that such a narrow interpretation of the statute was necessary to avoid politically sensitive questions. The defendants in Palmer had commissions from a South American republic rebelling against Spain and might have been acting more as revolutionaries than pirates. The Court could have sought to construe the statute not to apply to them on that basis, but the line between a pirate and a mercenary might be difficult to

19 Id. Here, as elsewhere throughout this period, there may be an assumption that the limit is absolute – that Congress could not go beyond the bounds of international legislative jurisdiction even if it so intended.
20 Id. at 631.
21 Id.
22 Id.
23 Id.
24 Id. at 632-33.
25 Id. at 633-34.
draw, and the Court may have been reluctant to involve itself in “questions which respect the rights of a part of a foreign empire, which asserts, and is contending for its independence, and the conduct which must be observed by the courts of the union towards the subjects of such section of an empire who may be brought before the tribunals of this country,” which, Marshall wrote, are “generally rather political than legal in their character, . . . belonging more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it.”

Nevertheless, Palmer was unsatisfactory in several respects. First, it “appeared to cripple the federal Government’s power to punish pirates.”

Second, Marshall’s eloquence in describing the “delicate and difficult” questions arising from reviewing acts taken in the course of a revolution could not obscure the fact that the Court’s decision did not defer to the views of the political branches on those questions; it overrode them. There could be little doubt that Congress had intended the statute to fulfill its constitutional mandate by outlawing all piracy, not just piracy by or against U.S. nationals. And the executive branch had sought to prosecute the defendants under the statute in full knowledge of whatever consequences such a prosecution might have on foreign relations. Finally, the opinion did not even clearly resolve whether the statute applied to actions of U.S. nationals on foreign ships, arguably the key issue in the case.

The decision was “roundly criticized by contemporaries,” and a year later Congress effectively overruled it by enacting a new statute that provided, “if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations,” and are afterwards brought within the United States, they would be subject to punishment by death. The act of 1819 did not replace the 1790 law, however, and that law came before the Court again in 1820, in United States

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26 Id. at 634.
27 White, supra note 16, at 731.
28 The indictment describes two of the defendants as being “late of Boston,” and the third as “late of Newburyport.” 16 U.S. at 611.
29 White, supra note 16, at 731.
The defendant in *Klintock* was accused of violating the earlier law in 1818, before the enactment of the new one. Like the *Palmer* defendants, he argued that he was not a pirate at all, but was acting under a commission from Louis-Michel Aury, a French national who styled himself as a brigadier of the self-proclaimed Mexican Republic then fighting its war of independence with Spain. Klintock had seized a Danish ship, however, not a Spanish one, after having planted papers on the ship that fraudulently identified it as Spanish. That eased the Court’s concerns over trespassing into political issues, since the justices had no doubt that Klintock’s action was robbery, not rebellion. But Klintock also argued that under *Palmer*, the 1790 statute did not apply to U.S. nationals if their actions were taken on foreign ships against other foreign ships.

The Court thus had to face the question it had left unclear in *Palmer*: whether section 8 of the 1790 law applied to U.S. nationals on foreign ships. It could have responded by saying that *Palmer* held only that the statute did not reach foreign nationals acting against other foreign nationals, and that the 1790 act applied to U.S. nationals even if they were on a foreign ship. Instead, it revised its interpretation of the statute to bring it in line with the jurisdiction of the United States over piracy, as delineated by international law. For the Court, Marshall wrote that the statute applied to “persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever. . . . Persons of this description are proper objects for the penal code of all nations.” The general terms of the statute “ought not to be applied to offences committed against the particular sovereignty of a foreign power; but we think they ought to be applied to offences committed against all nations, including the United States, by persons who by common consent are equally amenable to the laws of all nations.” The effect was to revitalize the 1790 statute by making it applicable to all ships except those under the acknowledged

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31 18 U.S. 144 (1820).
32 *Id.* at 144-145.
33 *Id.* at 149-50 (“Whether a person acting with good faith under such commission, may or may not, be guilty of piracy; we are all of opinion that the commission can be no justification of the fact stated in this case. The whole transaction taken together, demonstrates that the Norberg was not captured *jure belli*, but seized and carried into Savannah *animo furandi*. It was not a belligerent capture, but a robbery on the high seas.”).
34 *Id.* at 148.
35 *Id.* at 152.
authority of a foreign sovereign, which by definition pirates were not. The Court did so by referring to the “common consent” (expressed in the law of nations) that offences committed against all nations were subject to universal jurisdiction. Piracy, of course, was the leading example of such an offense.  

The Court affirmed the importance of international law in another 1820 case involving piracy, *United States v. Furlong*. The defendant was accused of violating the act of 1819 by seizing a foreign vessel from a U.S. ship that he and others had “run away with,” and of violating the 1790 statute by committing the “piratical murder” of two Englishmen. The circuit court divided on several issues that it sent to the Supreme Court, chiefly concerning whether the indictment was proper even though it did not charge Furlong as a U.S. citizen or charge the acts as committed on a U.S. vessel. In an opinion by Justice William Johnson, the Court confirmed that under *Klintock*, once the ship “embarked on a piratical cruise, every individual becomes equally punishable under the law of 1790, whatever may be his national character, or whatever may have been that of the vessel in which he sailed, or of the vessel attacked.” Although that answered the certified questions regarding Furlong, the Court went on to address a related question: the application of U.S. laws to murder committed at sea on board a foreign vessel, by a foreigner, against a foreigner.

Johnson noted that “though not in all its circumstances the same,” the question was apparently answered by *Palmer*, in which the Court had held that the 1790 law did not extend to a foreign-flag vessel. He then shifted to

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36 See Blackstone, supra note 14, at 71 (“[T]he crime of piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, hostis humani generis. As therefore he has renounced all the benefits of society and government . . . by declaring war against all mankind, all mankind must declare war against him.”). See also Smith, 18 U.S. at 153 (“[W]hether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat of piracy as an offence against the law of nations . . . . And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offence is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment.”).

37 18 U.S. 184 (1820). The case is also known as *United States v. Pirates*.

38 Id. at 185-87. The 1819 statute could not provide a basis for an indictment for murder, because the Supreme Court had interpreted the piracy it prohibited, as defined by the law of nations, as only “robbery upon the sea.” *Smith*, 18 U.S. at 153.

39 18 U.S. at 186. Furlong was an English subject and the murders were alleged to have taken place on an English ship.

40 Id. at 193.
the first-person voice to explain why he had no objection to that outcome in *Furlong* even though he had dissented from *Palmer*. He did not agree with *Palmer’s* failure to apply the 1790 statute to piracy committed by anyone and to robbery committed by U.S. citizens even on foreign ships, but he agreed that extending the statute to *murder* committed by a non-U.S. citizen on a non-U.S. ship was beyond its scope, because it would exceed the jurisdiction of Congress under international law. He stated:

> To me it appears, that the only fair deduction from the obvious want of precision in language and in thought, discoverable in the act of 1790, and insisted on in the case of *Palmer*, is, that in construing it we should test each case by a reference to the punishing powers of the body that enacted it. *The reasonable presumption is, that the legislature intended to legislate only on cases within the scope of that power; and general words made use of in that law, ought not, in my opinion, to be restricted so as to exclude any cases within their natural meaning.* As far as those powers extended, it is reasonable to conclude, that Congress intended to legislate, unless their express language shall preclude that conclusion.

. . . Testing my construction of this section, therefore, by the rule that I have assumed, I am led to the conclusion, that it does not extend the punishment for murder to the case of that offence committed by a foreigner upon a foreigner in a foreign ship. But otherwise as to piracy, for that is a crime within the acknowledged reach of the punishing power of Congress. As to our own citizens, I see no reason why they should be exempted from the operation of the laws of the country, even though in foreign service. Their subjection to those laws follows them every where . . . .

In *Klintock* and *Furlong*, then, the Court took the position that the United States attorney had first proposed in *Palmer*: that the general terms of a statute such as the act of 1790 should be bounded by the international limits on legislative jurisdiction, but should not stop short of those limits. In other words, the Court adopted a presumption against extrajurisdictionality.

Four years later, in *The Apollon*, the Court again looked to those limits to interpret an open-ended federal statute. The case arose from the seizure of a French ship by a U.S. revenue collector acting under a 1799 federal

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41 *Id.* at 195-98 (emphasis added).

statute regulating the collection of duties. The Apollon had sailed up the St. Mary’s River, then as now the border between Georgia and Florida, and anchored in the Belle River, a tributary to the St. Mary’s on the Florida side. Florida was still under Spanish control, and the captain of the ship sought to avoid the imposition of the U.S. tonnage duty by unloading his cargo there and transshipping it across the border to Georgia. While in Florida, the ship was seized by the U.S. collector of the St. Mary’s district, who brought the ship to Georgia and instituted proceedings in admiralty to forfeit the cargo and subject the ship to the duty. The district court restored the ship and cargo to the master, who then sued for and was awarded damages. The United States appealed to the circuit court, which affirmed, before taking the case to the Supreme Court.

Before the Court, the U.S. attorney defended the action of the collector by relying on the collection act of 1799, which provided “[t]hat if any ship or vessel which shall have arrived within the limits of any district of the United States, from any foreign port or place, shall depart, or attempt to depart, from the same” before entering or reporting to the collector, “it shall be lawful” for a collector to arrest the ship and bring it back to a U.S. port. The United States argued that the ship had entered the district of St. Mary’s, which was defined by the 1799 law as “comprehend[ing] all the waters, shores, harbors, rivers, creeks, bays and inlets, from the south point of Jekyl Island exclusive to St. Mary’s river inclusive,” but then failed to enter or report, in violation of the law.

Writing for the Court, Justice Story made clear that even if the 1799 law had required the Apollon to enter a U.S. port, the seizure of the ship would be illegal. “It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations.” But apart from looking to international law to limit the United States’ jurisdiction to enforce, the Court also looked to it to limit the scope of the U.S. law at issue. After acknowledging that under general principles of the law of nations, a boundary river such as the St.

43 An Act to Regulate the Collection of Duties on Imports and Tonnage, Mar. 2, 1799 (Collection Act of 1799), 1 Stat. 627.
45 Collection Act of 1799, § 29, 1 Stat. at 648-49.
46 Id. § 14, 1 Stat. at 637.
47 Apollon, 22 U.S. at 368-69.
48 Id. at 371.
Mary’s “must be considered as common to both nations, for all purposes of navigation,” the Court rejected the argument that the definition of the St. Mary’s district in the 1799 collection act included ships transiting through the river for the purpose of proceeding to Spanish territory.49 The Court rejected this reading of the statute because it would take the law beyond the United States’ legislative jurisdiction under international law. The Court said that “however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction.”50 What are those places and persons? Normally, its territory and its citizens: “The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens.” And why must the construction of general terms be limited in this way? Beyond these jurisdictional limits, laws “can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction.” Because the United States and Spain had an “equal authority” over the St. Mary’s river, an attempt by the United States to compel an entry of vessels on their way to Spanish territory “would be an usurpation of exclusive jurisdiction over all the navigation of the river.”51 The Court concluded that “it would be an unjust interpretation of our laws, to give them a meaning so much at variance with the independence and sovereignty of foreign nations.”52

As in the piracy cases, then, the Court applied a presumption in Apollon not against extraterritoriality, but against extrajurisdictionality: a presumption against interpreting U.S. laws to extend beyond U.S. jurisdiction under international law. Some commentators have conflated the two, stating that the presumption employed in Apollon and the earlier cases was indeed based on international law, but was a presumption against the extraterritorial application of U.S. laws.53 But this misreads the decisions. In neither the piracy cases nor Apollon did the Court apply a presumption against extraterritoriality. By their terms, the criminal statutes at issue in the piracy cases necessarily applied extraterritorially to actions on the high

49 Id. at 369-70.  
50 Id. at 370.  
51 Id.  
52 Id.  
53 E.g., Born, supra note 12, at 10 (citing Palmer and Apollon for the statement that “[d]uring the nineteenth century, a common application of the Charming Betsy presumption was to incorporate the American understanding that international law forbids the extraterritorial application of national laws”).
The question was whether they applied to certain piratical actions taken by U.S. and foreign nationals in ships not under U.S. flag, who were arguably under U.S. jurisdiction over its nationals and over non-national pirates, but in no sense could be considered subject to its territorial jurisdiction. After waffling in Palmer, the Court eventually answered that question Yes with respect to everyone on board ships not owing allegiance to any nation, No with respect to murder of foreigners by foreigners on foreign ships, and Yes with respect to murder committed by U.S. citizens on foreign ships. It reached these conclusions not through application of a presumption against extraterritoriality, which would have urged it to answer No for each, but through application of a presumption against extrajurisdictionality, because those were the answers consistent with U.S. jurisdiction: over pirates of any nation, over U.S. citizens even on foreign ships, but not over non-piratical offenses on foreign ships by and against foreigners.

Similarly, in Apollon, the question was not whether U.S. law should apply beyond U.S. territory, but rather whether and how to apply U.S. law to a river over which the United States and Spain jointly had jurisdiction. Had the Court simply applied a presumption against extraterritoriality, it would have asked whether the vessel transited the U.S. side of the St. Mary’s, since the boundary line between the two countries was set by treaty as the mid-point line of the river. It did not do so. After emphasizing the importance of staying within the bounds set by international law on legislative jurisdiction, the Court emphasized that both countries had equal rights to navigation in the entire river, and that applying the statute to ships bound up the river to ports on the Spanish side “would be an usurpation of exclusive jurisdiction over all the navigation of the river.” It was to avoid that result that the Court interpreted the statute to “compel an entry of all vessels

54 Recall that the Act of 1790 only applied to offences committed “upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state.” Act of April 30, 1790, § 8, 1 Stat. 112, 113-14. The 1819 statute enacted in response to Palmer more succinctly provided for the punishment of “the crime of piracy, as defined by the law of nations,” when committed “on the high seas.” Act of March 3, 1819, § 5, 3 Stat. 510, 513-514.
53 The U.S.-flag ships themselves were often considered floating bits of U.S. territory at the time. See note 66 infra and accompanying text.
56 Klintock, 18 U.S. at 152.
57 Furlong, 18 U.S. at 196-97.
58 22 U.S. at 369.
59 Id. at 370.
coming into our waters, being bound to our ports.” The distinction between vessels to which the law would apply and those to which it would not apply did not depend on whether the vessels were in U.S. port, or in U.S. waters, or under a U.S. flag; it depended on whether the vessels were subject to U.S. jurisdiction — that is, whether they were headed up the river over which the United States and Spain shared rights of navigation to a U.S. port (in which case they were subject to U.S. jurisdiction) or a Spanish port (in which case they were not, even if they crossed over the midpoint line of the river into U.S. territory).

The reasoning behind reading U.S. laws in accordance with international limits was clear: doing otherwise would be impractical, because the laws could have “no force to control the sovereignty or rights of any other nation, within its own jurisdiction,” and by contradicting the “independence and sovereignty of foreign nations,” the extension of U.S. laws extrajurisdictionally would lead to conflicts with foreign governments. Trying to extend U.S. laws to situations outside U.S. jurisdiction under international law would often take the laws beyond any ability of the United States to enforce them, and at the same time challenge the sovereignty of those nations that did have jurisdiction. As a result, the Court considered that Congress would almost never step over the lines set by international law. The presumption against extrajurisdictionality could thus be considered an application of the more general presumption, stated by the Court in 1804 in the Charming Betsy case and known as the Charming Betsy canon, that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”

For the rest of the nineteenth century, the Supreme Court heard relatively few cases involving disputes like these over the reach of U.S. legislation to ships at sea. When the issue did arise, however, the Court continued to interpret federal statutes in the context of international limits on the United States’ legislative jurisdiction. For example, in 1856, in Brown v. Duchesne, the Court reviewed a claim by a U.S. citizen that a French national had violated his patent on a feature of a sailing vessel. Writing for the Court, Chief Justice Roger Taney noted that the patented improvement was on a French ship, and stated that its use on the high seas “outside of the jurisdiction of the United States is not an infringement of [the plaintiff’s]

60 Id. (emphasis added).
61 Id.
62 Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).
63 60 U.S. 183 (1856).
rights,” because the statutory provisions on which he based his claim “do not, and were not intended to, operate beyond the limits of the United States.”

The reference to “the limits of the United States” might be thought to express a presumption against extraterritoriality rather than extrajurisdictionality. It would be a mistake, however, to read the language as suggesting that the Court presumed that the U.S. patent law at issue in the case did not extend beyond the territorial limits of the United States to other situations within U.S. jurisdiction, including in particular U.S.-flag ships. The emphasis on the nationality of the vessel throughout the opinion strongly suggests that the Court would have had little or no hesitation to apply the laws to a ship under a U.S. flag, even if the ship had only used the device on the high seas. More fundamentally, at the time the Court viewed language such as “the jurisdiction of the United States” and even “the limits of the United States” as including U.S.-flag ships, because the Court treated U.S. ships as if they were part of U.S. territory for the purpose of U.S. legislative jurisdiction. Again, it based this position on its understanding of international law, which stated that unless they were within another country’s waters, ships remained subject to the jurisdiction of their own flag state as if they were floating pieces of its territory. The question of jurisdiction over a ship flying one country’s flag while in another’s territory

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64 Id. at 195.
65 E.g., id. (the patent clause in the constitution “confers no power on Congress to regulate . . . the vehicles of commerce, which belong to a foreign nation, and which occasionally visit our ports in their commercial pursuits”).
66 St. Clair v. United States, 154 U.S. 134, 152 (1894) (“A vessel registered as a vessel of the United States is, in many respects, considered as a portion of its territory, and persons on board are protected and governed by the laws of the country to which the vessel belongs.”); Wilson v M cNamee, 102 U.S. 572, 574 (1880) (“A vessel at sea is considered as a part of the territory to which it belongs when at home. It carries with it the local legal rights and legal jurisdiction of such locality.”); Crapo v. Kelly, 83 U.S. 610, 624 (1872) (“for the purpose we are considering . . . the ship Arctic was a portion of the territory of Massachusetts”); The Scotia, 81 U.S. 170, 184 (1871) (“the navigation laws of the United States . . . are municipal regulations, yet binding upon American vessels, either in American waters or on the high seas. . . . Every American vessel, outside of the jurisdiction of a foreign power, is, for some purposes at least, a part of the American territory, and our laws are the rules for its guidance.”); United States v. Smiley, 27 F. Cas. 1132, 1134 (C.C. Cal. 1864) (opinion of Justice Field, sitting as a circuit judge) (“The constructive territory of the United States embraces vessels sailing under their flag: wherever they go they carry the laws of their country, and for a violation of them their officers and men may be subjected to punishment.”).
67 Crapo, 83 U.S. at 624-26 (citing sources).
was more complicated, as the following section explains.

2. The Application of the Presumption to Foreign Ships in the United States

In deciding whether laws of general application extended to foreign-flag ships in U.S. territory, the Supreme Court again looked to the international law of legislative jurisdiction, although over the course of the nineteenth century it changed its position on exactly what that law required.

The first Supreme Court decision involving a contested application of U.S. law to a foreign ship in U.S. territory concerned the Schooner Exchange, which had been a U.S. ship until it was taken on the high seas by France, then under the rule of Napoleon. In 1811, the ship returned to Philadelphia as a French warship, under the name of the Balaou, and the original owners had it seized. In deciding whether the ship was exempt from U.S. jurisdiction, Chief Justice Marshall began by stating that “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. . . . All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.” Nevertheless, “all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.” After reviewing other situations in which countries were understood to have waived the full exercise of their territorial jurisdiction, including by exempting foreign sovereigns and their ministers from arrest, Marshall concluded that because a warship forms “a part of the military force of her nation; acts under the immediate and direct command of the sovereign; [and] is employed by him in national objects. . . . interference [with it] cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.” He said, “Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly in practice, nations have not yet asserted

69 Id. at 136.
70 Id. at 144.
their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.”

The strictness of Marshall’s statements – particularly his suggestion that territorial jurisdiction is “exclusive” – may be explained by his failure to distinguish clearly between legislative jurisdiction and the jurisdiction to enforce. That he was primarily concerned with the latter is indicated by his statement that the presumption that warships are exempt from national jurisdiction may be overcome by “the sovereign of the place,” which “may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.”

*Schooner Exchange* based its reasoning on principles of sovereign immunity from legislative jurisdiction, and suggested that foreign merchant ships, like foreigners generally, would not be exempt from territorial jurisdiction. The Court later had to face that issue more directly in *Brown v. Duchesne*, because the ship in that case had used the patented improvement while sailing through U.S. territorial waters on its way to a U.S. port. The defendant’s attorney argued that international law allowed foreign ships to be within the domestic jurisdiction for some purposes – *e.g.*, to ensure that persons on board “do no act against the public peace” – but not for others, and that the use of the improved gaff fell into the second category. Citing Justice Story’s Commentaries on the Conflict of Laws, the Court took the more sweeping view that “undoubtedly every person who is found within the limits of a Government, whether for temporary purposes or as a resident, is bound by its laws.” The Court nevertheless declined to apply U.S. patent law to the foreign ship while it was within U.S. territory. It cited not only the fact that the use had caused no harm, but also its concern that such an interpretation would “seriously embarrass the commerce of the country with foreign nations,” as well as potentially interfere with the United States’ ability to enter into treaties and enact laws to regulate foreign commerce.

Thus, even though the Court stated that international limits on jurisdiction did not apply, it still crafted its decision to keep U.S. law within

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71 *Id.*
72 *Id.* at 146.
73 *Brown*, 60 U.S. at 192.
74 *Id.* at 194.
75 *Brown*, 60 U.S. at 196-97.
those limits. After all, why did the extension of U.S. patent law to foreign ships create such great potential for embarrassment and conflict? The obvious reason is that despite their apparent legal power to apply their local laws to merchant ships within their territory, nations had generally refrained from doing so in the absence of harm to the host nation.

The same section of Justice Story’s treatise that the Brown Court cited also said that although the sovereign “may of strict right make laws for all foreigners who merely pass through his domains, . . . commonly this authority is exercised only as to matters of police.” By the middle of the nineteenth century, international practice with respect to foreign ships was described as forming, or beginning to form, a rule. In a treatise published only five years after Brown, Henry Halleck wrote that “the comity and practice of nations have established the rule of international law [that a foreign vessel in port] is, for the general purpose of governing and regulating the rights, duties and obligations of those on board, to be considered as a part of the territory of the nation to which she belongs. . . . It, therefore, follows that with respect to facts happening on board, which do not concern the tranquility of the port, or persons foreign to the crew . . . are not amenable to the territorial justice. All such matters are justiciable only by the courts of the country to which the vessel belongs.” Taney’s opinion in Brown made clear that the Court would not have hesitated to apply the patent laws to a French ship had the disputed invention been manufactured or sold from the ship in U.S. port. Why would such an application of the U.S. law not give rise to the same potential for embarrassment? The difference is that in the latter case, the application would not have conflicted with the emerging international norm.

By 1887, in Wildenhus’ Case, the norm had evolved to the point that the Court took greater notice of it. It described the practice according to which the local government abstained from interfering with internal matters within a vessel that “affected only the vessel, or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port,” and explained that “[s]uch being the general public law on this subject, treaties and conventions have been entered into by nations having commercial intercourse, the purpose of which was to settle and define the rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from

76 Story, supra, § 541.
78 Brown, 60 U.S. at 196.
In the United States, the agreements took the form of bilateral treaties with another country that gave its consular officers the right to decide disputes within its ships while in U.S. ports (and the reciprocal rights to U.S. consular officers). Later treaties specified that while the consuls had the “authority to cause proper order to be maintained on board, and to decide disputes between the officers and crew,” the local authorities had the right “to interfere if the disorders taking place on board were of such a nature as to disturb the public tranquility.” In other words, the United States had entered into treaties that delineated the scope of its jurisdiction over foreign ships in its ports.

In *Wildenhus*, the Court had to construe one of these treaties, between the United States and Belgium, in order to determine on which side of the jurisdictional line fell a murder by one Belgian seaman of another, on a Belgian ship in U.S. port. Rejecting the argument of the Belgian consul that the murder concerned only the internal regulation of the affairs of the ship, the Court decided that “[t]he very nature of such an act is to disturb the quiet of a peaceful community, and to create, in the language of the treaty, a ‘disorder’ which will ‘disturb tranquillity and public order on shore or in the port.’” The general rule, the Court said, was that “[d]isorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished, by the proper authorities of the local jurisdiction.” *Wildenhus* could be read as deriving its rule from general principles of international law as well as from the specific treaty before it (an ambiguity that would later lead to confusion), but either way, it continued the Court’s reliance on international law in determining the scope of U.S. legislative jurisdiction.

B. The Addition of a Presumption against Extraterritoriality

The next chapter in the Court’s jurisprudence on legislative jurisdiction opened in 1909, with Justice Oliver Wendell Holmes’ opinion in *American Banana Co. v. United Fruit Co.*

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79 *Mali v. Keeper of the Common Jail (Wildenhus’ Case)*, 120 U.S. 1, 12 (1887).
80 *Id.* at 13-17 (reviewing treaties).
81 *Id.* at 16-17.
82 *Id.* at 18.
extraterritoriality and, confusingly, conflated it with the older presumption against extrajurisdictionality. In later cases, the Court clarified that it would apply both presumptions to situations arising in foreign countries, such as *American Banana*, but only the older presumption to situations arising on U.S. or foreign ships.

The latter situations had been brought before the Court in the nineteenth-century cases discussed in the preceding section; *American Banana* broke new ground in asking the Court to determine whether a regulatory statute, the Sherman Act, applied to actions by a U.S. company in another country. In refusing to extend the statute so far, the Court announced a presumption against interpreting any statute to apply beyond “the territorial limits over which the lawmaker has general and legitimate power.” But the Court said that its primary reason for construing the statute not to apply beyond those territorial limits was that “the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States, and within that of other states.” Because the Court viewed the actions as outside U.S. jurisdiction and within that of another country, the Court saw them as subject to “the general and almost universal rule . . . 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.” Statutory terms with “universal scope,” the Court said, “will be taken, as a matter of course, to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch.”

The Court thus appeared to treat application of U.S. laws to acts outside U.S. territory as the same thing as application of U.S. laws acts outside U.S. jurisdiction. The Court’s conflation of extraterritoriality and

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84 American Banana alleged that the United Fruit Company had induced the government of Costa Rica to interfere with and eventually seize an American Banana plantation in Panama. 85 *American Banana*, 213 U.S. at 357 (emphasis added).
86 *Id.* at 355 (emphasis added).
87 *Id.* at 356. Holmes took this rule from contemporary views of conflict of laws, rather than from public international law limits on legislative jurisdiction. The idea that the law of place where the wrongful act occurs governs the lawfulness of the act was the basis for Joseph Beale’s “vested rights” approach to conflicts, which culminated in the First Restatement of Conflict of Laws in 1934. See Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 Sup. Ct. Rev. 179, 186; Born, *supra* note 12, at 17.

As a separate ground for the decision, the Court stated that persuading a foreign power to seize property cannot be the basis for a claim because “it is a contradiction in terms to say that, within its jurisdiction, it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper.” 213 U.S. at 358.
88 *American Banana*, 213 U.S. at 357 (emphasis added).
extrajurisdictionality created a basis for three types of confusion.

First, it left unclear how courts should analyze the application of U.S. laws to actors in foreign countries, the very situation at issue in the case. Holmes’ opinion came close to claiming that legislative jurisdiction is mutually exclusive, allowing no two states to have jurisdiction over the same situation. In particular, he wrote that for a state other than the one with territorial jurisdiction to treat an actor “according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.” Although the use of the term “comity” rather than “law” softened the statement, it nevertheless suggested that the extraterritorial extension of laws was akin to, and perhaps simply a form of, extrajurisdictionality, and objectionable in the same way. At the same time, as the opinion itself recognized, states had other bases for jurisdiction than territory, including universal jurisdiction, jurisdiction over acts “immediately affecting national interests,” and jurisdiction over their nationals. Holmes did not acknowledge the way that these international rules of legislative jurisdiction undermined his conflation of territory and jurisdiction. If general laws should be construed to apply to “everyone subject to such legislation,” why should U.S. laws not apply to U.S. nationals residing overseas, who had long been recognized by the Court as falling within U.S. jurisdiction under international law?

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89 It is true that in Schooner Exchange, the Court had said that “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute.” 11 U.S. at 136. But as noted above, the Court in that case appeared to focus on jurisdiction to enforce, rather than legislative jurisdiction. See note 72 supra and accompanying text. The Court had later recognized that nationality was also a basis for legislative jurisdiction, Apollon, 22 U.S. at 370, even if that would mean that nationals in a foreign territory could be subject to more than one set of laws. Furlong, 18 U.S. at 197-98.

90 213 U.S. at 356.

91 “The doctrine of comity is not a rule of public international law, but the term characterizes many of those same functional elements that define a system of international legal order. In Anglo-American law the extension of comity to another nation is viewed as a unilateral decision of the forum, not as an act required by a rule of the public international system. This emphasis on the voluntary nature of the doctrine has led to its use to describe an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith.” Harold G. Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law, 76 Am. J. Int’l L. 280, 281 (1982).

92 213 U.S. at 356.

93 See The Apollon, 22 U.S. at 370 (“The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens.”); Rose v. Himely, 4 Cranch 279 (1808)
statutes bind British subjects everywhere,” as the opinion stated, why should U.S. statutes not do the same?

The second potential ground for confusion was that American Banana might be read as calling into question the application of U.S. law to situations outside U.S. territory but within sole U.S. jurisdiction. Such situations might seem to be subject to a presumption against extraterritoriality even though they would not be subject to the presumption against extrajurisdictionality. At the time, the locations that most obviously fell into this intermediate category were U.S. ships on the high seas. But within a few decades, the Court would also be faced with questions concerning the application of laws to territory under U.S. control even though outside U.S. national boundaries.

The third area in which the conflation of territoriality and jurisdictionality could give rise to confusion had to do with questions of infraterritorial application of U.S. laws – most importantly, with respect to foreign ships in U.S. ports. If a presumption against extraterritoriality completely replaced the presumption against extrajurisdictionality, then there would not seem to be any obstacle to extending U.S. laws to all situations within U.S. territory, even to actions on foreign ships that might be outside its jurisdiction under international law.

The following sections describe how the Court addressed the application of U.S. laws to actions within other states’ territorial jurisdiction, to U.S. ships and possessions, and to foreign ships within U.S. territory. In short, the Court’s decisions in the years after American Banana indicated that: the presumption against extraterritoriality did not supplant the presumption against extrajurisdictionality; the presumption against extraterritoriality only applied to situations arising in foreign countries, not to situations arising on U.S. or foreign ships; and where it did apply, the presumption against extraterritoriality was much easier to avoid or overcome than the presumption against extrajurisdictionality, which could only be overcome with a clear statement of congressional intent.

1. Applying U.S. Laws to Actions in Other Countries

In the six decades after American Banana, the Court applied the presumption against extraterritoriality in a series of decisions involving the potential application of U.S. law to actors in other countries. Those cases

("It is conceded that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens.")
made clear that the new presumption was separate from the presumption against extrajurisdictionality, which continued in its own right, and that the new presumption was much easier to avoid or overcome than the older one.

a. Continuing the Presumption Against Extrajurisdictionality. After American Banana, the Court continued to apply its older presumption against extrajurisdictional application of U.S. laws in cases involving foreign countries, at the same time that it began to apply a new presumption against extraterritorial application. The Court almost never found that a law ran afoul of the presumption against extrajurisdictionality, however, because in nearly every case the application of the law was a legal exercise of U.S. jurisdiction: while the situations were typically within the primary jurisdiction of another state, they were not within that state’s sole jurisdiction. The cases thus demonstrated that American Banana’s suggestion that any extraterritorial application of U.S. law would violate the “comity of nations” was simply wrong.

For example, in its 1922 decision in United States v. Bowman, the Court considered whether a federal statute criminalizing false claims against the United States or corporations in which the United States owned stock should apply to actions by U.S. nationals in Brazil. The Court emphasized that applying the law to actions in Brazil did not raise American Banana’s concerns about interference with foreign sovereigns: since the Bowman defendants were U.S. citizens, they “were certainly subject to such laws as [the United States] might pass to protect itself and its property. Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance.” The Court noted that another, uncaptured defendant in Bowman was British, and said that “it will be time enough to consider what, if any, jurisdiction the District Court below has to punish him when he is brought to trial.”

More explicitly, in Blackmer v. United States, decided ten years later, the Court rejected the argument that the extension of a U.S. statute authorizing the issuance of subpoenas to a U.S. citizen resident in France violated the jurisdictional limits of international law. As a citizen of the

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94 260 U.S. 94 (1922). The case also concerned actions by the defendants on the high seas. See note [141] infra.
95 Id. at 102.
96 Id. at 102-03.
97 284 U.S. 421 (1932).
98 Blackmer’s counsel argued that “[t]his nation is an equal sovereignty, which, in the absence of treaty, can not exercise power extraterritorially.” Id. at 424. Again, this statement is more accurate as a description of the bounds of jurisdiction to enforce.
United States, Blackmer “was bound by its laws made applicable to him in a foreign country. . . . With respect to such an exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government.”

By 1952, litigants had stopped trying to argue that the extraterritorial application of U.S. laws to U.S. nationals violated limits on Congress’ power: the Court began its analysis in Steele v. Bulova Watch Co. by stating, “Petitioner concedes, as he must, that Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States.”

Bowman, Blackmer, and Steele involved the extraterritorial application of U.S. laws to U.S. nationals, for which international law provided a clear basis for jurisdiction. The Alcoa case, however, which was heard by the Second Circuit in lieu of the Supreme Court, concerned another basis for jurisdiction that was becoming increasingly important. Although Alcoa chiefly had to do with the application of the Sherman Act to Alcoa within the United States, it also addressed whether a Canadian company created by Alcoa had violated the Act by colluding with other foreign companies. In the course of that analysis, the court had to decide whether the Act applied at all “to the conduct outside the United States of persons not in allegiance to it.”

American Banana, of course, had held that the Act did not apply even to a U.S. company acting in another country. Writing for the Second Circuit, Judge Learned Hand acknowledged the presumption against extrajurisdictionality, saying “it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers.” But he found it to be “settled law” that “any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.”

This “territorial effects” basis for jurisdiction had been acknowledged

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99 Id. at 436-37. The Court cited various international law treatises for this point of public international law, and quoted Oppenheim: “The Law of Nations does not prevent a State from exercising jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy.” Id. at 437 n.2.
100 344 U.S. 280, 282 (1952). See also id. at 285-86 (repeating that international law does not prohibit the United States from governing the conduct of its own citizens abroad).
101 United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
102 Id. at 443.
103 Id.
104 Id.
by the Permanent Court of International Justice in 1924, in its famous *Lotus* decision,\(^{105}\) and had also been recognized in the parallel development of the conflict of laws.\(^{106}\) It was and would remain much more controversial than extending jurisdiction to the actions of nationals abroad.\(^{107}\) The significant point in the present context, however, is that Hand interpreted the statute in accordance with his understanding of international limits on legislative jurisdiction, not simply according to a presumption against extraterritoriality.

b. *Applying the New Presumption Against Extraterritoriality.* While the Court continued to apply a presumption against extrajurisdictionality after *American Banana*, it also began to apply a separate presumption against extraterritoriality in cases involving the application of U.S. laws to foreign countries. Despite *American Banana*’s initial identification of the new presumption with the older presumption against extrajurisdictionality, the scope of and reasons for the newer presumption could not be simply borrowed from the older one.

Clear evidence of congressional intent was necessary to overcome the presumption against extrajurisdictionality. Indeed, if viewed as an expression of the *Charming Betsy* canon, the presumption required the Court to avoid an extrajurisdictional interpretation of a law if any other interpretation were possible.\(^{108}\) In practice, the Court never found evidence sufficient to indicate that Congress intended a statute to apply beyond the international limits on legislative jurisdiction. The justifications for such a strict standard could include not only practical problems with extending the putative reach of U.S. legislation far beyond the United States’ ability to enforce it, but also concerns that violating the law of nations would have serious consequences for international relations.\(^{109}\) But these concerns did not apply, at least to the same degree, with respect to extensions of U.S. law

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\(^{105}\) 1927 P.C.I.J. (Ser. A) No. 10, at 23 (recognizing that many countries had interpreted their criminal laws to apply to offenses committed extraterritorially “if one of the constituent elements of the offense, and more especially its effects, have taken place” internally).

\(^{106}\) Restatement (First) of Conflict of Laws § 65 (“If consequences of an act done in one state occur in another state, each state in which any event in the series of acts and consequences occurs may exercise legislative jurisdiction to create rights or other interests as a result thereof.”). Hand cited this section in support of his description of the “settled law.” 148 F.2d at 443.

\(^{107}\) For a sampling of criticisms and defenses of *Lotus*, see Born, *supra* note 12, at 25 n.104.

\(^{108}\) *Charming Betsy*, 6 U.S. (2 Cranch) at 118 (“an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”).

\(^{109}\) See note 61 *supra* and accompanying text.
outside U.S. territory but within U.S. jurisdiction. Although the United States could not enforce its laws directly against non-resident nationals, for example, it could nevertheless use their continuing ties with the United States to obtain (or at least realistically threaten to obtain) their compliance. The U.S. government could, for example, take action against their assets within U.S. territory or arrest them when they returned. Moreover, extending U.S. laws (but not direct enforcement of them) to U.S. nationals living abroad would often avoid international conflict, since countries generally acknowledge the legal right of each country to extend its laws to its own nationals.\footnote{110}

Those differences would suggest that the presumption against extraterritoriality would be less strict than the presumption against extrajurisdictionality. And so it proved. In a series of decisions after \textit{American Banana}, the Court consistently allowed the presumption against extraterritoriality to be avoided or overcome without requiring a clear statement of congressional intent to do so.

The Court allowed the presumption to be avoided entirely if the subject of the statute was one whose “nature” indicated that Congress intended to address it extraterritorially. For example, in the 1922 \textit{Bowman} decision, the Court said that while a presumption against extraterritorial application would apply to federal statutes addressing crimes against “the peace and good order of the community,” such as murder and robbery, committed outside the “strict territorial jurisdiction” of the United States, the presumption did not apply to laws that defend the government against obstruction or fraud, which by their nature are “not logically dependent on their locality for the Government’s jurisdiction, but . . . enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated.”\footnote{111} For laws in the second category, the Court said, “Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it

\footnote{110 As part of its conflation of territoriality with jurisdiction, \textit{American Banana} did say that applying a law extraterritorially to an actor in another country “would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state justly might resent.” 213 U.S. at 356. But, as explained in the preceding section, the Court recognized in \textit{Bowman} and \textit{Blackmer} that extending a U.S. statute to U.S. nationals living abroad was within the bounds of the United States’ jurisdiction under international law, and thus unlikely to give rise to any “offense to the dignity or right of sovereignty” of the territorial sovereign. \textit{Bowman}, 260 U.S. at 102; \textit{Blackmer}, 284 U.S. at 436-37.}

\footnote{111 260 U.S. at 98.}
to be inferred from the nature of the offense.”

Three years later, in *New York Central R.R. v. Chisholm*, the Court decided that the federal Employers’ Liability Act of 1908, which provided that railroad carriers were liable to their employees for damages caused by the carriers’ negligence, did not apply to a fatal accident caused by a U.S. railroad company in Canada. Citing *Bowman*, the Court held that the statute “contains no words which definitely disclose an intention to give it extraterritorial effect, *nor do the circumstances require an inference of such purpose.*”

Allowing “circumstances” or “the nature of the offense” to avoid application of the presumption against extraterritoriality created a potentially gigantic exception to the rule, the boundaries of which the Court did not clarify. On the contrary, the Court made matters worse by often failing to refer to the presumption at all, even when it was not obvious why the presumption would not apply. In *Cook v. Tait*, for example, decided in 1924, the Court upheld the imposition of income tax on U.S. citizens residing abroad, without even mentioning the presumption against extraterritoriality. The statute in question applied a tax of 8% on the “net income of every individual,” except that “in the case of a citizen or resident of the United States” the rate would be 4% on the first $4,000 of taxable income. The use of the phrase “citizen or resident” might have been thought to express Congress’ intent to apply the tax to non-resident citizens, and the regulation implementing the statute made clear that the Executive Branch took that position. But the Court did not explain how the statute overcame the presumption. Instead, it focused on the plaintiff’s

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112 *Id.*
113 268 U.S. 29 (1925).
114 *Id.* at 31 (emphasis added).
115 265 U.S. 47 (1924). The failure to mention the presumption was particularly striking because ten years before, in *United States v. Goelet*, 232 U.S. 293 (1914), the Court had referred to the presumption in deciding that an excise tax on yachts did not apply to a yacht kept abroad by a non-resident citizen. Although *Goelet* did not cite *American Banana*, it did express a presumption against extraterritoriality: “It may not be doubted . . . that the taxing power, when exerted, is not usually applied to those even albeit they are citizens, who have a permanent domicile or residence outside of the country levying the tax. . . . [W]e must approach the statute for the purpose of ascertaining whether its provisions sanction such rare and exceptional taxation.” *Id.* at 297-98. Even though the statute had placed the excise tax on “any citizen,” the Court declined to find that the presumption had been overcome.
118 265 U.S. at 53 n.1 (quoting the regulation, which stated in part: “Citizens of the United States . . . wherever resident, are liable to the tax.”).
argument that Congress lacked the power to tax his income under the constitution or international law, which it rejected on the ground that there was no doubt that the United States had the power to tax its citizens abroad if it chose to exercise it.\textsuperscript{119}

The Court again failed to acknowledge a presumption against extraterritoriality in \textit{Kawakita v. United States}, which upheld the conviction of a dual-national of the United States and Japan for treason during the Second World War.\textsuperscript{120} The defendant argued that a person with dual nationality “can be guilty of treason only to the country where he resides,” and that while he lived in Japan he owed his “paramount allegiance” to it, not to the United States. The Court said, “The argument in its broadest reach is that treason against the United States cannot be committed abroad or in enemy territory, at least by an American with a dual nationality residing in the other country which claims him as a national. The definition of treason, however, contained in the Constitution contains no territorial limitation.”\textsuperscript{121} The Court thus seemed to apply the reverse of a presumption against extraterritoriality – that is, it presumed that U.S. laws without a “territorial limitation” do apply to U.S. nationals abroad.\textsuperscript{122} Similarly, the Second Circuit’s decision in \textit{Alcoa} did not address the presumption against extraterritoriality, instead applying the Sherman Act once the court had determined that its application was within the jurisdictional reach of the United States.\textsuperscript{123}

Perhaps one way to distinguish the laws on income tax, treason, and criminal fraud against the government, which the Court did not subject to the presumption, from statutes concerning railroad liability and crimes such as murder and robbery, which the Court did subject to the presumption, is that the latter did not involve adverse effects within the United States. Treason and fraud against the government obviously cause such effects, and

\textsuperscript{119} \textit{Id.} at 54-56. \textit{See also} Lévitt, \textit{supra} note 117, at 609-18 (reviewing the international law of legislative jurisdiction at the time and concluding that it clearly supported the imposition of taxes on citizens living extraterritorially).

\textsuperscript{120} 343 U.S. 717 (1952).

\textsuperscript{121} \textit{Id.} at 732-33.

\textsuperscript{122} Again, had the Court applied the presumption against extraterritoriality, it would have been easy to overcome. The statute implementing the constitutional prohibition against treason made explicit what had probably been implicit in the constitutional provision, stating, “Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort \textit{within the United States or elsewhere}, is guilty of treason . . . .” \textit{Id.} at 733 n.7 (quoting 18 U.S.C. § 2381) (emphasis added).

\textsuperscript{123} \textit{See Alcoa}, 148 F.2d at 443.
one might argue that failure to pay tax on income allows foreign-resident U.S. citizens to obtain the benefits of such citizenship without paying for it, increasing the burden on resident citizens. This distinction would also explain the Second Circuit’s failure to address the presumption in *Alcoa*. An objection to this reasoning is that the Supreme Court never explicitly adopted such an “effects test” as a basis for avoiding the presumption entirely. Another problem is that the Court’s 1952 decision in *Steele v. Bulova Watch Co.* does not neatly fit this pattern.

In *Steele*, the Court emphasized that the defendant’s actions could cause unlawful consequences within the United States but nevertheless applied, rather than sidestepped, the presumption. In that case, the question was whether the Lanham Act’s prohibitions on trademark infringement applied to the actions of a U.S. citizen who placed the “Bulova” mark on watches he made and sold in Mexico.124 After noting that Congress had the authority to regulate the behavior of U.S. nationals abroad,125 the Court stated that congressional legislation “will not extend beyond the boundaries of the United States unless a contrary legislative intent appears.”126 In reaching the conclusion that the presumption was overcome, the Court relied on both the “broad jurisdictional grant” in the Act, which extended its scope to “all commerce which may lawfully be regulated by Congress,” and the fact that the defendant’s “operations and their effects were not confined within the territorial limits of a foreign nation”: the defendant bought parts for his infringing watches in the United States and the watches “could well” adversely affect Bulova’s trade reputation in the United States as well as abroad.127 If effects within the United States did not avoid the presumption entirely in *Steele*, the decision nevertheless suggested that they may have helped to overcome it. The statutory language that *Steele* found so broad was virtually identical to language that the Court had found insufficient to overcome the presumption in *Chisholm*, nearly thirty years before.128 One possible basis for a different result could have been the threat of adverse

125 *Id.* at 282.
126 *Id.* at 285.
127 *Id.* at 286-87.
128 Where § 32 of the Lanham Act provided for liability of “[a]ny person who shall, in commerce,” infringe a registered trademark, and defined commerce as “all commerce which may lawfully be regulated by Congress,” the Employers’ Liability Act at issue in *Chisholm* provided for liability of “every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . or any of the States or Territories and any foreign nation or nations.” 35 Stat. 65, § 1.
When the presumption did apply, what evidence of congressional intent was necessary to overcome it? The Court suggested in the 1920s that an explicit statement in the statute itself was necessary, but it indicated in later cases that the presumption could be overcome with more general evidence of “contrary [congressional] intent.” In 1949, in *Foley Bros. v. Filardo*, the Court sought such evidence in a wide variety of sources beyond the language of the statute itself. *Foley Bros.* concerned the Eight Hour Law, which provided that every contract to which the United States was a party must provide for time-and-a-half pay for time worked beyond eight hours a day. The issue was whether the statute applied to a U.S. national hired to work on a U.S. construction project in Iran. In determining whether the necessary “contrary intent” appeared, the Court examined the language of the statute and found nothing “that gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or some measure of legislative control.” It went on to analyze the structure of the act, the statute’s legislative history, and the statutory and legislative history, and the structure and purpose of the act, to determine whether the statute applied to the situation at hand.

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129 Steele did not discuss *Chisholm*, but it did emphasize effects in distinguishing *American Banana*. 344 U.S. at 288. I do not mean to overstate the importance of adverse effects, however. The presence or absence of effects in the United States was not even mentioned in *Chisholm*; the key factor there may have been the continuing influence in 1925 of then-prevailing conflict-of-law rules for torts. The Court cited a 1904 decision in which it had applied foreign law to a very similar situation: a tort suffered by a U.S. citizen and caused by a U.S. corporation operating a railroad from Texas to Mexico City. 268 U.S. at 32 (citing *Slater v. Mexican National R.R.*, 194 U.S. 120 (1904)). The Court may have felt that a federal statute could only overcome these rules if it did so explicitly.

130 *Bowman*, 260 U.S. at 98; *Chisholm*, 268 U.S. at 31. If this were the general standard statutes had to meet to overcome the presumption, then few laws would pass muster, since Congress often uses general terms without specifying their geographic scope. Some laws would meet even this standard, however. In *Blackmer*, for example, the Court referred to the presumption that “unless the contrary intent appears,” federal statutes are “construed to apply only within the territorial jurisdiction of the United States.” 284 U.S. at 421. While it did not specify exactly where the “contrary intent” could be found, there seemed to be no dispute that a statute specifically authorizing U.S. consuls to serve subpoenas on U.S. citizens living abroad was clear enough.

131 *Blackmer*, 284 U.S. at 421; *Steele*, 344 U.S. at 285.


133 *Id.* at 283 (citing Eight Hour Law, 54 Stat. 884).

134 *Id.*. The Court’s use of the term “some measure of legislative control” as an alternative basis to sovereign territory was significant, and may have reflected its recent decision in *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948), in which the Court had just held that another federal labor law did apply to a U.S. “possession” in another country. See notes 168-75 infra and accompanying text.
and even administrative interpretations of the law, none of which provided support for an extraterritorial interpretation.\textsuperscript{135}

Thus, although the Court was far from perfectly clear about the precise contours of the presumption against extraterritoriality, it did clarify two important aspects of the presumption: it could be avoided entirely if the nature of the offense in question indicated that Congress intended the statute to reach it (and that was more likely if the offense caused adverse effects in the United States); and in considering whether to overcome the presumption when it did apply, the Court would look for any relevant evidence of Congress’ intent, not just a clear statement in the statute itself. As a result, the presumption against extraterritoriality was a much lower hurdle than the presumption against extrajurisdictionality, which admitted no exceptions and required the clearest possible evidence to overcome.

Perhaps the Court would have better explained the presumption against extraterritoriality if it had explored the possible reasons for it. If, for example, it had acknowledged that even though extraterritorial applications of U.S. law to situations within the jurisdiction of the United States did not raise the problems of practicality and conflict that truly extrajurisdictional applications did, they could raise lesser but still significant possibilities of those problems. By relying on indirect enforcement, the extraterritorial extension of laws would face practical obstacles to ensuring that the laws on the books were not flouted. And conflicts could arise with territorial sovereigns even when the extraterritorial laws had an arguable basis in international law, as \textit{Alcoa’s} extension of the Sherman Act to foreign actors on the basis of their effects within the United States would demonstrate.\textsuperscript{136} These possibilities easily could have justified the presumption against applying laws extraterritorially to situations and actors in foreign countries, and could have explained why the presumption was less strict than the presumption against extrajurisdictionality, which protected against graver problems of practicality and conflict.\textsuperscript{137}

But the Court did not adequately explain the reasons for the

\textsuperscript{135} 336 U.S. at 286-90. The structure of the act militated against extraterritorial application because its failure to distinguish between U.S. and foreign workers would otherwise lead to the regulation of “labor conditions which are the primary concern of a foreign country”: its legislative history revealed that Congress was concerned with domestic labor conditions; and administrative interpretations tended to support a restrictive interpretation.

\textsuperscript{136} One echo of the \textit{American Banana} concern did appear in the dissenting opinion of Justices Reed and Douglas in \textit{Steele}. See 344 U.S. at 292 (“Such extensions of power bring our legislation into conflict with the laws and practices of other nations . . . .”).

\textsuperscript{137} See Part III.A infra.
presumption against extraterritoriality, how they differed from those underlying the presumption against extrajurisdictionality, or how the two presumptions worked together. Not until Foley Bros., in 1949, did the Court provide any justification for the presumption against extraterritoriality in its post-American Banana form, and then it said only that the presumption “is based on the assumption that Congress is primarily concerned with domestic conditions.”\textsuperscript{138} This statement could help to explain why the Court viewed domestic effects of foreign actions as so important in determining whether to apply laws to extraterritorial actions. But by failing to explain why Congress would be primarily concerned with domestic conditions, the Court missed an opportunity to clarify the scope and strength of the presumption.\textsuperscript{139} Moreover, by itself this justification was hard to square with contemporary decisions by the Court that refused to apply the presumption to U.S. ships out of territorial waters, the subject of the next section.

2. Applying U.S. Laws Outside U.S. Sovereign Territory but Within U.S. Jurisdiction

American Banana’s conflation of extraterritoriality and extrajurisdictionality had great potential for confusion with respect to situations that were beyond the sovereign territory of the United States but still within its jurisdiction, such as U.S. ships at sea or in foreign ports. As Part I.A.1 of this article explains, the Supreme Court had applied statutes to U.S. ships on the high seas throughout the nineteenth century without employing a presumption against doing so. Indeed, in The Hamilton, written by Justice Holmes just two years before American Banana, the Court had applied a Delaware statute governing tort claims to actions arising

\textsuperscript{138} 336 U.S. at 285.

\textsuperscript{139} Briefly describing two hypothetical interpretations of the language may demonstrate how little it helped to clarify the presumption. First, the Court could have meant that Congress is primarily concerned with domestic conditions because those are the only conditions within its legislative jurisdiction under international law. (As explained above, this was an interpretation that American Banana seemed to support, although the Court later retreated from it.) If so, the presumption would be of equal stringency to the presumption against extrajurisdictionality, since any extraterritorial application would give rise to serious conflicts with international law and foreign states. Second, the Court could have meant that Congress is primarily concerned with domestic conditions because it does not normally think that actions taken abroad affect U.S. interests. In that case, it might be justifiable to overcome the presumption whenever such an action would affect U.S. interests. In the first case, the presumption would almost never be overcome; in the second, it could be overcome easily.
from a death on the high seas caused by a collision between two Delaware ships, saying that “the bare fact of the parties being outside the [state’s] territory, in a place belonging to no other sovereign, would not limit the authority of the state, as accepted by civilized theory,” and that “we construe the statute as intended to govern all cases which it is competent to govern, or, at least, not to be confined to deaths occasioned on land.”

Other than its emphasis on territoriality, nothing in American Banana suggested that the Court intended to overrule the line of cases culminating in The Hamilton; on the contrary, American Banana cited The Hamilton for the proposition that “in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law.” Over the next several decades, the Court continued to extend statutes to U.S. ships without applying a presumption against extraterritoriality. The Court was less clear, however, on how it avoided the presumption.

At times, the Court repeated the view that U.S. ships should be treated as the constructive territory of the United States, the position it had taken in the nineteenth century. If ships were floating pieces of U.S. territory, then a presumption against extraterritorial application of U.S. laws would obviously not apply to them. The Attorney General relied on this reasoning

\[\text{\textsuperscript{140}}\text{Old Dominion Steamship Co. v. Gilmore (The Hamilton), 207 U.S. 398, 403, 405 (1907).}\]

\[\text{\textsuperscript{141}}\text{213 U.S. at 355-56.}\]

\[\text{\textsuperscript{142}}\text{In one early case, the Court did imply that the presumption might apply to actions on the high seas. In Bowman, the indictment charged the defendants with violating the law while on a U.S. ship on the high seas and in Brazilian port, as well as while in Brazil. Relying on the presumption against extraterritoriality, the district court dismissed the indictment. It claimed incorrectly that Congress had always expressly indicated when it intended that its laws should be operative on the high seas and, since it had not done so in this case, the district court declined to interpret the law as extending so far. Id. at 97. In overruling the decision, the Supreme Court distinguished between crimes that “affect the peace and good order of the community” and crimes that defend the government against obstruction or fraud, and held that while the first class was subject to the presumption against extraterritoriality, the second was not. By not differentiating the application of the statute to the defendants on the high seas and in Brazil, the Court’s opinion could be read as suggesting that if the presumption against extraterritoriality did apply, it would apply to both situations. Because the Court decided not to apply the presumption at all, however, any such suggestion was not necessary to its holding.}\]

\[\text{\textsuperscript{143}}\text{See note 66, supra. See also The Hamilton, 207 U.S. at 405 (citing Crapo v. Kelly, 83 U.S. at 610, its most detailed exposition of this point of view, in reference to “[t]he jurisdiction commonly expressed in the formula that a vessel at sea is regarded as part of the territory of the state”).}\]
in a 1922 opinion on the scope of the Eighteenth Amendment and the 1919 Volstead Act implementing it.\footnote{Liquors on American and Foreign Vessels, 33 Op. Att’y Gen. 335 (1922).} Although the Act contained no jurisdictional limit,\footnote{National Prohibition Act, tit. II, § 3, 41 Stat. 305, 308 (1919).} the Eighteenth Amendment prohibited “the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof.” Despite this apparently strict territorial limit, the Attorney General cited the many Court opinions that spoke of U.S. ships as U.S. territory and concluded that the prohibition extended to the limits of U.S. jurisdiction, including over U.S. ships at sea.\footnote{Id. at 338.} The opinion entirely ignored any presumption against extraterritoriality.

The problem with this method of sidestepping the presumption was that the Supreme Court did not always find itself able to pretend that U.S. ships were floating bits of U.S. territory. In 1923, in \textit{Cunard S.S. Co. v. Mellon}, steamship companies complaining of their inability to offer alcoholic beverages on U.S. ships at sea challenged the Attorney General’s 1922 opinion, and the Supreme Court overturned it. Citing international law treatises, the Court said that “the statement sometimes made that a merchant ship is a part of the territory of the country whose flag she flies . . . is a figure of speech, a metaphor. . . . The jurisdiction which it is intended to describe arises out of the nationality of the ship, as established by her domicile, registry and use of the flag, and partakes more of the characteristics of personal than of territorial sovereignty.”\footnote{Cunard S.S. Co. v. Mellon, 262 U.S. 100, 123 (1923).} If jurisdiction over ships is more personal than territorial, should they be subject to the presumption against extraterritoriality? The Court did not apply the presumption to the Eighteenth Amendment in \textit{Cunard}, but the case did not squarely present the issue because the Amendment itself included a clear territorial limitation.\footnote{The Court held that the context of the Amendment’s reference to “all territory subject to the jurisdiction” of the United States, as well as “the purport of the entire section,” made clear that “the term is used in a physical and not a metaphorical sense.” \textit{Id.} at 122.}

When faced with less clear statutes in later cases, however, the Court continued to except U.S. ships from the presumption against extraterritoriality, even without treating them as if they were U.S. territory. In \textit{Maul v. United States},\footnote{274 U.S. 501 (1927).} for example, the Court was asked to determine

\begin{itemize}
\item \footnote{Liquors on American and Foreign Vessels, 33 Op. Att’y Gen. 335 (1922).}
\item \footnote{National Prohibition Act, tit. II, § 3, 41 Stat. 305, 308 (1919).}
\item \footnote{Id. at 338.}
\item \footnote{Cunard S.S. Co. v. Mellon, 262 U.S. 100, 123 (1923).}
\item \footnote{The Court held that the context of the Amendment’s reference to “all territory subject to the jurisdiction” of the United States, as well as “the purport of the entire section,” made clear that “the term is used in a physical and not a metaphorical sense.” \textit{Id.} at 122.}
\item \footnote{274 U.S. 501 (1927).}
whether a statute authorizing customs officers to seize any vessel liable to seizure under the revenue laws “as well without as within their respective districts” allowed the Coast Guard to seize a ship on the high seas. The Court reviewed two possible constructions of the language: “one restricting the natural sense and treating the clause as if saying ‘as well within other customs districts as within their own,’ and the other accepting the natural sense.”

The key difference between the two was that “one excludes and the other includes the sea outside customs districts.” The Court chose the second interpretation, emphasizing not only that “it is better adapted to the attainment of the purpose of the section,” but also that it “giv[es] effect to the natural import of the clause.”

The Court refused to interpret the statute restrictively, as a presumption against extraterritoriality would have suggested that it should. Instead, it emphasized that the statute did not run afoul of the presumption against extraterritoriality:

“The terms [Congress] has used are easily broad enough to meet the situation effectively, and no reason is suggested or perceived for cutting them down as respects domestic vessels. If Congress were without power to provide for the seizure of such vessels on the high sea, a restrictive construction might be justified. But there is no want of power in this regard. The high sea is common to all nations and foreign to none; and every nation having vessels there has power to regulate them and also to seize them for a violation of its laws."

Even after *Cunard*, however, the idea that U.S. ships are constructively part of U.S. territory occasionally reappeared. In 1933, in *United States v. Flores*, the Court had to decide whether to apply U.S. criminal law to a U.S. citizen charged with murdering another U.S. citizen on a U.S. ship in a port 250 miles up the Congo River, in Belgian territory. Flores argued that the presumption against extraterritoriality applied and that it had not been overcome. The Attorney General acknowledged that “as a general

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150 *Id.* at 510.
151 *Id.* at 511.
152 *Id.* at 511-12 (citations omitted).
153 289 U.S. 137 (1933).
154 The heading of his first argument in his brief was: “The Criminal Jurisdiction of the United States is Based upon the Territorial Principle,” and the second heading was that “Congress did not Intend to Depart from the Territorial Principle of Criminal Jurisdiction.” He relied on *Bowman* for the proposition that criminal laws against murder were subject to the presumption against extraterritoriality, and on *Cunard* for the argument that ships are not part of the territory of their state.
principle, the criminal laws of a nation do not operate beyond its territorial limits” but, relying upon international law, he stated that “there are exceptions to [this general rule] as fully recognized as the doctrine itself. One of those exceptions is that offences committed upon vessels belonging to citizens of the United States, within their admiralty jurisdiction, (that is, within navigable waters,) though out of the territorial limits of the United States, may be judicially considered when the vessel and parties are brought within their territorial jurisdiction. As we have before stated, a vessel is deemed part of the territory of the country to which she belongs.”

The Court could have applied the presumption but held that the statute overcame it. The statutory language made punishable murder and other offenses defined in the U.S. criminal code, *inter alia*, “when committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof.” The statute evidently applied outside of U.S. territorial jurisdiction; the only question was whether it applied to a U.S. ship on a navigable river within a foreign country, and the Court concluded that “the language of the statute making it applicable to offenses committed on an American vessel outside the jurisdiction of a state within the admiralty and maritime jurisdiction of the United States’ is broad enough to include crimes in the territorial waters of a foreign sovereignty.” But the Court went further, agreeing with the Attorney General that the presumption against extraterritoriality did not even apply, because the ship was effectively part of the territory of the United States:

> It is true that the criminal jurisdiction of the United States is in general based on the territorial principle, and criminal statutes of the United States are not by implication given an extraterritorial effect. But that principle has never been thought to be applicable to a merchant vessel which, for purposes of the jurisdiction of the courts of the sovereignty whose flag it flies to punish crimes committed upon it, is deemed to be a part of the territory of that sovereignty, and not to lose that character when in navigable waters within the territorial limits of another sovereignty. This qualification of the territorial principle in the case of vessels of the flag was urged by Mr. Webster while Secretary of State . . . . Subject to the right of

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155 *Id.* at 18-19.
156 289 U.S. at 145-46.
157 *Id.* at 155.
the territorial sovereignty to assert jurisdiction over offenses disturbing the peace of the port, it has been supported by writers on international law, and has been recognized by France, Belgium, and other continental countries, as well as by England and the United States.\footnote{158}

The \textit{Flores} Court emphasized the role of international law in guiding its decision, noting that if the country with jurisdiction over the river where the ship was lying sought to exercise jurisdiction as well, “there is not entire agreement among nations or the writers on international law as to which sovereignty should yield to the other,” but that the U.S. position, as expressed in \textit{Wildenhus},\footnote{159} is that “in the case of major crimes, affecting the peace and tranquillity of the port, the jurisdiction asserted by the sovereignty of the port must prevail over that of the vessel.”\footnote{160} It concluded, “In the absence of any controlling treaty provision, and any assertion of jurisdiction by the territorial sovereign, it is the duty of the courts of the United States to apply to offenses committed by its citizens on vessels flying its flag, its own statutes, interpreted in the light of recognized principles of international law.”\footnote{161}

In 1941, eight years after \textit{Flores}, the Court again made clear that it did not view the presumption against extraterritoriality as relevant to the application of statutes to U.S. nationals on the high seas. In \textit{Skiriotes v. Florida},\footnote{162} the defendant was convicted for violating a Florida statute forbidding the use of deep sea diving equipment in taking sponges. He argued that he had been diving beyond the international boundary of the United States and that Florida’s criminal jurisdiction could not extend so far. In rejecting his argument, the Court again ignored the presumption against extraterritoriality, instead deciding the extent of the statute in light of the legislative jurisdiction of the United States under international law. The Court said that his argument based on territorial limits was “beside the point,” because “the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed.”\footnote{163} Since the United States could control

\footnote{158} \textit{Id.} at 155-57.  
\footnote{159} \textit{Id.} at 1.  
\footnote{160} 289 U.S. at 158.  
\footnote{161} \textit{Id.} at 159.  
\footnote{162} 313 U.S. 69 (1941).  
\footnote{163} \textit{Id.} at 73. The Court echoed the language of \textit{Blackmer}, 284 U.S. at 437, saying in virtually identical language, “With respect to such an exercise of authority there is no
its citizens’ actions on the high seas, so could Florida.\textsuperscript{164}

Citing \textit{The Hamilton}, the \textit{Skiriotes} Court stated, “If it be said that the case was one of vessels and for the recognition of the formula that a vessel at sea is regarded as part of the territory of the State, that principle would also be applicable here. There is no suggestion that appellant did not conduct his operations by means of Florida boats. . . . . But the principle recognized in \textit{The Hamilton}, supra, was not limited by the conception of vessels as floating territory. There was recognition of the broader principle of the power of a sovereign State to govern the conduct of its citizens on the high seas. . . . When its action does not conflict with federal legislation, the sovereign authority of the State over the conduct of its citizens upon the high seas is analogous to the sovereign authority of the United States over its citizens in like circumstances.”\textsuperscript{165}

The cases decided after \textit{American Banana} made clear, then, that the presumption against extraterritoriality did not apply at all when “a statute is applied to acts committed by citizens in areas subject to the laws of no sovereign” such as the high seas.\textsuperscript{166} But what about areas under U.S. control but within the formal sovereignty of another country, such as military bases abroad? In 1940, the United States and the United Kingdom agreed that the United States would give the United Kingdom more than fifty destroyers in return for long-term leases to territory in Newfoundland and the Caribbean. The question later arose whether U.S. labor laws – in particular, the Fair Labor Standards Act – applied to one of those bases, on Bermuda. In 1948, in \textit{Vermilya-Brown Co. v. Connell}, the Court held that it did.\textsuperscript{167}

Citing \textit{Bowman}, \textit{Blackmer}, and \textit{Skiriotes}, the Court began by stating that Congress had the power to regulate the actions of U.S. citizens abroad, and that such legislation “could not offend the dignity or rights of sovereignty of another nation.”\textsuperscript{168} It continued, “A fortiori civil controls

\textsuperscript{164} \textit{Id.} at 76 (“If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress.”).

\textsuperscript{165} \textit{Id.} at 77-79.

\textsuperscript{166} \textit{Steele}, 344 U.S. at 291 (Justices Reed, Douglas, in dissent).

\textsuperscript{167} 335 U.S. 377 (1948).

\textsuperscript{168} \textit{Id.} at 381.
may apply, we think, to liabilities created by statutory regulation of labor contracts, even if aliens may be involved, where the incidents regulated occur on areas under the control, though not within the territorial jurisdiction or sovereignty of the nation enacting the legislation. As it sometimes did in this period, it did not clearly disentangle legislative power under international law from legislative authority under the Constitution, saying both that the Constitution gave Congress the power to enact needful rules and regulations respecting property belonging to the United States, and that although the leased area was “under the sovereignty of Great Britain and . . . not territory of the United States in a political sense,” in the lease agreement the United Kingdom had authorized the United States “to provide for maximum hours and minimum wages for employers and employees within the area.” Having disposed of legislative authority under international law and the Constitution at the same time, the Court said, “the question of whether the Fair Labor Standards Act applies is one of statutory construction, not legislative power.”

The Court did not mention the presumption against extraterritoriality. Instead, it treated the question as a straightforward exercise in statutory construction. The language of the statute stated that it applied to commerce “among the several States,” and “State” was defined to include “any . . . possession of the United States.” Although “possession” might be read to include the Bermuda base, the Court found “no such definite indication of the purpose to include or exclude leased areas . . . in the word ‘possession.’” The Court therefore looked to the broad purpose of the statute, and said, “Where as here the purpose is to regulate labor relations in an area vital to our national life, it seems reasonable to interpret its provisions to have force where the nation has sole power, rather than to limit the coverage to sovereignty.”

In a strong dissent joined by three other justices, Justice Robert Jackson accused the Court of completely misreading the lease, “enlarge[ing] the responsibilities which the United States was willing to accept and the privileges which Great Britain was willing to concede.” Jackson, who

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169 Id.
170 Id.
171 Id. at 380-81, 383.
172 Id. at 383.
173 Id. at 379 (quoting Fair Labor Standards Act, § 3(b), (c), 52 Stat. 1060).
174 Id. at 387-88.
175 Id. at 390.
176 Id. at 392.
had been the Attorney General when the leases were signed, argued vehemently that the leases were only for military purposes, and their terms were chosen “carefully to deny every commercial and political right to the United States except as they are incidental and appurtenant to this primary military usufruct.”\textsuperscript{177} As a result, they could not and should not be treated as “possessions.” Doing so would overstep the limits of the lease and intrude on Britain’s legal authority: “It should be enough to dispose of this matter to point out that the United States has no supreme authority or sovereign function in Bermuda, where every commercial activity is subject to control by another sovereign which is our political superior in the island.”\textsuperscript{178} Jackson’s concern was not so much whether the United States required its contractors to pay overtime, but that the Court’s interpretation rested on the position that Bermuda was a U.S. “possession.”\textsuperscript{179} Like the majority opinion, the dissent did not refer to the presumption against extraterritoriality.

By focusing on whether the United States had acted in accordance with its rights and obligations under the international lease and ignoring the presumption against extraterritoriality, \textit{Vermilya-Brown} thus suggested that cases involving U.S. bases might be treated as cases involving U.S. ships had been, with the crucial question being whether the extension of legislative authority would be in accordance with international limits and evidence of congressional intent. But a decision the next year cast doubt on that reading. In \textit{United States v. Spelar},\textsuperscript{180} the Court had to decide whether the Federal Tort Claims Act applied to a base in Newfoundland leased to the United States under the same terms as the Bermuda base at issue in \textit{Vermilya-Brown}. The Court held that it did not, because the statute provided that it did not apply to “any claim arising in a foreign country.”\textsuperscript{181} Since the Court had already held in \textit{Vermilya-Brown} that the leases did not transfer sovereignty to the United States, “[t]he claim must be barred.”\textsuperscript{182} The Court could have stopped there, but it went on to review the legislative

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{177} Id. at 395.
\item \textsuperscript{178} Id. at 400-01.
\item \textsuperscript{179} Id. at 408-09 (“It would not concern the United Kingdom . . . if the United States should require its contractors to pay overtime, upon any assumptions which do not imply a possession adverse to theirs. But I do think it will cause understandable anxiety if this Court does it by holding, as a matter of law, that the leased areas are possessions of the United States, like those we govern to the exclusion of all others.”).
\item \textsuperscript{180} 338 U.S. 217 (1949).
\item \textsuperscript{181} 62 Stat. 984.
\item \textsuperscript{182} 338 U.S. at 219.
\end{itemize}
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history, which made clear that the language meant what it said. Then, only after having decided the issue, it referred to the presumption against extraterritoriality that it had applied earlier that year in *Foley Bros.*, and said, “That presumption, far from being overcome here, is doubly fortified by the language of the statute and the legislative purpose underlying it.” Spelar thus suggested strongly that the presumption against extraterritoriality *would* apply to situations involving U.S. control of territory within another state’s sovereign jurisdiction.

The difficulty for the Court was that these situations fell neatly into none of the usual categories. They were akin to U.S. ships on the high seas insofar as the United States had jurisdiction over them under international law, which suggested that the key question was simply whether the United States was acting within the scope of its legislative jurisdiction. But, like actions of U.S. nationals in foreign countries, they could also be subject to the sovereign control of another country, which suggested that the presumption against extraterritoriality should also apply. As this article explains below, in Part III, one way to analyze such cases would be to examine them more closely to see which category they should be assigned: that is, to ask whether the U.S. control over the areas in question was virtually absolute, as it is over U.S. ships on the high seas, or whether it is shared with another sovereign, as with respect to U.S. nationals in a foreign country.

3. **Applying U.S. Law to Foreign Ships in U.S. Territory**

A third area in which the application of U.S. law may run afoul of international limits on legislative jurisdiction concerns foreign ships in U.S. waters. According to the Supreme Court’s 1887 decision in *Wildenhus*, international law normally allocates jurisdiction over situations affecting only the internal affairs of a ship to the flag state, not the state in whose territory the ship happens to be. Under a presumption against extrajurisdictionality, whether U.S. law would apply to a situation on a foreign ship would depend on whether the situation was within U.S. or flag-state jurisdiction and, in the latter event, on whether the Court found evidence that Congress had intended to overcome the presumption. *American Banana*’s conflation of extraterritoriality and extrajurisdictionality called into question how the Court would decide whether U.S. laws applied

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183 *Id.* at 222.
to foreign ships: whether it would apply the new presumption against extraterritoriality (on the ground that the foreign ships were not part of U.S. territory), apply no presumption at all, or continue to apply a presumption against extrajurisdictionality.

As it did with respect to U.S. nationals in foreign countries and U.S. ships on the high seas, the Court continued to apply a presumption against extrajurisdictionality. It often (though not always) looked to the *Wildenhus* internal-affairs rule, and when it decided that applying U.S. law to foreign ships would violate the jurisdictional limits set by international law, it required a clear statement by Congress of its intent to overcome those limits, as it did with respect to the extension of U.S. law to U.S. ships on the high seas and actors in foreign countries. The following subsections describe first how the Court determined whether the situation in question was within or beyond U.S. jurisdiction and, second, what standard it employed in deciding whether the U.S. law should apply extrajurisdictionally.

a. **Determining whether a situation on a foreign ship was within U.S. jurisdiction**. In deciding whether to apply a U.S. statute to a foreign ship in U.S. territory, the Supreme Court usually looked to the *Wildenhus* internal-affairs rule, although it did not always agree on whether the rule was binding or committed to the discretion of the territorial state.\(^{184}\)

\(^{184}\) On occasion, the Court treated a statute as applying to a foreign ship not while it was in U.S. waters, but rather while it was in a foreign port. In *Sandberg v. McDonald*, 248 U.S. 185 (1918), for example, the Court construed the Dingley Act of 1884, as amended by the Seamen’s Act of 1915, 38 Stat. 1168-69, which prohibited paying seamen wages in advance of the time that they had been earned and provided that shipowners could not use advance payments to offset the later payment of the earned wages. (The prohibition was intended to protect sailors from recruiters who would use advance wages to induce sailors to become intoxicated, after which they would be placed on board a ship about to sail. “When once on shipboard, and the ship at sea, the sailor is powerless and no relief is availing.” Patterson v. The Eudora, 190 U.S. 169, 175 (1903).) Although the seamen in *Sandberg* brought their claim for full payment while in a U.S. port, they had received advance payment in England. The Court treated the requested application of the law as extending beyond the territory of the United States to override the validity of acts taken in a foreign country. It cited *American Banana’s* presumption against extraterritoriality, and concluded that nothing in the statute showed “that Congress intended to take over the control of such contracts and payments as to foreign vessels except while they were in our ports.” 248 U.S. at 196. Four dissenting justices acknowledged that “the language of an act, though universal, may find limitation in the jurisdiction of the Legislature,” but characterized the situation as involving only the application of U.S. law to a ship in U.S. port and said that “a ship within the harbours of the United States is within the jurisdiction of the United States.” *Id.* at 202-03. The dissenters did not mention the internal-affairs exception, perhaps because they believed that the statute applied “to foreign vessels as explicitly and as circumstantially as it does to domestic
In its 1923 decision in *Cunard*, for example, the Court stated that territorial laws apply to foreign merchant ships unless the territorial sovereign chooses “out of considerations of public policy” to limit or not exercise its jurisdiction, and stressed that “this is a matter resting solely in [the sovereign’s] discretion.”\(^{185}\) The Court found no basis in the Eighteenth Amendment and its implementing legislation for not applying their prohibitions to foreign ships in U.S. waters. Eight years later, the Court held that the Jones Act, which provides a cause of action for seamen who suffer personal injury in the course of their employment,\(^{186}\) covered a U.S. stevedore harmed while working on a German-flag ship in New York City.\(^{187}\) It said that it saw no reason for exempting torts from U.S. jurisdiction, at least “when they go beyond the scope of discipline and private matters that do not interest the territorial power.”\(^{188}\) Although that language might be taken as an acknowledgment of a possible exception from territorial jurisdiction for matters within the internal affairs of the ship, the Court immediately went on to state that even with respect to such matters, “the local authority might abstain from interfering simply because it did not care to interfere,”\(^{189}\) thus suggesting that whether to follow the rule was up to the discretion of the territorial power.

On the other hand, in *Lauritzen v. Larsen*, decided in 1953, the Court...
quoted the *Wildenhus* statement that “all matters of discipline, and all things done on board, which affected only the vessel, or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged,” and called the rule “settled American doctrine.”\(^\text{190}\)

Just four years later, in *Benz v. Compania Naviera Hidalgo*, the Court seemed to switch back to the discretionary pole, stating that “[i]t is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country.”\(^\text{191}\)

Unlike *Cunard*, however, where the Court emphasized the discretion of the territorial sovereign to avoid any presumption against applying U.S. law, *Benz* emphasized the other side of the coin: that is, that “[t]he exercise of that jurisdiction is not mandatory but discretionary. Often, because of public policy or for other reasons, the local sovereign may exert only limited jurisdiction and sometimes none at all.”\(^\text{192}\)

The issue in *Benz* was whether the National Labor Relations Act (NLRA) protected U.S. unions’ right to picket a foreign-flag ship in U.S. port, in order to support a strike by the foreign crew. The Court was highly aware that bringing U.S. labor laws to bear on foreign ships’ internal disputes could give rise to serious conflicts with other countries:

> For us to run interference in such a delicate field of international relations there must be present the affirmative intention of Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.\(^\text{193}\)

Absent from *Benz*, however, was an explanation of why “international discord” would be so likely: because applying U.S. law to such matters would violate the usual international limits on domestic jurisdiction.

*Benz* closely echoed the concerns expressed by Justice George Sutherland in dissent in *Cunard*. He had argued that the Eighteenth Amendment should not be applied to foreign ships in U.S. waters because interference with the purely internal affairs of a foreign ship is of so

\(^{190}\) *Lauritzen*, 345 U.S. at 585-86. *Lauritzen* quoted from *Flores*, 289 U.S. at 158, which in turn was quoting from *Wildenhus*, 120 U.S. at 12.

\(^{191}\) 353 U.S. 138, 142 (1957).

\(^{192}\) *Id*.

\(^{193}\) *Id.* at 147.
delicate a nature, so full of possibilities of international misunderstandings and so likely to invite retaliation that an affirmative conclusion in respect thereof should rest upon nothing less than the clearly expressed intention of Congress to that effect, and this I am unable to find in the legislation here under review.194

But Sutherland had supplied the link to international limits on legislative jurisdiction missing from Benz. He began his dissent by stating that the internal affairs exception to territorial-state jurisdiction was “a general rule of international law,” and on that basis argued that “due regard for the principles of international comity, which exists between friendly nations,” prevented the majority’s extension of Prohibition to foreign ships without any express indication of congressional intent to do so.195

In 1963, the Court revisited the application of U.S. labor law to foreign ships and supplied the link to international law present in the Sutherland dissent but missing from Benz. In McCulloch v. Sociedad Nacional de Marineros de Honduras, the Court had to decide whether the NLRA applied to the crew of a foreign-flag ship that was owned by a foreign subsidiary of a U.S. corporation and that sailed regularly between U.S. and other ports.196 In holding that the NLRA did not apply, the Court relied on Benz and the absence of any expression of congressional intent. It cited “the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship” and stated that “[t]he possibility of international discord cannot therefore be gainsaid.”197

In relying on the internal-affairs rule as a limit on U.S. jurisdiction under international law, McCulloch specifically rejected a “balancing of contacts” approach to determining U.S. jurisdiction over foreign ships that had been adopted by the National Labor Relations Board. Under this approach, the Board weighed the ship’s contacts with the United States and with other jurisdictions to determine which were more significant.198 The Board had taken this test from two Supreme Court decisions in the 1950s involving tort claims arising on foreign ships. In the first, Lauritzen, the Court considered a claim under the Jones Act by a Danish seaman against a

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194 262 U.S. at 133.
195 Id. at 132-33.
196 372 U.S. 10 (1963). The particular issue was whether the crew had the right under the NLRA to elect a union representative under U.S. law.
197 Id. at 21.
198 In McCulloch, for example, the Board had found that the ships operated “in a regular course of trade” between U.S. and foreign ports and that their owners were subsidiaries of a U.S. corporation, and held that these contacts indicated that U.S. law should apply. Id. at 19.
Danish shipowner for injuries incurred on a Danish-flag ship while it was in port in Cuba. The Court acknowledged that if read literally, the Jones Act did not require that “either the seaman, the employment or the injury have the slightest connection with the United States,” but it emphasized that U.S. shipping laws, “[b]y usage as old as the Nation, . . . have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law.”

Although, as noted above, the Court characterized the internal-affairs rule as “settled American doctrine,” it did not simply hold that international law provided no basis for U.S. jurisdiction, but rather “review[ed] the several factors which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim.” The Court acknowledged that the most important of these factors was “the law of the flag,” but took into account six others, including the place of the wrongful act, the nationality of the injured person, and the nationality of the shipowner. The Court concluded that the factors showed “an overwhelming preponderance in favor of Danish law,” and found “no justification for interpreting the Jones Act to intervene between foreigners and their own law because of acts on a foreign ship not in our waters.”

Lauritzen’s emphasis on the importance of the internal-affairs exception and the priority of flag-state law stands in some tension with its examination of so many other factors, although the tension may be obscured by the fact that its application of the factors did not change the result it would have reached had it simply applied the internal-affairs rule. Similarly, six years later, in the next tort case brought under the Jones Act, the Court applied the Lauritzen factors and again refused to apply U.S. law to an injury sustained on a foreign-flag ship. Even though, unlike Lauritzen, the plaintiff had been injured in U.S. territorial waters, the Court emphasized that “the territorial standard is so unfitted to an enterprise conducted under many territorial rules and under none that it usually is modified by the more constant law of the flag.”

199 345 U.S. 571 (1953).
200 Id. at 577.
201 Id. at 583.
202 “[T]he weight given to the ensign overbears most other connecting events in determining applicable law.” Id. at 585.
203 Id. at 592 (“The parties are both Danish subjects, the events took place on a Danish ship, not within our territorial waters.”).
204 Id. at 593.
duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an onerous but also an unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country.\textsuperscript{206}

The \textit{Lauritzen} test seemed to be balancing in theory, then, but in practice relied primarily on the importance of deferring to the flag state on matters of internal affairs. Nevertheless, whatever sense its choice-of-law approach might make in a tort context, where multiple factors were increasingly being used to determine the applicable law, it did not translate well to resolving whether Congress intended a regulatory statute to apply to foreign ships. That was the view taken by the \textit{McCulloch} Court in strongly rejecting the use of the test to determine the reach of the NLRA. It said:

\begin{quote}
[T]o follow such a suggested procedure to the ultimate might require that the Board inquire into the internal discipline and order of all foreign vessels calling at American ports. Such activity would raise considerable disturbance not only in the field of maritime law but in our international relations as well. In addition, enforcement of Board orders would project the courts into application of the sanctions of the Act to foreign-flag ships on a purely \textit{ad hoc} weighing of contacts basis. This would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice.\textsuperscript{207}
\end{quote}

Although the Court said that it did not foreclose using the balancing test in contexts such as the Jones Act, “where the pervasive regulation of the internal order of a ship may not be present,” it noted that even there, it had emphasized that “perhaps the most venerable and universal rule of maritime law . . . is that which gives cardinal importance to the law of the flag.”\textsuperscript{208}

And in later cases, the Court continued to limit the balancing test to the Jones Act, looking to the internal-affairs rule elsewhere.\textsuperscript{209}

b. \textit{Applying a clear statement test to overcome the presumption against extrajurisdictionality}. When the Court did not find that applying U.S. law to a foreign ship would exceed international limits on legislative jurisdiction, it

\begin{itemize}
\item \textsuperscript{206} Id. at 384 (quoting \textit{Lauritzen}, 345 U.S. at 584).
\item \textsuperscript{207} 372 U.S. at 19.
\item \textsuperscript{208} Id. at 19 n.9 (quoting \textit{Lauritzen}, 345 U.S. at 584).
\item \textsuperscript{209} Compare Int’l Longshoremen’s Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970) (holding that longshore activities by U.S. residents in U.S. port did not fall within the internal-affairs exception and thus were covered by the NLRA); \textit{with} Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970) (applying balancing test to suit brought under Jones Act).
\end{itemize}
construed the law without reference to any presumption. But when the
Court found that a statute would exceed international limits, it consistently
required a clear statement of specific congressional intent to do so. It tied
this strict standard to the *Charming Betsy* canon, under which “an act of
Congress ought never to be construed to violate the law of nations if any
other possible construction remains.”

This general approach was first set out by Justice Sutherland in dissent
in *Cunard*. After stating that in his view the internal-affairs rule was a rule
of international law, he cited the *Charming Betsy* canon and said that an
interpretation which would violate that rule by interfering with the purely
internal affairs of a ship “should rest upon nothing less than the clearly
expressed intention of Congress to that effect.” It was taken up by the full
Court in *Lauritzen*, which said that the “doctrine of construction” under
which U.S. laws are interpreted “to apply only to areas and transactions in
which American law would be operative under prevalent doctrines of
international law” was “in accord with the long-heeded admonition” in
*Charming Betsy*. Similarly, *Benz* required “the affirmative intention of
the Congress clearly expressed,” although, as noted above, it did not clearly
link it to international limits on legislative jurisdiction.

Most conclusively, the *McCulloch* Court made clear that applying U.S. law to the
internal affairs of a ship would run afoul of international law and thereby
trigger the *Charming Betsy* canon, stating, “We therefore conclude, as we
did in *Benz*, that for us to sanction the exercise of local sovereignty under
such conditions in this ‘delicate field of international relations there must be
the affirmative intention of the Congress clearly expressed.’”

This language indicates that the necessary evidence of congressional
intent must be found in the statute itself, although *Benz* and *McCulloch*
could be read to suggest that the legislative history might be relevant as
well. What seems quite clear, however, is that the standard for

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210 In *Cunard*, for example, the Court looked at the Eighteenth Amendment and its
implementing legislation, determined that neither had an exception for foreign merchant
ships, and held that both should therefore apply. *Cunard*, 262 U.S. at 126.
211 Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).
212 *Cunard*, 262 U.S. at 133.
213 *Lauritzen*, 345 U.S. at 577-78.
214 353 U.S. at 147.
215 372 U.S. at 21-22.
216 Both cases note that the parties were unable to point to any specific language supporting
the extrajurisdictional application in the statute itself or in the legislative history. *Benz*, 353
U.S. at 142; *McCulloch*, 372 U.S. at 19.
extrajurisdictional application is stricter than for extraterritorial application, in which the Court regularly looked at evidence of intent not only from the statute and its legislative history, but also from its context and the nature of the actions regulated.

II. THE INCOHERENCE OF CURRENT CASE LAW ON LEGISLATIVE JURISDICTION

As Part I explains, in the six decades or so after American Banana, the Court employed two presumptions in construing the scope of application of federal statutes: a strict presumption against extrajurisdictionality and a softer presumption against extraterritoriality. Some important aspects of the Court’s approach remained ambiguous. The Court did not explain the relationship between the presumptions, which made it easy for lower courts and, soon, the Supreme Court itself to confuse the two. The principal justifications for the presumption against extraterritoriality remained unexamined. And the Court did not consistently apply the presumption against extraterritoriality with respect to territory controlled by the United States but under the nominal sovereignty of another country, or to actions with effects within U.S. territory.

Nevertheless, the basic characteristics of the Court’s approach were clear. It applied the presumption against extrajurisdictionality to all situations implicating the limits of the United States’ legislative jurisdiction under international law. It tied this presumption to the Charming Betsy canon, and in accordance with that canon required inescapably clear evidence of congressional intent before it would interpret a statute to extend beyond U.S. jurisdiction under international law. The Court applied the presumption against extraterritoriality more narrowly, only to situations arising within foreign territory, not to U.S. or foreign ships, and treated it as much easier to avoid or overcome. The Court often ignored it entirely when faced with a situation with clear effects within U.S. territory and, when it did apply the presumption, the Court looked beyond the language of the statute itself for any evidence of congressional intent to override it.

Then, in a handful of decisions between 1989 and 1993, most written by Chief Justice William Rehnquist, the Court deviated from its previous approach in several ways. As section A of this Part explains, the Rehnquist Court broadened the scope of the presumption against extraterritoriality, applying it for the first time to places under complete U.S. jurisdiction. It made the presumption stricter, requiring a clear statement of congressional
intent to overcome it. And it detached the presumption from its roots in international law.

One might have expected that the result would have been fewer extraterritorial applications of U.S. laws. But the actual effect has been confusion in the lower courts, as section B describes. Much of the confusion has been due to the Court’s failure to state explicitly how it was varying from its previous jurisprudence. Instead of overruling its previous decisions, the Court often recharacterized them, ignored them entirely, or continued to treat them as binding precedents with respect to particular statutes without acknowledging how those decisions no longer comported with the Court’s current jurisprudence. The failure of the Court to explain its different treatment of legislative jurisdiction or to reconcile its newer decisions with its older precedents (or, for that matter, to resolve questions left unanswered by the older precedents) left lower courts free to pick and choose from virtually any set of decisions they liked.

In recent years, the Court has again begun to refer to the presumption against extrajurisdictionality. But as Section C explains, the Court has failed to apply the presumption in a predictable manner and, worse, has again failed to reconcile its most recent decisions with its previous ones. As a result, the Court’s jurisprudence in this area remains incoherent.

A. The Rehnquist Court’s New Presumption

Although the key decisions recasting the presumption against extraterritoriality were between 1989 and 1993, an early precursor was then-Justice Rehnquist’s decision in *Windward Shipping (London) Ltd. v. American Radio Association*, 217 which involved another dispute over the application of the NLRA to foreign ships in U.S. port. American unions representing merchant seamen picketed two Liberian-flag, Liberian-owned ships while the ships were in port in Houston. The unions intended to call attention to the fact that the foreign seamen on those vessels received lower wages and benefits than those received by U.S. seamen. Longshoremen refused to cross the picket lines, and the shipowners sought an injunction against the picketing from a state court in Texas. The unions successfully argued to the state courts that the NLRA preempted state jurisdiction. 218

The line of Supreme Court decisions described above indicated a framework for deciding the case: U.S. law would apply as written unless its application

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218 Id. at 106-08.
would involve the internal affairs of the foreign ships, in which case there would be a strong presumption against applying the statute. In dissent, Justice William Brennan urged the Court to take exactly that approach.219

But Justice Rehnquist’s opinion for the Court ignored the relevant principles of international law. Instead, he recharacterized Benz and McCulloch in vaguer terms, stating that they recognized that Congress did not intend the labor law “to erase longstanding principles of comity and accommodation in international maritime trade.”220 He cited Lauritzen’s emphasis on “accommodating the reach of our own laws to those of other maritime nations,”221 but ignored the language from Lauritzen that explained how the Court had previously made that accommodation—by construing generally worded statutes to apply “only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law.”222

Free from the limits of international law, the Court might have read the statute broadly, as it had in Cunard, to apply regardless of whether it affected the internal affairs of foreign ships. Instead, it replaced the limits set by international law with a stricter constraint: an assumption that Congress wanted to avoid interference with foreign vessels’ “maritime operations.”223 Applying this new canon, the Court concluded that the unions’ goal “to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to those of American shippers” would take the application of the law beyond its scope.224

219 Joined by two other justices, he said that “the only appropriate issue in the case is whether NLRB cognizance of respondents’ picketing would require that the Board inquire into the ‘internal discipline and order’ of foreign vessels, and thus threaten ‘interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law.’” Id. at 120-21 (quoting Ariadne Shipping, 397 U.S. at 200).
220 Id. at 112-13.
221 Id. at 113 (quoting Lauritzen, 345 U.S. at 577).
222 345 U.S. at 577.
223 Id. at 114.
224 Id. at 114-15. The Court said that the result of the picketing would place foreign owners in the unhappy situation of having to choose either “to raise foreign seamen’s wages to a level mollifying the American pickets,” which “would have the most significant and far-reaching effect on the maritime operations of these ships throughout the world,” or to boycott U.S. ports, which “would be detrimental not only to the private balance sheets of the foreign shipowners but to the citizenry of a country as dependent on goods carried in foreign bottoms as is ours.” A third possibility would be “[r]etaliatory action against American vessels in foreign ports,” which “would probably exacerbate and broaden the present dispute.” Id. at 114-15. Of course, another possibility, not mentioned by the Court, would be the negotiation
The characteristics of *Windward Shipping* – the disregard for international law, the willingness to recharacterize precedents, and the apparent goal of drawing in the boundaries of U.S. statutes – ran through the series of cases the Court decided from 1989 to 1993 on the presumption against extraterritoriality. The first of these cases, *Argentine Republic v. Amerada Hess Shipping Corp.*, involved an attempt by the Liberian owner-operators of a Liberian-flag oil tanker to recover damages in federal court from Argentina for its attack on the ship during the Falklands War. The Court, in another opinion by (now) Chief Justice Rehnquist, held that the only possible statutory basis for jurisdiction was the Foreign Sovereign Immunities Act of 1976, which bars a suit against foreign sovereigns unless it falls within a specified exception. The Act includes an exception for torts, but by its terms it applies only to torts “occurring in the United States.” The plaintiffs nevertheless made the creative, if hopeless, argument that the attack on the tanker, which had occurred on the high seas, had taken place in the United States for purposes of the statute.

The Court could have rejected the argument on the ground that the high seas are not in fact in the United States. It even could have relied on the presumption against extraterritoriality. Since *Amerada Hess* involved only foreign actors and a foreign-flag ship outside U.S. waters, and the attack on it had no direct or substantial effect on the United States, it would have fallen outside any recognized basis for U.S. jurisdiction under international law. Instead, Rehnquist cited the presumption against extraterritoriality. By citing the presumption without reference to the nationality of the ship, the decision strongly suggested that the presumption of an international agreement to avoid the calamities it envisioned. The majority concluded that “virtually none of the predictable responses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefiting American workingmen which the [statute] was designed to regulate.” *Id.* at 115. The dissent responded that the unions’ “target is to persuade shippers not to patronize foreign vessels, and [they] have no concern with the form of the shipowners’ response that makes their efforts succeed,” but noted that even if the Court were right, under the Court’s precedents the issue of jurisdiction would still turn “solely on the question whether cognizance of respondents’ activity would involve the Board in an examination into the internal relations between the foreign crews and shipowners.” *Id.* at 121-22.

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226 *Id.* at 439 (citing 28 U.S.C. § 1605(a)(5)).
227 As defined in the FSIA, the term “United States” includes all “territory and waters, continental and insular, subject to the jurisdiction of the United States.” The plaintiffs argued that the high seas were within the admiralty jurisdiction of the United States.
228 *Id.* at 440-41.
would apply to any situations arising on the high seas, even to U.S. ships that were clearly within U.S. jurisdiction. The effect would be to broaden the presumption against extraterritoriality to apply to situations within the complete jurisdiction of the United States.

The next decision, issued two years later, was *EEOC v. Arabian American Oil Co. (Aramco)*, again written by Chief Justice Rehnquist. Aramco involved a claim by a U.S. national that his employer in Saudi Arabia had discriminated against him in violation of Title VII of the Civil Rights Act of 1964. As Part I explains, a long line of cases had held that both the presumption against extraterritoriality and the presumption against extrajurisdictional application to the extension of U.S. laws to foreign countries. Rather than apply the presumptions separately, however, the Court conflated them. In particular, Rehnquist treated *Benz* and *McCulloch* as having applied the presumption against extraterritoriality, when in fact they had applied the presumption against extrajurisdictionality.

The principal effect of this conflation was to take the strict “clear-statement” standard from the presumption against extrajurisdictionality and attach it to the presumption against extraterritoriality. To arrive at the new standard, the Court grafted language from *Benz* to language from *Foley*, saying, “unless there is ‘the affirmative intention of the Congress clearly expressed,’ [*Benz*] we must presume it ‘is primarily concerned with domestic conditions,’ [*Foley*].” Elsewhere, the Court referred to the “need to make a clear statement that a statute applies overseas.” In dissent, Justice Thurgood Marshall pointed out the majority was “drawing on language from cases involving a wholly independent rule of construction.” He recalled that *Foley* itself had “considered the entire range of conventional sources [for determining congressional intent], . . . including legislative history, statutory structure, and administrative interpretations,” and argued that “it is the weak presumption of *Foley Brothers*, not the strict clear-statement rule of *Benz* and *McCulloch* that

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230 *Id.* at 248.
231 *Id.* at 258 (emphasis added). See Dodge, *supra* note 12, at 93 (in addition to this language, Rehnquist’s “rejection of arguments based on boilerplate language, implications from exemptions in Title VII, legislative history, and administrative interpretations . . . suggested that he was looking for a clear statement from Congress in the language of the statute itself”).
232 *Id.* at 264.
233 *Id.* at 263.
In *Smith v. United States*, the next decision in the series, the widow of a U.S. national killed in Antarctica while working at a U.S. scientific station there brought a claim under the Federal Tort Claims Act, which waives the sovereign immunity of the United States for certain tort suits. In yet another decision by Chief Justice Rehnquist, the Court held that the Act’s exception for claims arising in a foreign country applied to Antarctica, drawing on the presumption against extraterritoriality. The case illustrated both the detachment of the Court’s analysis from the international legal framework that had once guided its treatment of such cases and the resulting expansion of the presumption against extraterritoriality. The Court applied the presumption even though the U.S. base and its workers were under the sole jurisdiction of the United States under the long-standing U.S. view of the international law governing Antarctica.

As Part I explains, the Court had struggled in the 1940s, in *Vermilya-Brown and Spelar*, over whether to extend the presumption against extraterritoriality to U.S. bases in foreign countries. But a U.S. base on Antarctica is less like such bases than it is like a ship on the high seas, because the United States recognizes no state’s claim to jurisdiction in Antarctica. Applying the presumption therefore suggested, as had *Amerada Hess*, that the Court would now apply the presumption to other situations under sole U.S. jurisdiction, such as U.S. ships at sea. That suggestion was confirmed in a decision a few months after *Smith*, when the Court reviewed a challenge to actions on U.S. Coast Guard vessels, in *Sale v. Haitian Centers Council, Inc.*

To try to avoid legal review of claims of refugee status by Haitians fleeing Haiti, the first President Bush had directed the Coast Guard to intercept vessels beyond U.S. territorial seas and return the passengers to Haiti without determining whether they were refugees. Organizations representing the Haitians sought to overturn this directive, arguing that it violated a treaty and a federal statute prohibiting the return of an alien to a country if his or her life or freedom would be threatened because of race, religion, nationality, political opinion, or membership in a particular

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234 *Id.* at 265-66.
236 Although some countries have made territorial claims to parts of Antarctica, the United States does not recognize any such claim. And, in any event, such claims are effectively frozen under the Antarctic Treaty, Dec. 1, 1959, art. IV, 12 U.S.T. 794.
The Court decided that the statute did not apply to U.S. ships outside U.S. territorial waters, and did so largely through application of the presumption against extraterritoriality. Citing Aramco and Amerada Hess, the Court described the presumption as stating that “Acts of Congress do not ordinarily apply outside our borders” unless such an intent is clearly manifested. The Court decided that it could not find such a clear manifestation, and therefore declined to apply the statute to the actions taken on Coast Guard vessels.

The final decision in this period was Hartford Fire Ins. Co. v. California, in which California and other states accused foreign insurers of violating the Sherman Act. Hartford did not extend the presumption against extraterritoriality to new locations or raise the bar for overcoming it, but it further demonstrated the Court’s detachment from international law. The Court refused to consider whether the extension of the Sherman Act would violate the boundaries on legislative jurisdiction set by international law despite a dissent strongly urging it to do so. Writing for the dissenters, Justice Scalia reminded the Court of the presumption against extrajurisdictionality that its members (including those in the dissent) had largely overlooked for the preceding two decades, and argued that the Court should apply the presumption to the application of the Sherman Act at issue. The majority rejected the argument in a footnote, reiterating laconically that “it is well established that Congress has exercised

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238 The treaty is a 1966 protocol to the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, which incorporated the Convention’s substantive provisions but removed its limitation to refugees created before 1951. Article 33 of the Convention contains the prohibition on return of refugees. The statute on which the plaintiffs relied was § 243(h) of the Immigration and Nationality Act, which had been amended by the Refugee Act of 1980 to conform U.S. law to the requirements of Article 33.

239 Id. at 173, 188. The Court also concluded that, despite the apparent silence of the relevant provision of the treaty on its scope, and the “moral weight” of the argument that the treaty’s “broad remedial goals require that a nation be prevented from repatriating refugees to their potential oppressors whether or not the refugees are within that nation’s borders,” the text and negotiating history of the provision indicate that it was not intended to apply extraterritorially. Id. at 178-79.


241 Id. at 815 (“Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe. Consistent with that presumption, . . . even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law.”).

242 Id. at 818-19.
[legislative] jurisdiction under the Sherman Act.”

Moreover, Hartford endorsed the extraterritorial extension of the Sherman Act, the most controversial such application of any U.S. statute, without explaining how the statute had avoided or overcome the presumption against extraterritoriality whose importance the Court’s recent decisions had been trumpeting. Ever since Alcoa, lower courts had assumed that the presumption did not prevent the Sherman Act from applying extraterritorially to acts with intended effects in the United States but, in response to protests from foreign companies and their governments, federal courts of appeals had developed doctrines based on international comity that allowed them to consider other factors than domestic effects in deciding whether jurisdiction existed, or whether to exercise it if it did. Congress had eventually amended the Act to confirm that it did apply to some types of foreign actions with domestic effects, but it was unclear whether the amendment foreclosed courts from declining jurisdiction on comity grounds. Hartford did not take advantage of the opportunity to explain whether the international-comity approach to the law survived the amendment, or even to state whether the amendment made any change to previous law. More important, it missed the chance to explain the logically prior question of how the Sherman Act avoided or overcame the presumption against extraterritoriality, saying only that “it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did produce some substantial effect in the United

243 Id. at 796 n.22.
244 See Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d. Cir. 1979); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).
245 Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 96 Stat. 1246 (providing that the Sherman Act does not apply to conduct involving foreign trade or commerce unless the conduct has “a direct, substantial, and reasonably foreseeable effect” on domestic commerce).
246 The Court said that even if the FTAIA applied to the case and differed from the prior law, it would not cause a different outcome, 509 U.S. at 796 n.23, and that even if courts could decline to exercise jurisdiction on the basis of international comity, “comity would not counsel against exercising jurisdiction in the circumstances alleged here,” because there was no true conflict between the Sherman Act and foreign law. 509 U.S. at 798. There was no conflict, in the Court’s view, because the foreign companies could comply with both U.S. and foreign law. Id. at 799. The Court ignored the fact that conflicts between states’ interests may arise even if the states are not subjecting a person to “incompatible demands.” See 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, 50-51 (1995).
States.” The Court thus left open the possibility that lower courts could, or even should, interpret other statutes to apply to extraterritorial conduct with effects within the United States, without having to look for evidence of intent to overcome the presumption against extraterritoriality. The effect was to heighten the long-standing confusion over whether domestic effects may avoid or overcome the presumption. Especially in light of the Court’s immediately preceding decisions heightening and broadening the presumption, the effect was to increase further the incoherence of the Court’s jurisprudence.

B. Chaos in the Lower Courts

On their face, the Supreme Court decisions between 1989 and 1993 drew in the boundaries of U.S. legislative jurisdiction by heightening the presumption against extraterritoriality and extending it to new areas, and at the same time ignoring whether application of the U.S. statute would be in accord with the international law of legislative jurisdiction. But the Court did not overrule its older decisions, which applied a more capacious view of the scope of U.S. statutes. As a result, by the mid-1990s, lower courts could find Supreme Court precedents for an enormous range of approaches to determining U.S. legislative jurisdiction. They could find decisions suggesting that the presumption against extraterritoriality does, and does not, apply to actions taken outside U.S. territory that have effects in the

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247 509 U.S. at 796. It may have been “well established” among lower courts, but the Supreme Court had never squarely addressed the issue. The Court had regularly held that “[a] conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries,” Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 704 (1962) (citing cases) (emphasis added), but it had never explained how the Sherman Act applied to actions wholly outside the United States but that had effect there. Hartford cited Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), but that decision had only stated in passing that the Sherman Act applied to foreign conduct with effects within the United States, without any explanation of whether and how the Act had overcome the presumption against extraterritoriality. Id. at 582 n.6. See Larry Kramer, Extraterritorial Application of American Law after the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble, 85 Am. J. Int’l L. 750, 751-52 (1995); Dodge, supra note 12, at 99.

248 See Kramer, supra note 246, at 752-54 (describing “considerable tension” between Hartford and Aramco, in particular).
United States. They could find decisions saying that the presumption against extraterritoriality does, and does not, apply to U.S. ships at sea, and that it does, and does not, apply to actions in other areas outside U.S. territory but within its “legislative control.” They could find language treating foreign ships in U.S. territory as subject to a presumption against extraterritoriality, as subject to a presumption against extrajurisdictionality but only with respect to their internal affairs, as subject to a desire to avoid any interference with their maritime operations, as subject to a balancing test to determine whether U.S. law should apply, and as subject to no presumption at all. As the following subsections explain, lower-court decisions have reflected and amplified this incoherence.

1. Extraterritorial Actions with Effects in the United States

With respect to actions taken abroad that have effects in the United States, lower courts are able to draw on two strains in Supreme Court jurisprudence. On the one hand, in cases like Hartford, Steele, and Bowman, the Court has often concluded that particular laws apply extraterritorially to actions that have substantial effects in the United States. On the other hand, it has never delineated the scope of this apparent exception to the presumption against extraterritoriality, and allowing any exception at all seems to be inconsistent with its more recent emphasis on the importance of the presumption. Relying on the first set of
decisions, some lower courts have said that virtually any statute applies extraterritorially if it addresses actions with effects in the United States; while others have held that almost no statute does so, other than a few long-standing exceptions such as the Sherman Act.

The D.C. Circuit endorsed one of these interpretive poles in *Environmental Defense Fund v. Massey*, a case asking whether the National Environmental Policy Act required a U.S. agency to conduct an environmental impact assessment before it operated an incinerator at a U.S. base in Antarctica.\(^259\) Citing *Steele* and *Alcoa*, the court said that “the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States.”\(^260\) *Massey*’s language was dicta because the incinerator was not expected to have any effect in the United States. But other courts have relied on *Massey* in holding that the presumption does not apply to foreign actions with domestic effects in the context of bankruptcy discharge injunctions\(^261\) and releases from toxic waste sites.\(^262\)

A leading example of the opposite interpretive pole is the Second Circuit’s decision in *Kollias v. D & G Marine Maintenance*, which concerned the application of a federal workers’ compensation act to an injury on the high seas.\(^263\) The plaintiff argued that the court should follow *Bowman*, the 1922 decision holding that the presumption does not apply to criminal statutes that are “not logically dependent on their locality for the Government’s jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated.”\(^264\) Rejecting the argument, the Second Circuit said, “The Supreme Court’s recent discussions of the presumption against extraterritoriality, none of which mentions *Bowman*, seem to require that all statutes, without exception, be construed to apply within the United States only, unless a contrary intent appears.”\(^265\) The court said that it would read

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259 986 F.2d 528 (D.C. Cir. 1993).
260 Id. at 531.
261 In re Simon, 153 F.3d 991, 997 (9th Cir. 1998) (“Because allowing a participating creditor to disregard bankruptcy court orders would have ‘substantial effects within the United States,’ the presumption against extraterritorial effect of a statute does not apply.”) (citation omitted).
263 29 F.3d 67 (2d Cir. 1994).
264 Id. at 71 (citing *Bowman*, 260 U.S. at 98).
265 Id. (emphasis in original).
Bowman as limited to its facts, so that “perhaps only those [criminal statutes] relating to the government’s power to prosecute wrongs committed against it, are exempt from the presumption.”

But the zigs and zags of the Supreme Court’s jurisprudence make it difficult for circuit courts to hew consistently to strict positions. The D.C. Circuit has refused to follow Massey’s logic where it would lead to extending Title VII to an instance of extraterritorial employment discrimination even if it had domestic economic consequences, because doing so might run afoul of the Supreme Court’s specific holding in Aramco. And despite its strong language in Kollias, the Second Circuit has made no effort to apply a strict view of the presumption to the anti-fraud provisions of the Securities Exchange Act or the Commodities Exchange Act, even though those laws are silent as to their extraterritorial application. Instead, it has long applied prohibitions against securities fraud to foreign transactions if the prohibited conduct occurred in the United States or if it caused substantial effects in the United States. Other circuits have followed suit.

Combined with the exceptions for antitrust and trademark, the exception for securities fraud might lead one to conclude that lower courts apply an unarticulated general exception to the presumption for foreign conduct that affects the United States economy. But that is not the case, either. For example, the Ninth Circuit, refusing to read Massey broadly, has held that domestic effects are not enough to avoid or overcome the presumption in the context of copyright law. And in considering whether to apply extraterritorially a whistleblower provision in the Sarbanes-Oxley Act of 2002, the First Circuit acknowledged the antitrust and securities precedents but said that “while the Sarbanes-Oxley purpose to protect investors and build confidence in U.S. securities markets may be a factor supporting extraterritorial application of the instant whistleblower protection

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269 Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088 (9th Cir. 1994).
provision, the other pertinent factors run strongly counter to finding an extraterritorial legislative intent.” 272 Relying chiefly on Aramco, the court looked at the statute’s text and history and concluded that they did not indicate the necessary “clear intent” that the law should extend extraterritorially. 273

Criminal statutes seem particularly prone to conflicting interpretations. Bowman indicated that some criminal laws avoided the presumption and others did not on the basis of their effects vel non in the United States, and lower courts have tried ever since to determine exactly where to draw the line between these two types of cases. Some courts have followed Kollias and held that Bowman should be read narrowly. In United States v. Gatlin, for example, the Second Circuit had to decide whether a U.S. civilian could be prosecuted for sexual abuse of a minor while on a military base in Germany. 274 The government prosecuted the defendant under a federal statute that prohibits such abuse while “in the special maritime and territorial jurisdiction of the United States,” 275 which in turn is defined as including “[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof.” 276 At the outset, the court said that the Bowman exception is limited to certain crimes against the government and does not apply to crimes against private individuals. 277 The court found that the text of the statute did not overcome the presumption, and that its legislative history indicated that Congress had not intended the “special maritime and territorial jurisdiction” to extend beyond U.S. sovereign territory. 278 The U.S. Court of Appeals for the Armed Forces has agreed with this narrow reading of Bowman. 279

Other courts, however, have taken much more expansive views. Many, including the Third, Fifth, Ninth, and Eleventh Circuits, “have routinely inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm.” 280 This approach turns the

272 Camero v. Boston Scientific Corp., 433 F.3d 1, 8 (1st Cir. 2006).
273 The court also emphasized the context of the provision; the statute contemplated extraterritorial enforcement of other laws, which “demonstrated that it was well able to call for extraterritorial application when it so desired.” Id.
274 216 F.3d 207 (2d Cir. 2000).
277 216 F.3d at 211 n.5.
278 Id. at 215-220.
280 United States v. Plummer, 221 F.3d 1298, 1305 (11th Cir. 2000).
Bowman exception into a general effects test similar to that used in antitrust and securities cases.\textsuperscript{281} Another approach is illustrated by the Ninth Circuit decision in United States v. Corey, which construed the very same criminal provision at issue in Gatlin and reached the opposite conclusion.\textsuperscript{282} In an opinion by Judge Kozinski, the Corey court read Bowman to say that the presumption does not apply at all “when the legislation implicates concerns that are not inherently domestic.”\textsuperscript{283} The D.C. Circuit has also adopted this view of Bowman. In United States v. Delgado-Garcia, it held that statutes that prohibit conspiring to encourage aliens to enter, and attempting to bring them to, the United States illegally, overcome the presumption because they are “fundamentally international, not simply domestic, in focus and effect.”\textsuperscript{284} As in Bowman, “the natural inference from the character of the offense[s] is that an extraterritorial location ‘would be a probable place for [their] commission.’”\textsuperscript{285}

The conflicting Supreme Court precedents have resulted in conflicting opinions not only between circuits, but between judges sitting on the same panel. Judge McKeown dissented in Corey, arguing that the Ninth Circuit’s broad reading “extends Bowman far beyond its holding or any reasonable extension of it,”\textsuperscript{286} and Chief Judge Gierke and Judge Crawford separately dissented in Martinelli, on the ground that their court’s reading of Bowman was too narrow.\textsuperscript{287} And Judge Rogers dissented in Delgado-Garcia, arguing that the majority had improperly ignored the heightened presumption against extraterritoriality expressed in Aramco and Sale.

Judge Rogers’ dissent in Delgado-Garcia is particularly interesting not only because it pointed out that allowing the presumption to be overcome whenever a statute concerns more than merely domestic conditions cannot

\textsuperscript{281} Sometimes the borrowing is explicit. See, e.g., United States v. Philip Morris U.S.A., Inc., 477 F. Supp. 2d 191, 197 (D.D.C. 2007) (citing antitrust and securities cases applying effects test, and concluding that “RICO has extraterritorial effect where illegal activity abroad causes a ‘substantial effect’ within the United States”).
\textsuperscript{282} 232 F.2d 1166 (9th Cir. 2000).
\textsuperscript{283} Id. at 1170. The court also held that if the presumption did apply, “the text of section 7 would clearly rebut it.” Id. at 1171.
\textsuperscript{284} In the Military Extraterritorial Jurisdiction Act of 2000, 114 Stat. 2488, 18 U.S.C. § 3261, Congress amended the law at issue in Gatlin and Corey to make clear that certain criminal laws apply to persons employed by or accompanying the armed forces overseas, but the application of criminal laws in many other areas remains contested.
\textsuperscript{285} United States v. Delgado-Garcia, 374 F.3d 1337, 1345 (D.C. Cir. 2004).
\textsuperscript{286} Id. (quoting Bowman, 260 U.S. at 99).
\textsuperscript{287} 232 F.3d at 1187.
\textsuperscript{288} 62 M.J. at 68, 77.
be reconciled with the Supreme Court’s decision in Sale, but also because it shows some of the potential consequences of the court’s broad reading of Bowman. She emphasized that extending U.S. law to non-nationals who were intercepted over two thousand miles from the United States, while they were in the process of taking immigrants from Ecuador to Guatemala, raises the potential of conflict with the countries of their nationality, under whose laws the defendants may have committed no crime. She pointed out that Bowman declined to address whether it would have reached the same conclusion with respect to a British defendant. She concluded that “absent a territorial stopping point, the breadth of the statute becomes staggering,” potentially applying to “the guide who covertly helps migrants from Ecuador into Colombia (so that they can eventually reach the United States) . . . [and] the Ecuadorian mother who convinces her son to make the illegal voyage to the United States so that he can send back money to support the family.” Although her opinion does not go so far as to suggest a presumption against extrajurisdictionality as a backstop to the presumption against extraterritoriality, it does illustrate the continuing need for the older presumption, by raising the concerns of potential conflict with foreign nations that the older presumption was originally designed to address.

2. U.S. Ships and Other Situations within U.S. Control

Three circuit-court decisions from the 1990s illustrate the range of possible approaches to the extension of U.S. statutes to U.S.-flag ships. Indeed, Cruz v. Chesapeake Shipping, Inc., a Third Circuit decision from 1991, illustrates the range of possibilities all by itself. Its judges split three ways on how to decide whether to apply the Fair Labor Standards Act to Philippine nationals employed on former Kuwaiti oil tankers that had been reflagged as U.S. ships to obtain U.S. protection during the Iran-Iraq War. Judge Cowen applied the eight-factor balancing test developed by the Supreme Court in its Jones Act decisions. Judge Rosenn appeared to rely on a combination of a presumption against extraterritoriality and the Benz...
concern over interfering in a delicate field of international relations. And Judge (now Justice) Alito rejected the presumption against extraterritoriality on the ground that “this canon of construction does not apply” because “the United States has sovereignty over American-flag vessels.” Instead, he looked to the statute’s language and legislative history to determine whether it applied.

Cruz was decided after Amerada Hess first applied the presumption against extraterritoriality to the high seas, but before Sale applied it to a U.S. ship. Even after Sale, however, lower courts have continued to disagree with one another over whether and how to apply the presumption to U.S. ships. In Kollias, noted above, the Second Circuit held that a federal workers’ compensation statute had to overcome the presumption in order to be applied to an injury on a U.S. ship on the high seas, and rejected the argument that the ship “was in effect a United States territory as it traveled across the high seas.” (The court found that the statutory language and purpose indicated that it overcame the presumption.) But in National Labor Relations Board v. Dredge Operators, Inc., the Fifth Circuit determined that the presumption did not apply to a U.S.-flag ship, instead agreeing with Judge Alito – and any number of older Supreme Court decisions, though not Sale – that “a United States flag vessel is considered American territory.”

Lower courts have also split over how to treat U.S. facilities outside U.S. territory. In Massey, the D.C. Circuit held that NEPA required environmental impact assessment of an incinerator in a U.S. government scientific base in Antarctica primarily because it viewed the decision to approve the incinerator as one taken within the U.S. agency in Washington, so the presumption did not apply. But Massey also cited Aramco’s language (taken from Foley) suggesting that the question is whether Congress intended to extend a statute beyond places under U.S. sovereignty or where it has “some measure of legislative control,” and said that the United States has in fact exercised such legislative control over its research stations in Antarctica.

Massey was in accord not only with the language from Aramco and

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294 Id. at 224–32.
295 Id. at 235 n.1.
296 29 F.3d at 72.
297 Id. at 73–75.
298 19 F.3d 206, 212 (5th Cir. 1994).
299 986 F.2d at 533–34 (quoting Aramco, 499 U.S. at 248).
Foley, but also with the Court’s decision in Vermilya-Brown and its pre-Sale decisions concerning U.S. ships at sea. It was decided before Smith, however, which seemed to hold clearly that the presumption did apply to U.S. bases in Antarctica and, by extension, in all foreign countries. After Smith, some courts have applied the presumption to U.S. bases abroad. Yet Smith did not even mention Massey. As a result, lower courts have continued to be able to draw on the earlier line of cases culminating in Massey. The Ninth Circuit, in particular, has cited Massey to go even further, and conclude that the presumption against extraterritoriality does not apply to any lands under U.S. legislative control, including a military base in Japan and a private apartment building there rented by the U.S. embassy for its employees.

3. Foreign Ships in U.S. Territory

Fewer cases have arisen concerning the application of U.S. law to foreign ships temporarily in U.S. territory. When they have, however, lower courts have been similarly unable to reach consistent results or agree on which presumptions should apply. For example, in two cases asking whether the public accommodation provisions of the Americans with Disabilities Act (ADA) apply to foreign-flag cruise ships that take on passengers in U.S. ports, the Fifth and the Eleventh Circuits employed no fewer than four different presumptions, and reached diametrically opposite results.

In Stevens v. Premier Cruises, Inc., the Eleventh Circuit reversed a district court’s decision that the ADA did not overcome the presumption against extraterritoriality, instead holding that “a foreign-flag ship sailing in United States waters is not extraterritorial.” The Eleventh Circuit looked to the “separate and different presumption . . . against the application of American law to the ‘internal management and affairs’ of a foreign-flag ship in United States waters,” but said that the extension of the ADA would not involve the internal affairs of the ship. Analogizing its case to Cunard, it emphasized that the ADA, like the Prohibition Act, was intended to have a

301 Corey, 232 F.3d at 1171.
302 215 F.3d 1237, 1242 (11th Cir. 2000).
303 Id.
broad reach and made no distinction between domestic and foreign-flag ships. It concluded that the ADA does apply to foreign-flag cruise ships in U.S. waters.\textsuperscript{304}

Four years later, in \textit{Spector v. Norwegian Cruise Line Ltd.}, the Fifth Circuit addressed the same issue very differently.\textsuperscript{305} First, it turned the strict presumption against applying U.S. law to the internal-affairs of a foreign ship into an equally strict presumption against applying U.S. law to foreign ships \textit{at all}. Citing \textit{Benz} and \textit{McCulloch}, but somehow overlooking their limitation to vessels’ internal affairs, the court said that they “prohibit United States courts from applying domestic statutes to foreign-flagged ships without specific evidence of congressional intent.”\textsuperscript{306} The court also applied the presumption against extraterritoriality on the ground that the ADA would require permanent changes to the ship itself, “investing the statute with extraterritorial application as soon as the cruise ships leave domestic waters” and leading to the possibility of international discord.\textsuperscript{307} Finally, the court applied the \textit{Charming Betsy} canon, deciding that the changes to the ship that would be required by the ADA would conflict with an international treaty on safety of life at sea to which the United States is a party.\textsuperscript{308} The court found no evidence of congressional intent to overcome all of these presumptions. It said that \textit{Stevens} was wrongly decided not only because that case applied a narrower presumption against interference with ships’ internal affairs, but also because in any event, the present case \textit{did} deal with the internal affairs of a ship.\textsuperscript{309}

C. The Return of the Presumption against Extrajurisdictionality?

In 2004 and 2005, the Supreme Court decided three cases acknowledging a role for international law in determining the geographic scope of federal statutes, and suggesting that a presumption against extrajurisdictionality may again play a role in its jurisprudence. The Court did not bring its jurisprudence into a more coherent shape, however. On the contrary, by referring to a failing to clarify how its newest decisions relate to its previous ones, it added another layer of inconsistent precedents to its

\begin{footnotesize}
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\item \textsuperscript{304} \textit{Id.} at 1242-43.
\item \textsuperscript{305} 556 F.3d 641 (5th Cir. 2004), \textit{rev’d}, 545 U.S. 119 (2005).
\item \textsuperscript{306} \textit{Id.} at 644-46.
\item \textsuperscript{307} \textit{Id.} at 648.
\item \textsuperscript{308} \textit{Id.} at 646-47.
\item \textsuperscript{309} \textit{Id.} at 649.
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The first of the cases was *Hoffman-La Roche Ltd. v. Empagran S.A.*, which concerned whether the Sherman Act applied to a claim arising from foreign injury caused by allegedly anti-competitive price-fixing. The specific question was whether the conduct fell within the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), which excludes application of the Sherman Act to “conduct involving trade or commerce . . . with foreign nations” unless the conduct has a “direct, substantial, and reasonably foreseeable effect” on domestic commerce and such effect gives rise to the Sherman Act claim. The Court could have relied solely on the language of the statute. Although the conduct was also alleged to have some domestic effect, it was the foreign, not the domestic, effect that gave rise to the claim at issue. Instead, the Court cited a new rule of construction: that it “ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.” In deciding whether the interference would be “unreasonable,” the Court examined a list of factors, including connections with the United States, harm to U.S. interests, and the potential for conflict. On the basis of those factors, the Court concluded that the justification for extending the law to the conduct “seems insubstantial.”

In support of this new canon, the Court cited *McCulloch*, *Romero*, and *Lauritzen*. *Romero* and *Lauritzen* did apply a multi-factor test, even though they did not describe it as a kind of “rule of reason.” But *McCulloch* explicitly rejected their multi-factor balancing approach in favor of a straightforward application of a bright-line rule against applying U.S. law to the internal affairs of foreign ships. The Court converted *McCulloch’s* approach to the presumption against extrajurisdictionality into exactly the

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311 Id. at 158-59 (citing FTAIA, 96 Stat. 1246, 15 U.S.C. § 6a). The FTAIA was enacted to clarify the scope of the Sherman Act in the wake of the controversy arising from its post-*Alcoa* application to foreign actions with domestic effects. See note 245 supra.
312 542 U.S. at 164.
313 Id. at 165-68. The Court also relied on its understanding that the FTAIA was designed “to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act’s scope as applied to foreign commerce,” and its failure to find any “significant indication that at the time Congress wrote this statute courts would have thought the Sherman Act applicable in these circumstances,” Id. at 169.
314 Nor did *Alcoa*, which the *Hoffman-La Roche* Court nevertheless cited as holding that “application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury.” Id. at 165 (emphasis in original).
kind of balancing test that McCulloch rejected by following the lead of the 1987 Restatement (Third) of Foreign Relations Law, which it cited as its primary source for the content of the canon. Echoing the general trend in choice-of-law rules away from bright lines, the Restatement adopted a rule-of-reason, balancing-test approach to questions of prescriptive jurisdiction.315 Perhaps reflecting the softer nature of the test, Hoffman-La Roche referred to it as “prescriptive comity,” although at the same time, confusedly, it emphasized that it “reflects principles of customary international law – law that (we must assume) Congress ordinarily seeks to follow,” and cited Charming Betsy.316

Hoffman-La Roche was nevertheless an important step in the right direction, away from the Court’s recent over-reliance on the presumption against extraterritoriality, and back toward recognizing the importance of international law and the presumption against extrajurisdictionality. The decision left unresolved, however, the inconsistencies in its jurisprudence that had been confusing lower courts. Indeed, the Court tied the presumption against extrajurisdictionality to a multi-factor test that is virtually impossible to apply consistently and predictably, as McCulloch had already explained.317

Rasul v. Bush,318 decided two weeks after Hoffman-La Roche, added to the confusion by holding that the presumption against extraterritoriality did not apply to a situation to which it had previously been held to apply: that is, to a U.S. base in a foreign country. Rasul asked whether the U.S. habeas statute, 22 U.S.C. § 2241, confers a right to judicial review of the legality of detention of aliens held at the U.S. naval base at Guantanamo Bay, in Cuba. As respondents, the U.S. government officials holding the prisoners argued that the statute should be limited by the presumption against extraterritoriality. They seemed on strong ground, at least as far as recent precedents were concerned: the case was arguably controlled by Smith, in which the Court had held that the presumption applied to the U.S. scientific base in Antarctica. Writing for a five-justice majority, however, Justice Stevens treated the base as within U.S. territorial jurisdiction, because the United States exercises “complete jurisdiction and control” over it pursuant

315 See Part III.B.2 infra.
316 542 at 164.
317 See Part III.B infra.
to its agreements with Cuba. 319 Like Hoffman-La Roche, Rasul was a step back toward the Court’s previous jurisprudence, in which the presumption against extraterritoriality only applied to situations subject to foreign territorial jurisdiction. By Rasul’s reasoning, the presumption should no longer apply to other situations within the sole jurisdiction of the United States, such as U.S. ships at sea. But by failing to overrule, distinguish, or even mention Smith or Sale, the Court added another inconsistent decision for lower courts to try to reconcile.320

The most recent decision in this area, Spector v. Norwegian Cruise Line Ltd., 321 further muddied the rules governing the application of U.S. law to foreign-flag ships. In Spector, the Court reviewed the Fifth Circuit decision described in the preceding section, which held that the Americans with Disabilities Act did not apply to a foreign-flag cruise ship in U.S. territory. As noted above, one of the grounds on which the Fifth Circuit relied was a strict presumption against any application of U.S. law to foreign-flag ships. All nine justices agreed that was incorrect, and that the correct approach would require a clear statement of congressional intent only before applying a federal statute to the internal affairs of a foreign-flag ship. 322 This in itself is again a return to the Court’s previous jurisprudence. Ignoring Windward Shipping, the 1974 decision that had failed to apply the internal-affairs rule, the justices all relied on McCulloch and the Court’s other decisions adopting that rule. But, again, the Court added to the confusion, this time by failing to reach agreement on how and why the rule should apply.

The Court split into three groups. Justice Kennedy, joined by Stevens and Souter, said that “general statutes are presumed to apply to conduct that takes place aboard a foreign-flag vessel in United States territory if the interests of the United States or its citizens, rather than interests internal to the ship, are at stake.”323 In the latter situation, a clear statement of congressional intent is necessary to overcome the presumption. Kennedy

319 Id. at 480. The agreements are a 1903 lease providing that during the period of U.S. occupation, “the United States shall exercise complete jurisdiction and control” over the leased areas, and a 1934 treaty providing that the lease would remain in effect so long as the United States does not abandon the base, unless the parties agree to modify or abrogate it. Id. at 471.

320 Moreover, the Court did not mention the presumption against extrajurisdictionality, although its treatment of the U.S.-Cuba agreements made clear that the United States had the legal right to exercise legislative jurisdiction under international law.


322 Id. at 130 (majority), 149-50 (dissent).

323 Id. at 130.
suggested that it may be unclear whether the statement is required only when there is “no effect on United States interests,” or whether the “predominant effect” is on the foreign ship’s internal affairs. 324 “We need not attempt to define the relevant protected category with precision. It suffices to observe that the guiding principles in determining whether the clear statement rule is triggered are the desire for international comity and the presumed lack of interest by the territorial sovereign in matters that bear no substantial relation to the peace and tranquillity of the port.” 325 Other than “international comity,” Kennedy did not refer to a presumption against applying statutes beyond U.S. jurisdiction under international law. He did state that the ADA should be construed not to conflict with the International Convention for the Safety of Life at Sea (SOLAS) “or any other international legal obligation,” but even then, he failed to refer to the Charming Betsy canon, basing his interpretation only on an interpretation of a particular term in the statute. 326 And he suggested that even if a requirement of the ADA does not violate international law, it might still interfere with the internal affairs of the ship, requiring a clear statement of congressional intent. 327

In contrast, Justice Ginsburg, joined by Justice Breyer, emphasized that the internal affairs clear statement rule “derives from, and is moored to, the broader guide that statutes ‘should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law.’ ” 328 Ginsburg accused Kennedy of cutting the rule “loose from its foundation,” by extending it to block statutory applications that may

324 Id. at 133.
325 Id. Although Kennedy did not explicitly choose between the two readings of the rule that he puts forward, he would apparently choose the second. He later said that the ADA might require removal of access barriers, but that this requirement “likely would interfere with the internal affairs of foreign ships,” and “[t]he clear statement rule would most likely come into play if Title III were read to require permanent and significant structural modifications to foreign vessels.” Id. at 134-35. Although he did not say so, removal of access barriers would also promote the welfare of disabled U.S. citizens.
326 Specifically, he said that the ADA requires barrier removal only if it “readily achievable,” and that bringing a vessel into noncompliance with SOLAS “would create serious difficulties for the vessel and would have a substantial impact on its operation, and thus would not be ‘readily achievable.’ ” Id. at 135-36. Justices Ginsburg and Breyer joined in this section of Kennedy’s opinion, making it the opinion of the Court, but they made clear in their separate opinion that they based their interpretation on a presumption against reading statutes to produce “international discord.” Id. at 144.
327 Id. at 137-38.
328 Id. at 143.
affect a ship’s internal affairs without conflicting with an international legal obligation. But her reading of the rule cut it loose from its foundations as well; she interpreted *McCulloch* and *Benz* as applying the rule only to avoid conflict with a specific international legal norm, not as standing for the proposition that interference with a ship’s internal affairs itself violates an international legal norm, by extending jurisdiction beyond the bounds set by international law.

Finally, Justice Scalia, joined by Justices Rehnquist, O’Connor, and Thomas, took the view that the premise of the internal-affairs rule is “the ‘rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship,” and its purpose is “to avoid casually subjecting oceangoing vessels to laws that pose obvious risks of conflict with the laws of the ship’s flag state, the laws of other nations, and international obligations to which the vessels are subject.” Although Scalia initially appeared to be basing the rule on the principles of international jurisdiction, he later said that the rule does not depend on the establishment of “an actual conflict with foreign or international law” – the point is to avoid even the possibility “of conflict among jurisdictions and with international treaties.”

None of the three opinions really followed *McCulloch*, which based its decision on the idea that the internal affairs rule was itself a rule of international law – not comity (as in Kennedy’s opinion), nor merely a court-made rule designed to avoid actual conflicts (as in Ginsburg’s opinion) or potential conflicts (as in Scalia’s) with other international or foreign laws – and that applying it was thus a way to avoid conflicts with the international law of legislative jurisdiction. *Spector* also left lower courts at sea as they decide how to construe U.S. statutes to foreign ships in U.S. territory: they can adopt either of the two Kennedy tests, or the Ginsburg or Scalia position, and the one thing they can be sure of is that a majority of the Court will disagree with whichever approach they choose.

Since 2005, the Court has not clarified the relationship between the presumption against extraterritoriality and the (possibly) rediscovered presumption against extrajurisdictionality. Instead, it shows signs of

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329 Thomas joined Scalia’s opinion except for a portion arguing that if any part of Title III of the ADA interferes with the internal affairs of the ship, the entire statute must apply or not apply as a whole.
330 *Id.* at 150 (quoting *McCulloch*, 372 U.S. at 21).
331 *Id.* at 151-52.
332 *Id.* at 153-54.
In Microsoft Corp. v. AT&T Corp., decided in 2007, the Court construed a provision of the Patent Act providing that patent infringement occurs ‘when one ‘supplies . . . from the United States,’ for ‘combination’ abroad, a patented invention’s ‘components.’’ The Court ruled that Microsoft did not violate the provision by dispatching software to another country where it was copied and loaded into a computer, thus becoming capable of performing as a speech processor subject to a patent owned by AT&T. It concluded that the original Microsoft software was not a “component,” the copies were, and that the copies were not supplied from the United States.

Although the Court based its analysis primarily on the plain language of the statute, it drew on the presumption against extraterritoriality to support its conclusion. It also said, quoting from Hoffman-La Roche, “As a principle of general application, moreover, we have stated that courts should ‘assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.” This reference left unclear whether the Court viewed the Hoffman-La Roche standard as additional to the presumption against extraterritoriality (as the word “moreover” might suggest) or as a description of it (as the see cite to Aramco immediately following might suggest). In addition, the quotation takes particularly vague language from Hoffman-La Roche, ignoring its somewhat clearer statement that courts should construe ambiguous statutes to avoid “unreasonable interference with the sovereign authority of other nations,” as well as its references to international comity, international law, and the Restatement of Foreign Relations Law. All of this calls into question whether the Court will continue to employ the revived presumption against extrajurisdictionality as it described it in Hoffman-La Roche. More generally, it indicates that the Court is not any closer to clarifying the canons it uses to construe the scope of federal statutes.

334 Id. at __, 127 S.Ct. at 1746 (quoting 35 U.S.C. § 271(f)).
335 The Court said that the presumption “applies with particular force in patent law,” apparently because the Patent Act itself “provides that a patent confers exclusive rights in an invention within the United States.” Id. at 1758 (emphasis added). It is unclear whether the Court meant that to overcome the presumption in the patent context, something more than the usual standard is required, since the Court did not describe either that standard or the standard that it was employing in the case.
336 Id. (quoting Hoffman-La Roche, 542 U.S. at 164).
337 Hoffman-La Roche, 542 U.S. at 164.
III. ADVANTAGES OF THE DUAL PRESUMPTIONS

The thesis of this article is that federal courts should situate their use of interpretive canons with respect to the scope of U.S. laws in the context of the international law of legislative jurisdiction. In particular, they should employ two presumptions: a strict presumption against applying U.S. law to situations without a basis for legislative jurisdiction under international law; and a soft presumption against applying U.S. law to situations not within sole or primary U.S. jurisdiction. Analogized to traffic signals, situations subject to sole or primary U.S. jurisdiction would receive a green light: courts would employ no presumption against applying U.S. law. The absence of any basis for jurisdiction would cause the light to turn red, requiring courts to find unmistakable evidence of congressional intent before applying a statute. And situations subject to some basis, but not a sole or primary basis, for U.S. jurisdiction would have a yellow light: courts would have to find some evidence, but not necessarily a clear statement, of congressional intent to apply a statute.

As Part I describes, in its essentials this was the approach employed by the Supreme Court for most of the twentieth century. In itself, that is not a sufficient reason to return to it now. This Part explains two other, more conclusive advantages of the proposed dual-presumption canons: they would better comport with reasonable assumptions of congressional intent, and they would be capable of predictable application.

A. The Dual Presumptions Better Comport with Reasonable Assumptions of Congressional Intent

To the extent that the Supreme Court referred to any justifications for the dual-presumption approach it took for most of the twentieth century, it relied on the assumptions that Congress does not intend to violate international law and that Congress is normally concerned with “domestic conditions.” In adopting the heightened presumption against

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338 See Part I.B supra. Specifically, the Court applied a strict presumption against extrajurisdictionality to situations in foreign countries outside any basis for U.S. jurisdiction, a softer presumption against applying laws to situations subject to U.S. jurisdiction but occurring within the territory of another country, and no presumption at all against applying laws to extraterritorial situations within sole U.S. jurisdiction.

339 E.g., Apollon, 22 U.S. at 371; Lauritzen, 345 U.S. at 578; McCulloch, 372 U.S. at 21-22.

340 Foley Bros., 336 U.S. at 285. The idea that judicial canons can or should reflect legislative intent is controversial; many scholars believe canons reflect only the policy
extraterritoriality in the 1980s and 1990s, the Rehnquist Court continued to refer to the latter assumption, but it ignored the former. Instead, it said that the presumption against extraterritoriality “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.” It also suggested that the heightened presumption was linked to separation of powers concerns – in particular, that it was stronger with respect to laws “that may involve foreign and military affairs for which the President has unique responsibility.”

This section of the article first explains how the assumption that Congress does not intend to violate international law justifies the dual-presumption approach that the Court employed for most of the twentieth century, but cannot justify the heightened presumption against extraterritoriality more recently adopted by the Court. It then argues that the international-discord and separation-of-powers justifications only make sense when seen as applications of the more fundamental assumption that Congress does not normally intend to violate international law. It acknowledges the validity of assuming Congress is concerned with domestic preferences of judges. E.g., Kramer, supra note 87, at 184 (saying that judicial presumptions reflect congressional intent “is just a coy way of soft-pedaling the conclusion that judges have found a particular policy normatively superior”); Curtis A. Bradley, The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law, 86 Geo. L. J. 479, 507 (1997) (supporters of normative canons such as Charming Betsy “admit that the canons are ‘not policy neutral,’ but rather ‘represent value choices by the [court].’” (quoting William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593, 595-96 (1992)); Lea Brilmayer, The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal, 50 Law & Contemp. Problems 11, 17 (Summer 1987) (“When a court decides whether a statute should apply to a situation which the statute does not address, it inescapably relies upon its own normative views.”). If the courts’ preferences are in fact the same concerns that they claim reflect Congress’ intent, then the primary difference between these two positions is whether, in the courts’ view, Congress would have taken a particular concern into account if it had explicitly considered the question, or Congress should have taken the concern into account. In this context, that difference does not matter much, if at all. Either way, the dual-presumption approach better comports with the concerns than does the Court’s current canons.

Another criticism of judicial canons is that courts use canons to further preferences other than those they are actually articulating. It seems likely that in raising the bar for the extraterritorial application of U.S. laws, the Rehnquist Court was doing just that. See Part III.A.5 infra. Obviously, for judges to raise a concern disingenuously, as cover for another unstated one, is problematic for any number of reasons.

341 Smith, 507 U.S. at 204 n.5: Aramco, 499 U.S. at 248.
342 Id.
343 Sale, 509 U.S. at 188.
issues, but argues that the reasons for that assumption apply as well to all areas within primary U.S. jurisdiction. The section concludes that the true reason for the heightened presumption against extraterritoriality adopted by the Rehnquist Court was probably that it reflected the conservative preferences of a majority of the justices, who inclined toward limiting the application of federal laws whenever possible.

1. Avoidance of Conflicts with International Law

Interpreting U.S. statutes to avoid conflicts with international law is one of the oldest judicial canons in the jurisprudence of the Supreme Court, dating from its 1804 decision in *Charming Betsy*. Courts and scholars generally agree that it has the purpose of effectuating congressional intent. It is reasonable to assume that Congress does not want courts to construe statutes in ways that inadvertently undermine international obligations binding on the United States and thereby lead to unintended conflicts between the United States and other countries. With respect to the international law of legislative jurisdiction, the utility of the presumption in avoiding such conflicts is particularly clear. In the words of Rosalyn Higgins, “[t]here is no more important way to avoid conflict than by providing clear norms as to which state can exercise authority over whom, and in what circumstances. Without that allocation of competences, all is rancour and chaos.”

In the context of jurisdiction, the *Charming Betsy* canon also has a more practical benefit. As long ago as *Apollon*, in 1824, the Court noted that beyond its jurisdictional limits, the laws of a country would have no force recognized by other countries.

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344 “[E]very commentator to consider the *Charming Betsy* canon at length concludes that, at least to some extent, it is properly based on the presumed intentions of Congress. More importantly, the courts seem to employ the canon because they believe that it maximizes the preferences of Congress.” Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. Rev. 293, 333 n.181 (2005) (citations omitted). Even Curtis Bradley, a skeptic of the idea that judicial canons generally and the *Charming Betsy* canon in particular reflect congressional intent, says that the rationale “still carries some force. It seems likely that, at least in a weak sense, the political branches (particularly the Executive) still care about international law, if for no other reason than that violations of international law may have negative effects on the relationship between the United States and other countries.” Bradley, *The Charming Betsy Canon, supra* note 340, at 533.


346 22 U.S. at 370.
be ineffective, since the state’s enforcement of its laws would depend on the return of the persons nominally subjected to them.

These concerns apply with most force with respect to extensions of jurisdiction that would exceed the boundaries set by international law, and justify a strict requirement that Congress demonstrate its intent nevertheless to do so in unmistakable terms. The concerns also apply when the United States has a basis to jurisdiction but it is not the sole or primary basis for jurisdiction, and another state has a basis for jurisdiction as well – for example, when an action within the territory of another state is taken by a U.S. national or when it directly and substantially affects the United States. But in these situations, the concerns apply only in paler form. First, applying U.S. law to such situations does not violate international law and therefore does not give rise to the kind of conflict that the Charming Betsy canon was designed to avoid. Extending U.S. laws abroad may give (and often has given) rise to political conflicts, as countries protest the extraterritorial extension of controversial laws, and even legal conflicts, if the countries argue that the United States did not actually have a valid legal basis for doing so.\(^{347}\) Those concerns justify some presumption against the extension of U.S. laws, but not as strong a presumption as against their extension in ways that would clearly violate international law.

Second, the practical objections are similarly diminished. Even when the United States has a basis for extending its laws abroad (e.g., to its own nationals), it may still not enforce those laws abroad.\(^{348}\) But it can call on other countries to assist it by extraditing or providing information on its subjects. And when those subjects come within its enforcement jurisdiction, it will meet no protest from another country if it decides to proceed against them. In some cases, the United States will be interested in extending its laws to its nationals, but there is no reason to assume that Congress intends every one of its statutes to apply to every situation arguably within its jurisdiction over U.S. nationals. A statute criminalizing murder by U.S. nationals while in other countries, for example, would be within the United States’ jurisdiction under international law, but its enforcement would depend almost entirely on the cooperation of other states. Moreover, such a law would almost always be superfluous, since the states with territorial jurisdiction already have criminal laws against murder and, with few

\(^{347}\) Cf. Kramer, supra note 87, at 206 (“interpreting American law to reach as far as . . . international law permits will generate a great many conflicts with other nations, and it makes sense to read some further limitation into the statute”).

\(^{348}\) See Higgins, supra note 345, at 73.
exceptions, are better suited to enforce them. Again, then, concerns over practicality justify a presumption, but a weaker presumption, against the extension of U.S. laws to these situations.

The dual presumptions employed by the Court after American Banana comport with these different justifications. The strict Charming Betsy canon against violating international law continued to operate, but the Court’s presumption against extraterritoriality was limited in scope — applying only to situations subject to another jurisdiction, not to U.S. ships at sea — and easier to overcome, allowing the necessary evidence to emerge from the context as well as the language of the statute. In contrast, the heightened presumption against extraterritoriality adopted by the Rehnquist Court cannot be justified by the concerns underlying the desire to avoid conflicts with international law. As described by the Court, that heightened presumption is as difficult to overcome and as broad in scope as the strict presumption against extrajurisdictionality. In Aramco, the Court actually derived the standard necessary to overcome the presumption against extraterritoriality — that is, a clear statement of congressional intent — from the Court’s earlier decisions applying the stricter presumption against extrajurisdictionality.\footnote{See note 230 supra and accompanying text. In later decisions, the Court has sometimes referred to the need to supply “clear evidence” of congressional intent, Smith, 507 U.S. at 204, and has said that the necessary “affirmative evidence” is missing from the history of the statute in question as well as from its text. Sale, 509 U.S. at 176. Some lower courts have concluded that the presumption may therefore be overcome with a sufficiently clear indication of congressional intent in the legislative history.} And in Sale and Smith, the Court applied the presumption to situations within sole U.S. jurisdiction. The concerns justifying the presumption against extrajurisdictionality simply do not justify such a sweeping presumption against applying U.S. law to situations outside U.S. sovereign territory but within U.S. jurisdiction. If the situation is within sole U.S. jurisdiction, the concerns do not apply at all. And even if the situation is within the primary jurisdiction of another country — say, within its territory — the concerns do not justify a strict presumption against applying U.S. law, because the concerns are weaker there than they are when the situation is outside U.S. jurisdiction entirely.

The heightened presumption against extraterritoriality not only fails to be supported by the concerns underlying the Charming Betsy canon; it may actually undermine those concerns. Presuming that U.S. law does not apply to situations within sole U.S. jurisdiction places the United States in
jeopardy of failing to comply with its international obligations, since international law does not merely prohibit or authorize actions by states; it often requires states to take certain actions, and those requirements often apply with respect to situations within the state’s jurisdiction, not just its territory.

Treaties often set out such extraterritorial requirements explicitly. But even when they do not, the obligation that states carry out their treaty obligations in good faith militates against cramped interpretations of general obligations that limit them only to actions within a party’s territorial jurisdiction, and not to other situations within its sole or clearly primary jurisdiction. The failure to recognize the nature of this type of international obligation, combined with the heightened presumption against extraterritoriality, led to the Court’s decision in Sale that the Refugee Protocol (and the U.S. statute implementing it) did not apply to refugees on a U.S. ship outside U.S. territory. In dissent, Justice Blackmun argued that the Refugee Protocol did apply to the United States’ conduct, and that the Court’s interpretation of the statute “flies in the face of the international

350 For example, the International Covenant on Civil and Political Rights requires each of its parties to respect and ensure the rights in the Covenant “to all individuals within its territory and subject to its jurisdiction.” International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, art. 2(1). The International Court of Justice has interpreted this language to mean that the Covenant “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.” Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ¶ 111 (ICJ, 2004). The Convention Against Torture explicitly requires each party to take the necessary measures to establish jurisdiction over acts of torture not only when the torture is committed within “any territory under its jurisdiction,” but also over such acts committed “on board a ship or aircraft registered in that State,” as well as when the acts are committed by its nationals. Convention Against Torture, Dec. 10, 1984, art. 5(1). The law of the sea includes any number of obligations on states to regulate actions under their jurisdiction even though outside their sovereign territory. The breadth of some of these obligations may be illustrated by Article 194(2) of the U.N. Convention on the Law of the Sea, which provides that “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment.” U.N. Convention on the Law of the Sea, art. 194(2). Article 194 echoes Principle 21 of the 1972 Stockholm Declaration, which says that states have “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” The Madrid Protocol to the Antarctic Treaty requires each party to undertake environmental impact assessment, “in accordance with appropriate national procedures,” for its activities in Antarctica, including in particular its bases and expeditions. Madrid Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, art. 8, ann. I.

“obligations” imposed by the treaty. Others also met that interpretation with “dismay.” Many observers concluded that the United States was in violation of its obligations under the Refugee Protocol, and its interpretation of the law was strongly condemned by the U.N. High Commissioner for Refugees and the Inter-American Commission for Human Rights.

Not every application of the presumption against extraterritoriality will place the United States in jeopardy of violating international law, but an across-the-board strict presumption that laws do not apply extraterritorially does increase the likelihood that the United States will fall short of its international obligations, particularly since it often relies on pre-existing statutes to meet them. For example, the United States did not enact new legislation to implement the International Covenant on Civil and Political Rights, instead relying on existing laws such as the federal habeas statute. Had the *Rasul* Court interpreted federal habeas law not to apply to detainees in Guantanamo Bay, as the Bush Administration urged, the result would have been to intensify accusations that the United States was in violation of its obligations under the Covenant, which entitles detainees to judicial review of the legality of their detention. Although before the Human Rights Committee, the body of independent experts charged with overseeing compliance with the Covenant, the United States argued that its obligations under the Covenant do not extend extraterritorially, the Committee strongly disagreed, informing the United States that its duties extend beyond its domestic jurisdiction.

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352 509 U.S. at 207. He said that “[i]f any canon of construction should be applied in this case,” it is the *Charming Betsy* canon. *Id.*

353 Jean-Marie Henckaerts & Louis Sohn, *Mass Expulsion in Modern International Law and Practice* 103 (1995). The authors quote Louis Henkin as stating, “It is incredible that states that had agreed not to force any human being back into the hands of his/her oppressors intended to leave themselves – and each other – free to reach out beyond their territory to seize a refugee and to return him/her to the country from which he sought to escape.” *Id.*

354 *Id.* at 103-04. For a balanced assessment that concludes that “an interpretation of art. 33 as applying only within the territory or at the borders is difficult to uphold,” see Thomas Gammeltoft-Hansen, *Extraterritorial Obligations and Refugee Law*, in *Extraterritorial Obligations in Human Rights Law*, __, __ (Sigrun Skogly & Mark Gibney eds., 2009).

355 See *Arc Ecology v. U.S. Dept. of Air Force*, 411 F.3d 1092, 1102-03 (9th Cir. 2005) (rejecting argument that failure to apply toxic waste statute extraterritorially would cause United States to violate its obligations under customary international environmental law).

356 ICCPR, *supra* note 350, art. 9(4) (“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”).
territory to places within its control such as Guantanamo Bay.\footnote{Concluding Observations of the Human Rights Committee, United States of America, ¶ 10, U.N. Doc. CCPR/C/USA/CO/3 (Sept. 15, 2006). In particular, the Committee said that the United States “should ensure, in accordance with article 9(4) of the Covenant, that persons detained in Guantanamo Bay are entitled to proceedings before a court to decide, without delay, on the lawfulness of their detention or order their release. Due process, independence of the reviewing courts from the executive branch and the army, access of detainees to counsel of their choice and to all proceedings and evidence, should be guaranteed in this regard.” \textit{Ibid.} ¶ 18. The Committee Against Torture, the oversight body for the Convention Against Torture, had already taken the same position with respect to that treaty.

Congress later amended U.S. law to bar habeas suits by detainees, but the Supreme Court held that constitutional habeas protections continue to apply and that the alternative legal procedures Congress had instituted were not an effective substitute for habeas review. \textit{Boumediene}, 553 U.S. at __.}

2. \textit{Avoidance of International Discord}

As the preceding section explains, one of the primary purposes of construing U.S. statutes not to exceed the limits of international law is the avoidance of international discord. In developing its heightened and broadened presumption against extraterritoriality, however, the Rehnquist Court referred to the avoidance of international discord as a justification for the presumption without situating the concern in the context of international law. Detached from that context, concerns over international discord are too inchoate to support a consistent interpretive canon and in particular provide no support for the Rehnquist Court’s presumption against extraterritoriality. More fundamentally, they fail to reflect any reasonable idea of congressional intent.

The fundamental problem with trying to base a presumption on the avoidance of international discord without referring to international law is that outside the framework of international law, courts have no way of determining which types of international discord Congress is supposed to want to avoid. As the preceding section explains, connecting the desire to avoid international discord with the international law of legislative jurisdiction provides clear guidelines: the conflicts to be avoided are those that result when a state’s legislation either oversteps its jurisdictional bounds entirely or addresses a situation where another state has at least as strong a right to legislate. In the absence of international law, courts are left without guidance as to which types of conflicts they should interpret federal statutes to avoid: only actual conflicts with foreign laws, where the two laws require
different, inconsistent actions? Conflicts that might arise from different approaches to a similar situation, even though the actors might not be under inconsistent obligations? Potential legal conflicts, where one state has not yet addressed a situation but might choose to do so in the future? Or political conflicts, which might arise even in the absence of any legal conflict?

The Court has never clarified this critical point. In *Aramco*, Rehnquist suggested that the conflicts to be avoided were the first type: that is, with foreign laws that required those regulated to take actions contrary to the requirements of the U.S. law. But the Court pointed to no such actual conflict between U.S. and Saudi law: Saudi law was not alleged to require the discrimination that Title VII prohibits. And, as the dissent pointed out, conflicts between Title VII and foreign law were unlikely because by its terms, Title VII did not apply to the employment of aliens outside any state of the United States. In *Hartford*, the Court seemed to adopt a firmer line, stating that no conflict exists unless the person subject to regulation cannot comply with both the U.S. and the foreign law: even if the foreign state had “a strong policy to permit or encourage” conduct forbidden by the U.S. statute, it would not be enough to create a conflict. But the Court’s treatment of conflicts in *Hartford* was in the context of what the Court saw as a question of international comity, not the presumption against extraterritoriality, which calls into doubt whether the Court meant its discussion to extend to the justification for the presumption.

The more recent decisions by the Court have not clarified which type of conflicts statutes should be construed to avoid. As explained above, in *Hoffman-La Roche* the Court said that it looks to avoid “unreasonable interference with the sovereign authority of other nations,” and in deciding whether interference would be “unreasonable,” the Court examined, *inter alia*, the potential for conflict between U.S. and foreign antitrust laws. It did not require evidence that companies would be unable

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358 499 U.S. at 256 (contrasting Title VII, which in the Court’s view did not address conflicts with foreign laws, with the Age Discrimination in Employment Act, which provided that it would not be unlawful for an employer to take actions that would otherwise violate the ADEA if compliance with the statute “would cause the employer . . . to violate the laws of the country in which such workplace is located”) (quoting ADEA, 81 Stat. 602, § 623(f)(1)).

359 In fact, according to Gary Born, employment discrimination was also contrary to Saudi law. Born, supra note 12, at 77.

360 499 U.S. at 267-71.

361 509 U.S. at 799.

362 542 U.S. at 164.
to comply with both U.S. and foreign law, but rather found sufficient that extending the U.S. law would pose "a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs," including through undermining foreign nations' antitrust enforcement policies. 363 Most recently, in Spector, in looking at the application of U.S. law to a foreign ship in U.S. port, Justice Scalia, writing for himself, Chief Justice Rehnquist, and Justices O'Connor and Thomas, stated flatly: "It has never been a condition for application of the foreign-flag clear-statement rule that an actual conflict with foreign or international law be established – any more than that has been a condition for application of the clear-statement rule regarding extraterritorial effect of congressional enactments." 364 Scalia emphasized that the basis for the presumption that U.S. law does not apply to the internal affairs of a foreign ship is "that subjecting such matters to the commands of various jurisdictions raises the possibility (not necessarily the certainty) of conflict among jurisdictions and with international treaties." 365 The clear implication is that the presumption against extraterritoriality is intended to avoid such potential conflicts as well. 366

Even if the Court was able to settle on which conflicts Congress ought to avoid, it could not rely on its conclusion as a basis for the presumption against extraterritoriality as applied by the Rehnquist Court, because that presumption would not effectively further the aim of avoiding any of these types of conflict. First, a concern over avoiding conflicts with foreign laws cannot justify the extension of the presumption against extraterritoriality to areas within sole U.S. control and jurisdiction, such as U.S. military ships on the high seas and U.S. scientific bases in Antarctica. 367 Second, it cannot

363 Id. at ___, ___.
364 545 U.S. at 153-54.
365 Id. at 154.
366 The other justices did not directly address the presumption against extraterritoriality. In the context of the internal-affairs rule, they looked for actual rather than potential conflict, albeit not with foreign laws, but rather with international treaty obligations governing the structure of ships. Id. at 135-37, 144-45. Of course, conflicts with such international rules would necessarily lead to conflicts with any foreign laws implementing them. Justices Ginsburg and Breyer would apply the internal-affairs rule only to situations involving actual conflict with international legal obligations; Justices Kennedy, Stevens, and Souter indicated that even in the absence of such conflict, the rule would apply to applications of U.S. law that interfere with a foreign ship’s internal affairs.

367 And, in fact, when these situations did come before the Rehnquist Court, it did not attempt to rely on the desire to avoid international discord as a basis for its application of the presumption. See Sale, 509 U.S. at 173-74; Smith, 507 U.S. at 204 n.5.
justify a heightened standard for overcoming the presumption. With respect to situations arising in territory under foreign jurisdiction, the strict clear-statement requirement goes unnecessarily far in trying to avoid conflicts, treating situations that are relatively less likely to give rise to such conflicts because they fall within U.S. jurisdiction as well as equivalent to situations that are very likely to give rise to such conflicts, because they are outside any basis for jurisdiction at all.

Most fundamentally, there is no reason to think that any of these concerns over conflicts with other states, once detached from international law, reflects any reasonable policy that Congress does or should have in mind when enacting legislation. Assuming that Congress only seeks to avoid actual legal conflicts would ignore all the ways that U.S. law could be objectionable to foreign countries even in the absence of a conflict with an existing foreign law; on the other hand, trying to avoid every potential conflict would place U.S. law at the mercy of any country that enacts a conflicting law, no matter how illegitimate or unreasonable.368 Restoring the role of the international law of legislative jurisdiction would recognize that the key question is not whether the U.S. law creates an actual or potential conflict with a foreign law, but whether the U.S. law is enacted in accordance with the limits on legislative jurisdiction that states have made part of international law.

As Part I of this article explains, the Supreme Court understood quite clearly for most of its history that the best way to construe U.S. laws to avoid international discord was to construe them in accordance with the international law of legislative jurisdiction. In the 1920s and 1930s, for example, the Court made clear that applying U.S. laws to U.S. nationals would not offend foreign states because doing so was in accordance with international law.369 As the Court said in Lauritzen in 1953, courts have long accommodated “the reach of our own laws to those of other maritime nations” by applying the U.S. statutes “to apply only to areas and transactions in which American law would be considered operative under

368 If, for example, a country enacted a law requiring all its nationals, wherever located, not to hire women, no one would expect that the United States would try to avoid a clash with this law by amending, or having its courts interpret, Title VII to exempt those employers.
369 Bowman, 260 U.S. at 102 (“Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold [U.S. citizens] for this crime against the government to which they owe allegiance.”); Blackman, 284 U.S. at 439 (“The mere giving of . . . notice to the citizen in the foreign country of the requirement of his government that he shall return is in no sense an invasion of any right of the foreign government . . . .”);
prevalent doctrines of international law.” Arthur Lauritzen called this “usage as old as the Nation,” citing Palmer and Charming Betsy. Indeed, McCulloch, the very case cited by Aramco for the principle that the purpose of the presumption against extraterritoriality is to avoid international discord, based its conclusion that “[t]he possibility of international discord [as the result of extending the U.S. law] cannot . . . be gainsaid” on the fact that the extension of U.S. law would violate the jurisdictional limits set by international law.

The international law of legislative jurisdiction cannot avoid every possible conflict with foreign law, but it nevertheless provides the most useful framework for considering congressional intent with respect to such conflicts. If a U.S. law extends beyond the boundaries set by international law, it will almost unavoidably cause conflicts with other countries, conflicts in which the United States will be widely perceived as being in the wrong. Congress may well be assumed to want to avoid those kinds of conflicts. On the other hand, when the United States regulates situations within its sole jurisdiction, in the event of any conflict it is the other state that will be in violation of international law. And such conflicts are unlikely; when the United States applies its laws to a scientific mission to Antarctica or a military prison under its sole jurisdiction, no country will protest and many will applaud, as the previous section explains. The failure to extend its laws to such situations is far more likely to give rise to international discord. Conflicts may of course arise in the great middle area in which both states have a claim to jurisdiction, and Congress may be reasonably assumed to want to avoid such conflicts in the absence of some evidence that it nevertheless intended the statute to apply.

In short, concerns over international discord only make sense when placed in the context of the international law of legislative jurisdiction, and in that context they justify precisely the canons this article has proposed: a hard presumption against applying U.S. laws when there is no international legal basis for jurisdiction, a soft presumption against doing so when there is a basis but it is not the sole or primary one, and no presumption at all when U.S. jurisdiction is sole or clearly primary.

370 345 U.S. at 577.
371 Id.
372 372 U.S. at 21.
3. Separation of Powers

The Court has sometimes suggested that its canons in this area reflect concerns over separation of powers. As expressed by the Court, these concerns are of two very different types. The first is a general reluctance for the judicial branch to insert itself into questions of foreign policy, which is unobjectionable but adds nothing to the concerns already addressed. The other concern, stated in passing in one of the Rehnquist Court’s decisions, is to avoid encroachment on the authority of the executive branch. This rationale does not withstand even minimal scrutiny, and even the Rehnquist Court barely relied upon it.

a. Judicial interference with the political branches’ conduct of foreign policy. From time to time, the Court has suggested that one of the bases for the presumptions against extrajurisdictionality is that courts should be careful not to interfere in sensitive questions of international relations, which are better left to the political branches. No one could disagree. Courts have no expertise in foreign relations, and whenever possible they should be careful not to create political headaches for the branches with responsibility in this area. But the assumption that courts will best avoid such headaches by construing laws not to extend extraterritorially is incorrect. Narrow constructions of law may well avoid some types of conflicts; but they may lead to others, as the preceding sections explain.

Concerns over separation of powers should not, therefore, lead courts to construe all laws narrowly, but rather warn them that they are not well-suited to determine the effects of their decisions on foreign affairs. One of the first major cases in this area, United States v. Palmer, illustrates the point. In that decision, Chief Justice Marshall eloquently argued that his narrow interpretation of the statute avoided “delicate and difficult” questions respecting the rights of a part of a foreign empire which is asserting its independence, which he characterized as “rather political than legal in their character” and thus belonging to the political branches rather than the judicial. But Marshall’s opinion did not avoid those questions, it answered them, and it answered them in ways that the political branches...
evidently did not like. Marshall’s decision gutted the piracy statute in a way that Congress could not have intended, and Congress responded by immediately enacting another one.\footnote{See note 30 and accompanying text.} The decision also prevented the executive branch from prosecuting the defendants, a prosecution that the executive branch was pursuing in full awareness of its implications for foreign relations.\footnote{Despite Chief Justice Marshall’s apparent concern over interfering with the political branches, it should be remembered that as the last of the great Federalists, he was not generally in accord with the political views of the Democratic-Republican presidents in office during his term, including James Monroe, the president at the time \textit{Palmer} was decided.} The Court was on firmer ground in the succeeding piracy cases, when it looked not to vague concerns about foreign affairs, but to the bounds of legislative jurisdiction set by international law.\footnote{See notes 35-41 and accompanying text. A difficult question is how far courts should defer to the executive branch in interpreting the limits on legislative jurisdiction set by international law. There is no apparent reason why courts should apply a more (or less) deferential standard of deference in this area than the standard it applies to questions of international law generally. But this article does not address the ongoing disagreement over what that standard should be.}

Looking to international law for guidance is not only more suitable for courts more qualified to interpret the law than to conduct foreign policy, it also is more likely to avoid interference with the political branches. Put in slightly different terms, the concern that courts not interfere with the role of the political branches simply reiterates and underlines the concerns over international discord discussed in the previous section. Interference with the political branches’ conduct of sensitive issues of foreign relations results when a court interprets a statute in a way that could cause international discord. For courts to look to the international law of legislative jurisdiction as a guide for their decisions not only means that they can stick to their own area of expertise; in addition, as the preceding sections explain, extrajurisdictionality provides a better measure than extraterritoriality of whether an interpretation of a statute would cause conflict with other countries. The potential for such conflict is greatest when a statute would overstep the limits set by international law; it is less but still significant when a statute would apply to a situation within U.S. jurisdiction but not within its sole or primary jurisdiction; and it is virtually nonexistent when a statute applies to a situation within sole or primary U.S. jurisdiction. As a result, courts should apply statutes in the first case only when the congressional intent to do so is unmistakably clear; in the second case when there is evidence of congressional intent to do so, even if it is not
indisputable; and in the third case unless there is some reason to think that the statute was not intended to apply. That is exactly what the proposed dual-presumption approach would do. Again, the heightened presumption against extraterritoriality does not reflect these concerns. It would cause U.S. law not to apply even when applying it would raise less potential for discord than failing to apply it; and whenever the presumption would apply, it would raise as high a bar to application as when the possibility of discord is at its highest.

b. Congressional interference with the executive branch’s conduct of foreign policy. In Sale, the Rehnquist Court said, without explanation, that the “presumption [against extraterritoriality] has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility.” The statement may have roots in an earlier decision, National Labor Relations Board v. Catholic Bishop of Chicago, a case in which lay teachers at Catholic high schools sought union representation, the schools refused to recognize or bargain with the unions, and the unions requested relief from the National Labor Relations Board under the NLRA. The schools argued that Board jurisdiction over the dispute would run afoul of the Religion Clauses in the First Amendment. Instead of addressing that issue directly, the Court decided that it had to determine first whether such jurisdiction “would give rise to serious constitutional questions,” because if so, the Court would have to find “the affirmative intention of the Congress clearly expressed” to conclude that the statute granted jurisdiction.

The Court took this standard and the very language expressing it from McCulloch, even though, as four dissenters pointed out in an opinion by Justice Brennan, “[n]o question as to the constitutional power of Congress to cover foreign crews was presented” in McCulloch. Nevertheless, the majority reframed McCulloch as a constitutional case, construing it as limiting the reach of a statute not to avoid interfering with international law, but rather to avoid “a serious question of separation of powers which in turn would have implicated sensitive issues of the authority of the Executive over

380 509 U.S. at 188.
382 Id. at 492-95.
383 Id. at 501.
384 Id. at 509 n.1 (citation omitted). See McCulloch, 372 U.S. at 17 (“Since the parties all agree that the Congress has constitutional power to apply the National Labor Relations Act to the crews working foreign-flag ships, at least while they are in American waters, we go directly to the question whether Congress exercised that power.”) (citations omitted).
This was a serious misreading of *McCulloch*, which not only did not discuss separation of powers, but even emphasized the importance of Congress, stating that it “alone has the facilities necessary to make fairly such an important policy decision.”

This language in *Catholic Bishop* and *Sale* seems to assume that the freedom of the executive branch to conduct foreign relations must be protected from undue interference by Congress. But the relationship between the two political branches in the conduct of foreign policy is and has always been contested, to say the least. The lines between the authority of Congress and the President in foreign affairs are, in very many instances, too blurry to be suitable for judicial policing. And, in practice, the Court virtually never engages in such policing. *Sale* itself involved a statute governing immigration, an area indisputably subject to regulation by Congress and not one in which the Court routinely strikes down statutes as encroaching on executive authority. Understandably, since *Sale* the Court has not referred to the need to protect the President from unconstitutional intrusions by Congress as a justification for its judicial canons in this area.

The Court’s strengthened presumption against extraterritoriality does have an effect on the relationship between the executive and legislative...
branches, but it is a pernicious one. Applying the presumption against the application of statutes to U.S. ships and bases under U.S. jurisdiction and control means that the executive branch can avoid laws with which it does not want to comply by shifting operations off-shore to one of these sites. Congress can, of course, extend the law explicitly, but until and unless it does so, the executive branch is free to act in disregard of the law.

Moreover, since these areas are not subject to the jurisdiction of other countries, they effectively become legal black holes, subject to no laws at all. The U.S. Coast Guard interdicted Haitian refugees on the high seas in the late 1980s and early 1990s precisely in order to avoid the application of U.S. law governing treatment of refugees. The Bush Administration established a prison at Guantanamo Bay to avoid U.S. laws governing treatment of detainees. Far from protecting the respective constitutional roles of the political branches, the heightened presumption against extraterritoriality allows the executive branch to avoid its primary constitutional function: to execute the laws enacted by Congress.

4. A Focus on Domestic Concerns

The Rehnquist Court extended the presumption against extraterritoriality to situations outside U.S. sovereign territory but under sole U.S. jurisdiction, such as a U.S. base in Antarctica, situations that could not give rise to any potential conflict with foreign laws or international discord. In that situation, the Court relied on another justification for the presumption, which it had first articulated in 1949 in Foley Bros.: that Congress normally enacts laws to address “domestic concerns.” The Court has never examined or explained this assumption, perhaps regarding it as self-evident. In general terms, it is undoubtedly true that Congress legislates to promote the general welfare of the United States and its nationals, and in that sense is primarily concerned with “domestic” interests. But on closer examination, the assumption does not support the strengthened presumption against extraterritoriality, for two reasons.

First, as scholars have repeatedly noted, the assumption that Congress cares primarily about domestic interests does not justify extending a presumption against extraterritoriality to actions taken abroad that affect the United States. In the words of Gary Born, “‘Domestic conditions’ may be

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389 Smith, 507 U.S. at 204 n.5 (rooting the presumption in “the commonsense notion that Congress generally legislates with domestic concerns in mind”); see Foley Bros., 336 U.S. at 285.
substantially affected by conduct occurring outside U.S. territory . . . In order for Congress to regulate adequately ‘domestic conditions’ in today’s world, it must also deal with conduct occurring outside U.S. borders that significantly affects the United States.” 390 If one takes that assumption about congressional intent seriously, then, there should be no presumption at all against applying laws to foreign actions with substantial domestic effects. 391 And, while the Court has occasionally acted as if that is the case, as in Hartford, the Rehnquist Court did not explicitly except such situations from its heightened presumption against extraterritoriality.

Second, the idea that Congress legislates to promote the general welfare of the United States justifies an assumption that Congress normally addresses all areas within its sole or primary jurisdiction under international law at least as well as it justifies a presumption that Congress only intends to address actions taken within U.S. sovereign territory. The welfare of the United States and its nationals is not bounded by territorial limits, and actions taken by the U.S. government and its nationals are routinely taken outside those limits. If holding prisoners on a U.S. military base would implicate U.S. interests when the base is in North Carolina, for example, there is no reason to think that the same interests would not be implicated when the base is under complete and exclusive U.S. control in Cuba. If Congress decides to ensure that U.S. agencies do not return refugees to countries where they would be persecuted, whatever justifications they have for doing so would apply equally to the agencies acting in the United States as to the agencies acting on U.S. ships outside U.S. territorial seas. If Congress decides to waive its immunity from tort liability, whatever reasons it might choose to do so would apply just as well to a U.S. facility in Antarctica as to a U.S. facility in Alaska.

The “domestic concern” rationale thus does not provide a strong basis for limiting the application of U.S. statutes to any situations that affect the United States, or to any situations within sole U.S. jurisdiction, even if they are outside U.S. sovereign territory. Of course, when actions fall within the jurisdiction of other countries, there are good reasons to assume that Congress does not intend to address them, as we have seen: doing so may be impractical and lead to international conflict. But these reasons to limit the scope of U.S. laws are irrelevant to the application of laws to situations within sole or clearly primary U.S. jurisdiction. Again, then, the rationale supports a strict presumption against extrajurisdictionality, a softer

390 Born, supra note 12, at 74; see Dodge, supra note 12, at 118-19.
391 This is the position Dodge takes. See id.
presumption when there is a ground for U.S. jurisdiction (including on the basis of effects) that is not clearly stronger than that of another country, and no presumption at all when the United States has sole or clearly primary jurisdiction.

The assumption that Congress intends to treat extraterritorial situations differently merely because they are extraterritorial, even if they are under sole U.S. jurisdiction, is not just unjustified. It has pernicious effects, as the preceding sections show: it allows the executive branch to avoid otherwise applicable statutes, places the United States at greater risk of violating its international obligations, and helps to facilitate the creation of legal black holes, where the laws of no country apply.

5. That Government Is Best That Governs Least

It seems doubtful, at best, that the reasons given by the Rehnquist Court for the heightened presumption against extraterritoriality were its real concerns. The Court switched justifications from case to case to support its desired result, and it continued to apply the presumption even when none of its stated justifications was present. Although it is impossible to know the real motivations of the justices, it seems likely that the Court inclined toward drawing in the boundaries of federal statutes simply because the political predilections of a majority of the Court aligned with the position that that government is best that governs least. In other words, the real justification for the heightened presumption was probably the politically conservative disinclination of the Rehnquist Court to construe federal statutes expansively.

In Aramco, the Court suggested that the principal purpose of the presumption was to protect against unintended clashes with foreign laws that could result in international discord. But, as noted above, Aramco identified no actual clash with a foreign law, and the statute was unlikely to risk undermining the foreign country’s regulatory scheme because the law explicitly exempted alien employees and, as the dissent explained, could easily have been interpreted to apply only to U.S. employers.

Moreover, as the dissent pointed out, evidence in the statute itself and its history suggested that Congress did intend the statute to apply to discrimination by U.S. employers against U.S. nationals. 499 U.S. at 266-71. In short, “it is hard to escape the impression that Aramco is an expression of the Rehnquist Court’s substantive preferences.” William N. Eskridge, Dynamic Statutory Interpretation 283 (1994).
Nevertheless, the idea that the presumption against extraterritoriality was principally designed to avoid conflicts with foreign laws, while overstated, might at least have provided guidance as to how it should be applied. In *Smith*, however, the Court showed that it would apply that presumption even in situations in which such conflicts were impossible. In refusing to apply the Federal Tort Claims Act to a U.S. base in Antarctica, despite the lack of any possible conflict with foreign law, the Court shifted its basis for the presumption, saying that it “is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind.”  

Again, this basis for the presumption might have helped to ground the presumption had the Court applied it consistently. Instead, later that year the Court applied the presumption when neither domestic concerns nor the desire to avoid international discord could justify it. Its decision in *Sale* employed the presumption against extraterritoriality to actions on board U.S. Coast Guard vessels even though neither justification for the presumption could apply. Extending the Refugee Protocol and its implementing legislation to the ships could not have conflicted with foreign laws or led to international discord; on the contrary, as explained above, it was the failure to apply the treaty that led to international protests. *Sale* cited *Smith* for the proposition that the presumption has a broader foundation than the desire to avoid such conflicts, but it did not state what other foundation might justify its refusal to extend the law to U.S. ships. In dissent, Justice Blackmun pointed out that *Smith*’s only other justification for the presumption – that Congress normally legislated with reference only to domestic concerns – could not possibly apply to a statute addressing whether refugees from other countries could be returned to those countries. *Sale* strongly suggests that the Rehnquist Court intended to apply the presumption even in the absence of any of the stated reasons for it.

The idea that the heightened presumption had its roots in something other than the stated justifications receives additional support from the dissenting opinion in *Hartford*, in which several of the most conservative justices on the Court, led by Justice Scalia, produced a paean to the importance of construing domestic statutes in light of international law, an approach that generally had attracted their opposition in other contexts. In particular, the Scalia dissent argued for limiting the scope of statutes in light of the international law of legislative jurisdiction. But none of the three

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394 507 U.S. at 204 n.5.
395 *Id.* at 206.
dissenting justices in *Hartford* who were on the Court when *Aramco* was decided two years before had joined the dissent in *Aramco*, the last time that the presumption against extrajurisdictionality had been raised as a separate presumption from that against extraterritoriality. The reason for their sudden, and not-to-be-repeated, interest in the older presumption was probably that it offered an obstacle to the extension of U.S. statutes when the Court had already decided that the new presumption was unavailable to do so.  

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B. The Dual Presumptions Would Be Capable of Predictable Application

To be effective, the judicial canons proposed in this article, like other interpretive canons, should be sufficiently transparent and predictable for Congress, the Executive, and everyone else concerned to be able to predict whether and how courts will use them to construe legislation.  

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This section responds to the anticipated objection that the canons’ reliance on the international law of legislative jurisdiction dooms them to failure, because that law provides no clear limits on the exercise of legislative jurisdiction.

Those who emphasize the indeterminacy of customary international law rules regarding legislative jurisdiction point to the following language in the 1927 *Lotus* decision by the Permanent Court of International Justice:

> [T]he first and foremost restriction imposed by international law

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397 See Eskridge, supra note 393, at 278 (“for economic theory to support a decision such as *Aramco* three conditions must be met: (a) Congress is institutionally capable of knowing and working from an interpretive regime that the Court is institutionally capable of devising and transmitting in coherent form; (b) the application of the [canon] must be transparent to Congress; and (c) . . . the interpretive regime and its application should not change in unpredictable ways”). Eskridge says that *Aramco* failed the second and third requirements, in particular, because a “reasonable congressional observer in 1964,” when Title VII of the Civil Rights Act was enacted, would have concluded that the Court had abandoned the *Foley Bros.* presumption in favor of the *Lauritzen* balancing-of-contacts approach. *Id.* at 281. In fact, as Part I.B supra explains, a reasonable observer in 1964 should have noticed that *Lauritzen* applied a presumption against extrajurisdictionality, not against extraterritoriality, that the Court had only applied the balancing-of-contacts approach to torts on foreign ships, and that just the previous year, *McCulloch* had decided not to apply it outside that context.

Nevertheless, Eskridge’s broader point is valid: *Aramco* did unpredictably change the applicable canon to a clear-statement standard from the soft presumption employed in *Foley Bros.*
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. . . . It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely upon some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

This language seems to suggest that in the absence of specific limits on legislative jurisdiction, states are free to extend their jurisdiction as far as they like, although it leaves unclear the critical question of what the Court considers those limits to be. The language is arguably dicta; the Court’s decision rested on its narrower conclusion that no rule of customary international law forbade Turkey from exercising legislative jurisdiction over an extraterritorial action based on its effect within Turkish territory.

399 Higgins, supra note 345, at 77.
400 Lotus, supra note 398, at 23. To be more precise, the effect was felt on a Turkish vessel, which the Court treated as equivalent to Turkish territory. Turkey wished to prosecute for manslaughter the captain of a French ship that had struck a Turkish ship and caused the death of Turkish nationals. The Court said that “a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so.” Id. at 25. As a result, “what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies. If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned . . . .” Id. Because the Court reached its decision on this ground, it said that it did not have to decide whether
In reaching that conclusion, the Court emphasized that many countries had already taken the position that they could exercise criminal jurisdiction over extraterritorial actions causing effects within their territory.\footnote{\textit{Lotus} was controversial from the outset: the members of the Court divided evenly and the case was decided by the President’s authority to cast the deciding vote. The dissenting members particularly disagreed with the suggestion that in the field of jurisdiction, customary international law allows all that is not specifically prohibited. \footnote{Whether or not that is what the \textit{Lotus} Court intended to hold, it is not reflected in state practice. No state acts as if it has the right to set out rules for everyone in the world in the absence of a rule of international law specifically prohibiting it from doing so. States regulate on the basis of a limited set of jurisdictional grounds, the most important of which are still territoriality and nationality, \footnote{the bases the Supreme Court recognized as long ago as its decision in \textit{Apollon}.} Although relying on effects, as in \textit{Lotus}, has been more controversial, the United States has regarded it as an acceptable basis for legislative jurisdiction at least since Judge Hand’s decision in \textit{Alcoa}. But even the Restatement (Third) of Foreign Relations Law, whose Section 402 lists effects as well as territoriality and nationality as bases for jurisdiction, \footnote{and to that degree may push the bounds beyond those accepted by some states,} does not suggest that any ground at all for jurisdiction is acceptable as long as there is no specific rule prohibiting it. Nevertheless, it is undoubtedly true that the outer limits of legislative jurisdiction under customary international law may be difficult to ascertain, especially when based on effects. To some degree, this problem is

\textit{Id.} at 22-23.

\textit{Id.} at 23.

\textit{E.g.}, \textit{Id.} at 34 (Loder, J.), 60 (Nyholm, J.), 102-03 (Altamira, J.).

\textit{See} Restatement, \textit{supra} note 8, at 237 (“Territoriality and nationality remain the principal bases of jurisdiction to prescribe . . . .”).

\textit{See} notes 50-52 \textit{supra} and accompanying text.

\textit{Restatement, supra} note 8, § 402. The Restatement also recognizes the “passive personality” principle, under which a state may apply its law to an act if the victim of the act is a national of the state, even if the act was committed outside the territory of the state by a non-national of the state, but only with respect to certain terrorist or other organized attacks on a state’s nationals, or to assassination of a state’s representatives, not to ordinary torts or crimes. \textit{Id.} comment g. In addition, even in the absence of any other basis for jurisdiction, every state may prescribe punishment for certain offenses recognized by the international community as subject to universal jurisdiction. \textit{Id.} § 404.

\textit{The United Kingdom, in particular, has opposed a broad view of the effects basis.}}
ameliorated by the growing number of treaties that delineate the allowed or authorized scope of the parties’ legislative jurisdiction in particular areas. More fundamentally, however, the response to concerns over the remaining indeterminacy of customary limits on legislative jurisdiction is that the present proposal does not require determination of the outer limits to an inarguable degree; all it requires is that the court be able to answer, first, whether there is a clear basis for sole or primary U.S. jurisdiction and, if not, whether there is any possible basis for U.S. jurisdiction. In the latter case, if there is even an arguable basis for jurisdiction, the court would look for evidence of congressional intent to apply the statute. The court would allow that evidence (or lack thereof) to decide the case if the question of jurisdiction were a close one.

The following sections describe how this process would work with respect to both questions a court would have to answer under the proposed approach: (1) whether the United States has sole or primary jurisdiction; and (2) if not, whether the United States has any claim to jurisdiction.

1. **Determining Whether the United States Has Sole or Primary Jurisdiction**

With respect to some situations, the United States would clearly be the only state with a claim to jurisdiction. For example, actions that take place within U.S. territory or on a U.S.-flag ship, are carried out by U.S. nationals, and have no effect on any other country could give rise to no claim to jurisdiction by any other state. With respect to such situations, no presumption against application of a U.S. statute would apply. This would not, of course, mean that every U.S. law would apply to every situation arising on, say, a U.S.-flag ship. The court could still conclude on the basis of the language, purpose, context, or history of a statute that it was not intended to apply. But it would not employ any automatic presumption against applying the statute.

The same approach would be taken even if another state did have a claim to jurisdiction, as long as the U.S. claim was clearly primary. By “primary,” I do not mean that the court should engage in a choice-of-law analysis to determine which state has the strongest, best, or most reasonable claim to jurisdiction. Rather, the term refers to a usual or normal jurisdictional claim, as opposed to a more unusual or exceptional claim.
The clearest example is territorial jurisdiction. If the question is whether a U.S. law applies to an action taken within its territory, even if the action were taken by a non-national and/or had effects on another country, U.S. courts should not employ a presumption against application of the law. The reason is clear: territorial jurisdiction is so common that legislatures normally expect their laws to apply to everyone within their territory, regardless of nationality or foreign effects.

This is so even though in a particular case, a foreign country might have a claim at least as strong as that of the United States to jurisdiction over an action. If, for example, the action were carried out by nationals of a foreign country and were directed at causing effects only in that foreign country, a choice-of-law analysis might conclude that the claim of the foreign country to jurisdiction was as strong or stronger than that of the United States. But under the present proposal, courts would not engage in that analysis; as long as the situation arose within the territory of the United States, courts would not assume that Congress intended its laws not to apply to it merely because the situation also fell within the jurisdiction of another country. This is, of course, how the courts have handled such cases; courts do not ordinarily employ any presumption against application of a U.S. statute to a situation arising within U.S. territory just because it may also be within the legislative jurisdiction of another country.

The chief exception to this statement is the application of U.S. law to foreign-flag ships within U.S. territory. In such cases, the ships are arguably within the primary jurisdiction of the United States because of its territorial jurisdiction and within the primary jurisdiction of the flag state because of its authority over its vessels. The “internal affairs” rule is an effort to reconcile those two jurisdictional claims by drawing a line between them: situations falling within the internal affairs of a vessel are within the primary

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407 See, e.g., Restatement § 402, comment c (“The territorial principle is by far the most common basis for the exercise of jurisdiction to prescribe . . . .”); id. comment b (“Territoriality is considered the normal, and nationality an exceptional, basis for the exercise of jurisdiction.”); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 ICJ 136, 179 (“while the jurisdiction of states is primarily territorial, it may sometimes be exercised outside the national territory”); Bankovic v. Belgium et al. ¶ 75 (Eur. Ct. Hum. Rts. 2001) (“the Court was satisfied that, from the standpoint of public international law, the jurisdictional competence of a State was primarily territorial”).

The importance of territory in the context of legislative jurisdiction is underlined by the fact that a state’s officials cannot take actions to enforce its laws in the territory of another state without that state’s consent. Restatement, supra note 8, §§ 432(2), 433(1); Ian Brownlie, Principles of Public International Law 306 (6th ed. 2003).
jurisdiction of the flag state; those affecting the United States as the
territorial state are within its primary jurisdiction. Some statutes may
include provisions that fall on both sides of the line. Such statutes should be
analyzed on a provision-by-provision basis, as Justice Kennedy did in
Spector, and require a clear statement of congressional intent only with
respect to provisions that interfere with the internal affairs of the vessel.

Although national territory is the paradigmatic type of primary
jurisdiction, it is not the only one. Bases for jurisdiction equivalent to
territory, such as jurisdiction over U.S.-flag vessels and U.S. scientific bases
in Antarctica, would also be subject to no presumption against application of
U.S. law. As with respect to national territory, the United States normally
exercises complete jurisdiction over such locations pursuant to customary
and/or treaty law; the possibility that other countries might also have a claim
to jurisdiction over a particular situation because of nationality or effect
would not be enough to justify a presumption against applying U.S. law. It
follows that the Court’s decisions in Smith and Sale were not in accord with
the proposed approach, since they applied a presumption against application
of U.S. law even though the United States had sole or at least primary
jurisdiction over the vessels and base at issue in those cases.

With respect to a military base in a foreign country, the answer to the
question would depend on the agreement between the United States and the
foreign country giving the United States the right to maintain the base. If
the agreement granted full rights to control the base, as with respect to
Guantanamo Bay, courts would apply no presumption against application of
U.S. law. The Supreme Court’s decision in Rasul was in accord with this
approach, since it relied on the lease and treaty between the United States
and Cuba that gave the United States “complete jurisdiction and control”
over the Guantanamo Bay Naval Base. More commonly, however, the
United States enters into a Status of Forces Agreement (SOFA) with the

\footnote{Justice Ginsberg’s dissent in Spector therefore misunderstood the nature of the internal
affairs rule, by construing it to militate against application of U.S. law only if the law would
conflict with a specific rule of substantive international law, such as rules regarding vessel
safety. 545 U.S. at 144. See note 328 supra and accompanying text.}

\footnote{545 U.S. at ___ (distinguishing between requirements imposed by the Americans with
Disabilities Act concerning physical barriers to access, which “might be construed as relating
to the internal affairs of foreign-flag cruise ships,” and duties not to discriminate by, e.g.,
charging disabled passengers higher fares, which would “have nothing to do with a ship’s
internal affairs”).}

\footnote{See notes 235-39 supra and accompanying text.}

\footnote{542 U.S. at 471. See note 319 supra and accompanying text.}
host country that allows each state to exercise legislative jurisdiction within set limits. For example, the U.S.-Japan SOFA provides that both countries may exercise jurisdiction over criminal acts committed by persons subject to the military law of the United States and committed in Japan, but the United States has the primary right to exercise jurisdiction over such offenses when committed in the course of official duty, or against the United States or members of the armed forces or civilians connected with the armed forces, while Japan has the primary right to exercise jurisdiction with respect to all other offenses. Whether the United States would be seen as entitled to primary jurisdiction in a particular case, and thus subject to no presumption against application of U.S. law, would depend on whether the treaty gave the United States such jurisdiction.

2. Determining Whether the United States Has Any Claim to Jurisdiction

If a court determined that the United States did not have sole or primary jurisdiction over the situation before it, it would then have to decide whether the United States had any basis for jurisdiction. The answer would determine which of the two presumptions the court would apply. If the United States had no basis for jurisdiction, then the court would employ the strict presumption against extrajurisdictionality and apply the statute only if the language of the statute were unmistakably clear. In other words, the light would be red. If the United States did have a basis for jurisdiction, the light would be yellow: the court would apply the statute if it found any evidence of congressional intent that the statute should apply. For that purpose, the court could look at all sources courts traditionally use to determine legislative intent, including the language, context, purpose, and history of the statute.

In the absence of a treaty speaking to the question, the two possible bases for such extraterritorial jurisdiction under customary international law would be the nationality of the actors and the effects of the actions on the United States. Nationality is fairly straightforward, and it has long been

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412 Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, Jan. 19, 1960, art. XVII. “Primary right” in this context means that the country with the right may prosecute the offense first. If it chooses not to do so, then the other country may prosecute. The agreement provides protections against double jeopardy.
accepted as a permissible ground for legislative jurisdiction. It has provided a basis for the extension of U.S. tax laws to its nationals living abroad, for example. In general, however, “the United States has only sparingly applied law to individuals residing abroad on the basis of their United States nationality. In part this is because much of the law of persons, such as marriage and divorce, estate and inheritance, has been the domain of the States . . . and in the Anglo-American tradition such law generally looks to residence or domicile rather than to nationality.”

Relying on effects as a basis for jurisdiction is more complicated and controversial. The Restatement takes the position that a state may have jurisdiction to prescribe with respect to “conduct outside its territory that has or is intended to have substantial effect within its territory” and certain conduct outside its territory [by non-nationals] that is directed against the security of the state or against a limited class of other state interests.

Although the extension of legislative jurisdiction to activities with effects within the United States has met with opposition from some other countries, the political branches of the United States have relied on the effects doctrine for years, including in particular with respect to jurisdiction over foreign actions in violation of the Sherman Act. As a result, U.S. courts should accept that if an action in question arguably has a substantial effect within U.S. territory or on other important U.S. interests – especially its security – then there is a basis for U.S. jurisdiction under international law as recognized by the United States, and the courts should employ the soft rather than the strict presumption against applying the law.

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413 For the Restatement’s summary of the rules pertaining to tax, and of U.S. practice thereunder, see Restatement, supra note 8, §§ 411-13. Other instances of the extension of U.S. law to U.S. nationals in foreign countries include laws prohibiting treason and requiring registration for the military draft.

414 Id. § 402 rep. note 1, at 242.

415 Id. §§ 402(1)(c), (3). Examples of this limited class of other state interests include “offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems, e.g., espionage, counterfeiting of the state’s seal or currency, falsification of official documents, as well as perjury before consular officials, and conspiracy to violate the immigration or customs laws.” Id. comment f.

416 See notes 245-46 supra and accompanying text.

417 For an argument that the effects basis is so deleterious to foreign relations that courts should use the equivalent of a clear-statement rule and Congress should avoid legislating on its basis, see Austen Parrish, The Effects Test: Extraterritoriality’s Fifth Business, 61 Vand. L. Rev. 1455 (2008). He says, however, that “international law now plainly accepts the effects test as a basis for legislative jurisdiction,” id. at 1500-01, and that “by the 1990s most countries had come to accept the doctrine,” id. at 1473, which undercuts his argument that the
presumption, courts should apply the statute if they find any indication, which need not be a clear statement in the statute, that Congress intended it to extend to the conduct in question.

This approach is not completely consistent with the Restatement. Under the Restatement, even if one of the bases for jurisdiction listed in Section 402 is present, a state may not exercise jurisdiction if it would be “unreasonable” to do so under Section 403. To inform the decision whether an exercise of jurisdiction would be unreasonable, Section 403 provides a long list of factors, including links to the regulating state and the extent to which another state has an interest in regulating the activity. Section 403 responds to the need to find some limiting principle for the bases for jurisdiction, especially the effects basis, which otherwise might authorize broad jurisdiction over many situations within the jurisdiction of other states, leading to international conflicts. Countries’ reactions to the expansive interpretation of the Sherman Act to foreign actions with effects test is so controversial that it should be avoided whenever possible. Nevertheless, I agree that relying on effects is likely enough to lead to controversy that there should be a soft presumption against its use.

William Dodge takes the opposite position: courts should employ no presumption at all against application of U.S. law to extraterritorial actions that cause effects in the United States. Dodge, supra note 12. He argues that Congress’ concern with domestic conditions justifies the assumption that it wants its laws to reach every activity that affects those conditions. But accepting this position would require ignoring that Congress is (or should be) concerned as well with the likelihood of international conflict resulting from extending U.S. laws to situations normally under the jurisdiction of other states. Dodge admits that the expansive statutory interpretations that would result from his proposal would result in conflicts with other states, but he argues that the heightened conflicts would facilitate multilateral agreement to resolve them. There is something to this, but it is a bit like arguing that the best way to resolve a boundary dispute is to invade the other country, because then it will be highly motivated to negotiate a solution.

The present proposal takes into account both the concerns with conflicts that motivate Parrish and the concerns with effectuating Congress’ intent to address domestic interests, by employing a presumption, but a soft rather than strict one. Courts could find the intent necessary to overcome it from the purpose and context of the statute; if not extending it to foreign activities with domestic effects would result in the continuation of the problem domestically, courts might conclude that Congress intended to address those activities. Moreover, the proposal would address areas within U.S. jurisdiction, which under both of the other approaches would remain presumptively outside the normal jurisdiction of any state.

Other factors include “the existence of justified expectations that might be protected or hurt by the regulation,” “the importance of the regulation to the international political, legal, or economic system,” and “the extent to which the regulation is consistent with the traditions of the international system.” Id. § 403(2). The list is not intended to be exhaustive. Id. comment b.
within the United States illustrate the potential for such conflicts.

Despite the need for some limits on the effects basis for jurisdiction, however, the Restatement’s approach has been widely criticized as not reflecting principles of customary international law. The problem may be that customary law has not determined the limits of the effects basis for jurisdiction clearly enough to allow a definitive restatement of those limits. Even as an approximation of customary law, however, or as an indication of where custom may develop, Section 403 is too unpredictable to provide useful guidance to courts seeking to construe the reach of ambiguous statutes. It borrows its approach from the strong trend in conflict-of-laws jurisprudence to resolve situations involving more than one potential law by choosing the jurisdiction with the most significant relationship to the situation, as determined by weighing a long list of factors indicating a stronger or weaker connection with different jurisdictions. Multi-factor balancing tests have been regularly criticized by courts and scholars as being too indeterminate to provide courts and litigants predictable guidance as to the scope of statutes, as even some of their proponents acknowledge.

420 See Dodge, supra note 396, at 139 (“international law does not require comparative interest balancing, the Restatement (Third)’s assertions to the contrary notwithstanding”). Dodge cites a number of additional statements to the same effect, including: Phillip R. Trimble, The Supreme Court and International Law: The Demise of Restatement Section 403, 89 Am. J. Int’l L. 53, 55 (1995) (“there is . . . no customary international law like that advanced in section 403”); Cecil J. Olmstead, Jurisdiction, 14 Yale J. Int’l L. 468, 472 (1989) (“it seems implausible that section 403 rises to the level of . . . ‘a principle of international law’”). The somewhat one-sided nature of the way that the Restatement marshals support for its rule of reason is illustrated by its citation to Lauritzen’s use of a multi-factor balancing test without any reference to Calloch’s subsequent limitation of Lauritzen to torts.

421 See Bradley, supra note 12, at 556 (“[P]otential litigants are given little advance notice about whether their conduct is subject to regulation. The unpredictability and lack of notice are likely both to distort business decisions and lead to substantial litigation.”); Kramer, supra note 246, at 755 (“[B]alancing tends not to work so well in practice. The considerations being weighed are usually imprecise enough to permit several answers, and to dictate none.”).

In addition, it has been suggested that in practice, application of a multi-factor test will favor the law of the forum, since “[t]he interests and values of a foreign state are necessarily more difficult for a municipal court to perceive and weigh than those social convictions shared by the court as decision maker and its own legislature or executive. . . . The result of such interest balancing will usually reflect an understandable bias in favor of the forum’s policy. . . .” Maier, supra note 91, at 317. Of course, the bias may also run the other way; if the court wishes not to apply forum law, it can manipulate the factors to avoid doing so. Dodge and Kramer have both accused Scalia’s dissent in Hartford as doing just that. Dodge, supra note 396, at 141; Kramer, supra note 246, at 755.

422 Gary Born, for example, has argued that courts should look first to the Restatement’s multi-factor test to determine whether the United States had a reasonable basis for
They give courts virtually unlimited discretion to decide whether and how far to extend a law, which is “a particular concern here,” as Curtis Bradley has pointed out, “because of the foreign affairs issues that are implicated.” Section 403 tries to address that concern by asking courts to balance the interests of the two or more states involved, but, in the words of Harold Maier, “Unilateral attempts to balance national interests in transnational cases can result, at best, in a pale reflection of the true weight and complexity of the competing interests involved. A unilateral decision maker cannot simulate intellectually the international process of demand, response, and compromise whose result reflects the vector of the various competing forces operative in the international law formation process.” Moreover, the Restatement’s goal of determining which of two states has the more reasonable claim to jurisdiction, however sensible an approach that may be in the private-law context, does not translate well to the application of statutes concerning regulatory or criminal law, a context in which more than one state may have concurrent jurisdiction and wish to exercise it.

The approach proposed in this article would avoid these problems. It would recognize that the United States has long taken the position that substantial, direct effects on the United States may provide a cognizable basis for legislative jurisdiction over extraterritorial actions. Rather than ask courts to determine whether the exercise of such jurisdiction in a particular case would be unreasonable based on a list of inherently indeterminate factors, the proposal would treat such effects like nationality, as a potentially valid, albeit unusual, basis for jurisdiction. As a result, courts would employ the soft rather than the strict presumption against application of U.S. laws to situations on the basis of their effects on the United States. In terms of the traffic light analogy, courts would err on the side of assuming that a jurisdiction; absent a clear statement, no statute would be applied “in violation of sections 402 and 403.” Born, supra note 12, at 90. Statutes that survive this analysis would then be subject to a second multi-factor balancing test, the “most significant relationship” test of the Restatement (Second) of Conflict of Laws, and would be applied only if U.S. interests were more significant than those of other countries. Rather than try to argue that this approach would be predictable, he defends it as no more unpredictable than the Aramco presumption, and suggests that his proposal might become more predictable after courts had used it to generate more specific rules in particular contexts. Id. at 98-99.

Bradley, supra note 12, at 555.

Maier, supra note 91, at 317.

As Dodge explains, although Section 403 allows concurrent jurisdiction in principle, application of the factors of Section 402 leads a court to determine which state’s exercise of jurisdiction would be more reasonable. Dodge, supra note 396, at 130-34.
light was yellow rather than red, but they would still seek evidence of congressional intent to go through it.

Of course, this approach would itself be far from completely predictable. Courts would not always agree on whether such evidence exists, and judges interested in pursuing their own ideological agendas would still be able to manipulate the evidence to support their desired outcomes. But it would provide courts clearer guidance than either the Restatement or the current hodgepodge of precedents. And tying the canon to the international law of legislative jurisdiction would mean that over time, as states further clarify that law through treaties and practice, the guidance the law provides to courts would become clearer as well. Moreover, for the reasons described in the preceding section, this approach would best reflect reasonable assumptions of congressional intent.

CONCLUSION

This article has argued that since the late 1980s, the Court’s jurisprudence with respect to the reach of federal statutes has become both incoherent and inconsistent with its earlier decisions. It has proposed that the Court clear away its tangled web of cases by looking again to the bases of jurisdiction under international law. If those rules allocate the United States sole or primary legislative jurisdiction, then the court would have a green light to construe the statute without any presumption against its application. If the United States does not have sole or primary jurisdiction, but international law does provide it some basis for jurisdiction, then the light would turn yellow: the court would employ a soft presumption against application of the statute that could be overcome by any indication of congressional intent to do so. Finally, if the United States has no basis under international law for jurisdiction, the light would be red. There would be a strict presumption against application of the law, which could be overcome only by an inescapably clear statement of congressional intent.

This proposal has several advantages. It would be consistent with the approach the Court took to these questions for most of our history. It would reflect reasonable assumptions of congressional intent: that Congress normally intends its statutes to address situations subject to sole U.S. authority under international law and to avoid unnecessary conflicts with other countries. And it would provide courts sufficiently clear guidance to allow them to apply the canons predictably, so that Congress, the Executive, and all those affected by the laws could anticipate how far they would reach.