Extraterritoriality and Its Discontents: Limiting the Reach of U.S. Law

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How far do U.S. laws reach beyond U.S. borders? In principle, Congress could extend its laws as far as it likes, subject to any constitutional restraints, but Congress often fails to make its intention clear. Many statutes do not specify their geographic scope, instead using general terms that have no inherent limit. Federal courts have long employed interpretive rules, or canons, to guide their construction of such statutes. The canon most commonly cited 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.”

The simplicity of this language masks difficult questions. Does the “territorial jurisdiction of the United States” include only territory within national boundaries, or does it extend to territory outside those boundaries but within U.S. control? How should the presumption apply to actions taken abroad that cause effects within U.S. territory, however defined? What implications does the presumption have for situations within U.S. territory but also within the jurisdiction of another country, such as foreign ships in U.S. port? When the presumption does apply, what evidence of “contrary intent” is necessary to overcome it?

To each of these questions, the Supreme Court has provided contradictory answers. For example, it has stated that the presumption against extraterritoriality does, and does not, apply to situations outside U.S. sovereign territory but within its complete control, such as U.S.-flag ships at sea and U.S. bases abroad. It has suggested that the presumption does, and does not, apply to actions taken outside U.S. territory that have effects in the United States. Its decisions have treated foreign ships within U.S. territory as subject to a presumption against extraterritoriality, to a presumption against interference with their “internal affairs,” to a presumption against...
interference with their maritime operations,\(^8\) to a balancing test to determine whether U.S. law should apply,\(^9\) and to no presumption at all.\(^10\) When the presumption applies, the Court has said that it may be overcome only with a clear statement of congressional intent,\(^11\) that the statutory structure, legislative history, and agency interpretations are relevant,\(^12\) and that no evidence of congressional intent is necessary at all.\(^13\) Lower courts have reflected and amplified this incoherence.\(^14\)

Much of the disarray in the Court’s jurisprudence results from a series of decisions by the Rehnquist Court in the early 1990s. For most of U.S. history, the Supreme Court determined the reach of federal statutes according to a relatively straightforward principle. The Court asked whether the extension of the law to a situation would accord with international law – specifically, the international law of legislative jurisdiction.\(^15\) In effect, it applied a presumption not against extraterritoriality, but against extrajurisdictionality, that is, a presumption that federal law does not extend beyond the jurisdictional limits set by international law. In the early twentieth century, the Court did adopt a presumption against extraterritoriality, but only as a limited, weaker version of the underlying presumption against extrajurisdictionality, which continued to apply in its own right. In the early 1990s, the Rehnquist Court detached the presumption against extraterritoriality from its roots in international law, made it harder to overcome, and broadened its application – all without reconciling these changes with its earlier jurisprudence. More recently, in its 2004 decision in Hoffman-La Roche v. Empagran, the Court appeared to renew its attention to international bounds on jurisdiction, but it employed an unpredictable “reasonableness” standard that is not based firmly in domestic precedent or international law.\(^16\)

Worse, it has again failed to reconcile this new approach with the presumption against

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11 Aramco, 499 U.S. at 248, 258.
12 Foley Bros., 336 U.S. at 286-87.
14 See infra Part IV.
15 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. The Restatement also usefully distinguishes jurisdiction to prescribe from two other types of jurisdiction: to adjudicate and to enforce. Unless this article otherwise indicates, its references to jurisdiction should be understood as referring only to the first type.
extraterritoriality, which it continues to cite with approval.\textsuperscript{17}

The resulting confusion has real consequences. Congress, the Executive Branch, the U.S. public, and all those potentially affected by U.S. laws cannot know whether an ambiguous statute applies extraterritorially or to a foreign ship in U.S. territory unless the Supreme Court happens to decide a case construing the statute. The most striking recent example may be \textit{Rasul v. Bush}, the 2004 decision applying the federal habeas statute to detainees held by the United States in Guantanamo Bay, Cuba.\textsuperscript{18} The Bush Administration reasonably could have concluded that the Court would employ the presumption to bar the application of a federal statute to a military base outside U.S. sovereign territory, since the Court had held only a decade earlier that U.S. law did not apply to two similar situations: a U.S. scientific base in Antarctica and a U.S. ship on the high seas.\textsuperscript{19} Nevertheless, the \textit{Rasul} Court held that the habeas statute applied to Guantanamo Bay without applying the presumption or even acknowledging the earlier decisions. Sometimes, the reach of a statute remains unclear even after the Court construes it: in a 2005 case considering whether the Americans with Disabilities Act applies to foreign ships in U.S. port, the justices split into three opinions, none garnering a majority.\textsuperscript{20}

This article proposes that the Court bring its jurisprudence back into coherence by adopting a clarified version of its long-standing presumption against extrajurisdictional application of U.S. law. Part I of the article describes the proposed canon. As applied to a particular situation, the strength of the renewed presumption against extrajurisdictionality would depend on the international law of legislative jurisdiction. If that law assigned sole or primary jurisdiction over the situation to the United States, courts would not employ any presumption against the application of federal statutes to it.\textsuperscript{21} If international law provided the United States a basis for jurisdiction, but not the sole or primary basis, then courts would apply a statute only if they found some indication (which need not be a clear statement) that Congress intended it to apply. Finally, if application of the statute to the situation in question violated the jurisdictional limits

\begin{footnotes}
\item[18] 542 U.S. 466 (2004).
\item[19] Sale, 509 U.S. at 155; Smith, 507 U.S. at 197.
\item[21] 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. For a complete explanation, see Part I infra.
\end{footnotes}
set by international law, then courts would employ a strong presumption against applying it, doing so only if the statute included an inescapably clear statement of congressional intent.

The remainder of the article argues that the proposed presumption against extrajurisdictional application of federal statutes better effectuates reasonable assumptions of congressional intent than does either the Rehnquist Court’s strict presumption against extraterritoriality or the Empagran rule of reason. At the outset, some might question whether congressional intent is the appropriate point of reference. Although it is generally accepted that courts interpreting a constitutional statute must defer to Congress when the statute is clear, and there is widespread (though far from universal) agreement that courts may use certain extra-textual tools in interpreting a statute, there is no consensus on what judges should do when a statute remains unclear after the application of those tools. In particular, the role of canons – background norms that courts use to guide their construction of ambiguous statutes – is highly contested.

The disagreement is not primarily over whether courts may ever look to background norms. When statutes are ambiguous, it is reasonable -- and perhaps unavoidable -- for courts to look to background assumptions or principles for guidance in how to apply them. Scholars sharply divide, however, over the relevance, legitimacy, and origin of these principles. Many claim that interpretive norms, including those used to limit the geographic scope of federal statutes, do

23 The dominant view among courts and many scholars is that in trying to elicit meaning from a statutory text, courts can take into account sources beyond the text itself, including its legislative history, its context, and the purpose and structure of the statute. See, e.g., Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 437 (1989). I do not mean to minimize dissents from this position or, more generally, the differences among textualists, intentionalists, dynamic statutory interpreters, pragmatists, and the exponents of other interpretive schools over the relative weight courts should give these tools. See generally William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, Legislation and Statutory Interpretation 211-47 (2000) (describing leading theories of statutory interpretation).
25 Although some textual or syntactic canons are relatively uncontroversial, there is far less agreement on substantive canons “rooted in broader policy or value judgments.” Eskridge et al., supra note 23, at 330.
or should reflect only the policy preferences of judges. Others argue that courts should employ canons that effectuate legislative intent, and that some canons, at least, do just that.

These disputes are of less concern in this context, however. The Supreme Court has repeatedly stated the specific assumptions it believes are most relevant to determining the geographic scope of federal statutes: a desire to avoid inadvertent international conflicts, a focus on domestic concerns, and a concern for the proper role of the courts in a system of separated powers. Of principles that apply to the construction of statutes generally, not just in determining their geographic scope, the one that seems the most applicable here is that canons should be capable of consistent application, so that those who enact and interpret laws may predict their application and thereby avoid needless disputes. Whether these background principles derive from the preferences of judges themselves, or from a genuine effort by judges to apply the assumed preferences of the legislature, matters less than that they are long-standing and eminently reasonable. The real question is which canon best reflects them.

This article argues that the proposed presumption against extrajurisdictional application of federal statutes reflects these principles far better than either the Rehnquist Court’s strict presumption against extraterritoriality or the Empagran rule of reason. Specifically, Part II

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27 E.g., Elhauge, supra note 22, at 7-8, 23-29; Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 Geo. L.J. 281, 281-82, 292-93 (1989). Scholars disagree over whether the relevant intent should be that of the enacting legislature or the current one. Compare Elhauge, supra at 22 (current legislature) with Richard A. Posner, Statutory Interpretation – in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 817 (1983); Easterbrook, supra note 22, at 69.


30 Foley Bros., 336 U.S. at 285; Aramco, 499 U.S. at 248; Smith, 507 U.S. at 204 n.5.


32 Eskridge & Frickey, Foreword: Law as Equilibrium, 108 Harv. L. Rev. 26, 66 (1994); Tyler, supra note 24, at 1419; Sunstein, supra note 23, at 462.

33 The proposal might be relevant to the extraterritorial application of U.S. constitutional protections as well. 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 them is beyond the scope of this exercise. For an engaging historical analysis of the extraterritorial application of the Constitution,
explains that the proposal is in line with the vast majority of Supreme Court precedent, including virtually all decisions before the early 1990s. Part III argues that the proposal better comports with the three rationales the Court has provided for limiting the geographic scope of federal statutes. And Part IV demonstrates that the canon would enable courts to determine the jurisdictional reach of federal statutes consistently, so that those who enact, apply, and interpret U.S. laws could anticipate how far the laws extend beyond our shores.

I. The International Law of Legislative Jurisdiction

Under the proposal, courts would look to the international law of legislative jurisdiction to guide their interpretation of the jurisdictional reach of federal statutes. To understand how the canon would operate in practice, and how it would differ from both the Rehnquist Court’s strict presumption against extraterritoriality and the Empagran approach, it is first necessary to review the relevant international law. Although that law is not free from ambiguity or controversy, its fundamental precepts are clear and generally accepted.

Customary (and, increasingly, conventional) international law includes bases for the exercise of legislative jurisdiction. The extension of jurisdiction beyond a legal basis for it, or in contravention of a specific legal limit, violates international law. The most important basis for jurisdiction is territory: each state undoubtedly has legislative jurisdiction over events taking place and persons found within its own territory, and territory is often called the normal or

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34 In its 1927 decision in the Lotus case, the Permanent Court of International Justice seemed to suggest that states do not need bases for legislative jurisdiction: in the absence of specific limits, they are free to extend their jurisdiction as far as they like. Case of the S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 18-19. The language is arguably dictum, because the decision rested on the narrower conclusion that Turkey had the right to exercise legislative jurisdiction over an extraterritorial action based on its effect within Turkish territory (more specifically, on a Turkish vessel that the Court treated as equivalent to Turkish territory). Id. at 23; see Rosalyn Higgins, Problems & Process: International Law and How We Use It 77 (1994); Frederick A. Mann, The Doctrine of Jurisdiction in International Law, 1964-I Recueil des Cours 1, 35. Even as dictum, the suggestion was controversial from the outset. The members of the Court divided evenly (the case was decided by the President’s authority to cast the deciding vote), and the dissenting members particularly disagreed with the idea that in the field of jurisdiction, international law allows all that is not specifically prohibited. Lotus, supra, at 34 (Loder, J.), 60 (Nyholm, J.), 102-03 (Altamira, J.). Whether or not that is really what the Lotus Court intended to state, 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 an international rule specifically prohibiting it from doing so. Instead, states regulate on the basis of a limited, widely accepted set of jurisdictional grounds. Vaughan Lowe, Jurisdiction, in International Law 341-42 (Malcolm Evans ed., 2006); see Mann, supra, at 35 (listing critics of Lotus); Ian Brownlie, Principles of Public International Law 301 (6th ed. 2003) (same).

35 Consequences may include a refusal by other states to give effect to the extrajurisdictional act, or diplomatic or legal claims. Oppenheim’s International Law § 143, at 485 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).
primary basis for jurisdiction. The prevalence of the territorial basis for jurisdiction is not new; international law has recognized it since before the United States was established.

Jurisdiction of a state over ships flying under its flag—that is, ships registered under its law—has also been considered an aspect of territorial jurisdiction, although the more common view today may be to treat it as a separate category. However it is characterized, flag jurisdiction is similar to territory, in that the flag state normally has complete jurisdiction over its ships on the high seas. When ships of one state are within the territory of another state, they may be subject to the concurrent jurisdiction of both.

A state may also extend its laws to its nationals outside its territory. Like territory, nationality has been recognized as a permissible basis for jurisdiction throughout U.S. history. As a practical matter, nationality is less important than territory, however. States rely on nationality far less often, and when they do extend laws extraterritorially to their nationals, they

36 Report of the International Bar Association Task Force on Extraterritorial Jurisdiction 11 (2008) (hereafter IBA Report) (“The starting point for jurisdiction is that all states have competence over events occurring and persons . . . present in their territory. This principle, known as the ‘principle of territoriality,’ is the most common and least controversial basis for jurisdiction.”); Restatement, supra note 15, § 402, comment b (“Territoriality is considered the normal, and nationality an exceptional, basis for the exercise of jurisdiction.”); Brownlie, supra note 34, at 297 (“The starting-point in this part of the law is the proposition that, at least as a presumption, jurisdiction is territorial.”); Oppenheim’s International Law, supra note 35, § 137, at 458 (“Territoriality is the primary basis for jurisdiction . . . ”); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 ICJ 136, 179 (“the jurisdiction of states is primarily territorial”); Bankovic v. Belgium, supra note 34, ¶ 75 (Eur. Ct. Hum. Rts. 2001) (“from the standpoint of public international law, the jurisdictional competence of a State [is] primarily territorial”). The importance of territory to jurisdiction is underlined by the fact that a state’s officials cannot enforce its laws in the territory of another state without that state’s consent. Restatement, supra note 15, §§ 432(2), 433(1); IBA Report, supra, at 9-10; Brownlie, supra note 34, at 306; Lotus, supra note 34, at 18-19.

37 Mann, supra note 34, at 26-28; see also Joseph Story, Commentaries on the Conflict of Laws, §§ 21, at 22-23.

38 Lowe, supra note 34, at 347. The United States has long extended its tax laws to its nationals living abroad, as well as laws prohibiting treason and requiring registration for the military draft. See Restatement, supra note 15, §§ 411-13. It also applies certain criminal laws extraterritorially to U.S. nationals. See, e.g., 18 U.S.C. § 2423(c) (criminalizing “illicit sexual conduct,” defined to include paying for sex with minors, “in foreign places,” when committed by a U.S. citizen or permanent resident); United States v. Clark, 435 U.S. 1100 (9th Cir. 2006) (upholding application of statute). 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.” Restatement, supra note 15, § 402 rep. note 1.
must wait to enforce the laws until the nationals return to their territory. Some countries have also exercised jurisdiction over extraterritorial actions that affect their nationals living abroad. This basis for jurisdiction, known as “passive personality,” is uncontroversial when employed in response to acts such as terrorism, but is less widely used and accepted when directed at lesser offenses.

Similarly, states sometimes exercise legislative jurisdiction over acts that cause effects within their territory. This jurisdiction is least controversial when it applies to extraterritorial conduct that, in the words of the Restatement, “is directed against the security of the state or against a limited class of other state interests.” Nor does the exercise of such jurisdiction attract much criticism when it is directed against an entire series of actions that occur largely outside the territory of the state, as long as some of the actions take place within it. Controversy has arisen, however, when a state has extended its jurisdiction to actions taken entirely outside the territory of the state (and by non-nationals), on the sole ground that the actions caused effects within its territory. The long-standing U.S. view, reflected in the Restatement, is that international law allows a state to regulate “conduct outside its territory that has or is intended to have substantial effect within its territory.” The legitimacy of such jurisdiction has been contested in the past, although such objections have decreased as more states employ it.

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45 Restatement, supra note 15, § 402, comment g; Lowe, supra note 34, at 351-52; Mann, supra note 34, at 91-93. See generally IBA Report, supra note 36, at 146-49 (surveying states’ exercise of passive personality jurisdiction).
46 Restatement, supra note 15, § 402(3). Examples 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. This “protective” jurisdiction is at least akin to jurisdiction based on effects, although it is often considered separately. Id.; see Lowe, supra note 34, at 347-48; Mann, supra note 34, at 94; IBA Report, supra note 36, at 149-50.
47 Lowe, supra note 34, at 343-44. Distinguishing between action and effect can be difficult, however. Mann suggests that only incidents that constitute elements of the offense should provide a basis for territorial jurisdiction, whether they are considered as action or effect. Mann, supra note 34, at 84-87; see Lotus, supra note 34, at 23.
48 IBA Report, supra note 36, at 12.
49 Restatement, supra note 15, § 401(1)(c). According to the Restatement, the exercise of such jurisdiction, as well as any other type of legislative jurisdiction, is acceptable only if it is not “unreasonable.” Id. § 403. See notes 62-63 infra and accompanying text.
Finally, international law provides that some criminal offenses, because of their heinousness and their ability to evade prosecution, are subject to universal jurisdiction. Those accused of such crimes are subject to prosecution by any state that has them in its grasp. Piracy is the paradigmatic example; others include genocide, crimes against humanity, and war crimes. In addition, some international agreements require their parties to prosecute or extradite those accused of certain offenses, including torture, hostage-taking, and hijacking or sabotaging aircraft, whether or not the accused are subject to territorial, national, or any other jurisdiction. For the crimes they address, these treaties establish a type of universal jurisdiction among the parties.

In the world defined by these international rules, states’ jurisdictions are both limited and overlapping. They are limited because some situations fall outside any possible basis for jurisdiction by a particular state. Because the exercise of one state’s jurisdiction is not bounded by the extent of other states’ jurisdiction, however, they may overlap, so that the same action may fall within more than one state’s legislative jurisdiction. An interpretive norm guided by international limits on jurisdiction must reflect both of these considerations: (a) that some exercises of jurisdiction by a state would exceed the limits set by international law; and (b) that even exercises of jurisdiction that fall within international limits could nevertheless create conflicts with the laws of other states that have overlapping jurisdictional claims of their own.

The first consideration is relatively easy to incorporate into a judicial canon. If the United

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Disputes remain, however, over what effects are necessary to support jurisdiction. See IBA Report, supra note 36, at 72. Generally, universal jurisdiction has supported criminal rather than civil actions. See id. at 150-61 (surveying state practice). Nevertheless, the Restatement indicates that “international law does not preclude the application of non-criminal law . . . by providing a remedy in tort or restitution for victims.” Restatement, supra note 15, comment b. Examples of such universal civil jurisdiction may include the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note, and the Alien Tort Claims Act, 28 U.S.C. § 1350, although the scope of the latter, in particular, remains unclear. See IBA Report, supra note 36, at 112-17; Donald F. Donovan & Anthea Roberts, The Emerging Recognition of Universal Civil Jurisdiction, 100 Am. J. Int’l L. 142, 146-49 (2006). The more general lack of clarity over universal civil jurisdiction is illustrated by the debate over whether Article 14 of the Convention Against Torture, which requires its parties to provide civil redress for acts of torture, applies only to torture committed within the territory of the state in question, or to torture committed anywhere in the world. See IBA Report, supra note 36, at 95-97 (describing opposing views).

Restatement, supra note 15, § 404; Lowe, supra note 34, at 348.

E.g., Convention Against Torture, Dec. 10, 1984, arts. 4-8; Convention Against the Taking of Hostages, Dec. 18, 1979, arts. 5-8; Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, arts. 4-8, 22 U.S.T. 1641; Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, arts. 5-8, 24 U.S.T. 565. See also IBA Report, supra note 36, at 163 (listing other treaties). These agreements require each party to establish its jurisdiction over the covered offenses on specified bases, typically territoriality, nationality, and registry of aircraft, but also to establish its jurisdiction over the offenses if it does not extradite the accused to a state that has jurisdiction on one of the specified bases.
States has no basis under international law for extending its law to a situation, courts should presume that Congress did not intend the law to extend so far. The presumption should be strict, able to be overcome only with a clear statement of congressional intent. The analogy is to a red light; Congress may intend to violate international law, just as a driver may intend to run a red light, but courts should only reach that conclusion on the basis of indisputably clear evidence. At the other extreme, courts would employ no presumption against application of U.S. statutes to situations over which the United States were the only country with a basis for legislative jurisdiction. To continue the analogy, in these cases the light would be green.

Under the proposed approach, courts would take into account the second consideration, the potential for overlapping jurisdiction, by asking whether the United States had a clearly primary basis for jurisdiction. If so, the light would still be green, and courts would employ no presumption against applying the statute. By “primary,” I do not mean that courts should try to determine which state has the strongest, best, or most reasonable claim to jurisdiction. Rather, the term simply refers to a usual or normal jurisdictional claim, as opposed to a more unusual or exceptional claim. The most obvious 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 or had effects on another country, U.S. courts should not employ a presumption against application of the law. Bases for jurisdiction equivalent to territory, such as jurisdiction over U.S.-flag vessels, 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 conventional 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.

If, on the other hand, the United States had a basis for jurisdiction but it was not the clearly primary basis, then the traffic-light would turn yellow. Courts could apply a statute to such situations only with caution, on the basis of some evidence of legislative intent. In addition to

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54 This is not the first effort to enlist a traffic-light metaphor in the context of jurisdiction. See Andreas F. Lowenfeld, International Litigation and the Quest for Reasonableness 16 (1996).
55 This would not, of course, mean that every U.S. law would apply to every such situation, any more than drivers go through every green light they see. Courts could still conclude that statutes were not intended to apply to a particular situation on the basis of their language, purpose, context, or history. But courts would not employ an automatic presumption against applying a statute.
56 The chief exception to this statement is the application of the law of a state to the internal affairs of foreign-flag ships within the state’s territory. See Parts II.B.3, IV.C infra.
sources such as statutory purpose, structure, and history, such evidence could include formal, consistent interpretations of the statutory language by the agency charged with its implementation.\textsuperscript{57} The most important example of the “yellow-light” category would be actions taken in a foreign country and therefore subject to foreign territorial jurisdiction, which were also subject to U.S. jurisdiction because they were taken by U.S. nationals or directly and substantially affected the United States. Because the United States would not have primary jurisdiction, a presumption would apply against application of U.S. law, but because the United States would have \textit{some} basis for jurisdiction, the presumption could be overcome more easily. This softer presumption would also be against the extrajurisdictional application of the statute insofar as it would be against extension of statutes to situations beyond the sole or primary jurisdiction of the United States.

In sum, under the proposed canon, a court would ask two questions. First, under international law, does the United States have sole or primary jurisdiction over the situation in question? If the answer were \textit{Yes}, then the court would construe the statute without any presumption against its application. If the answer were \textit{No}, then the court would examine a second question: does international law provide the United States a basis for \textit{any} jurisdiction over the situation? If the answer were again \textit{No}, then the court would 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 were \textit{Yes}, so that international law allowed the United States to exercise jurisdiction but did not assign it sole or primary jurisdiction, then the court would apply the statute only if it found some indication of intent that the law should extend to the conduct.\textsuperscript{58}

This proposal differs from the strict presumption against extraterritoriality propounded by the Rehnquist Court in two respects. As this article explains below, the Rehnquist presumption applies to all situations outside U.S. boundaries, even to places completely within U.S. control.

\textsuperscript{57} The article’s references to relevant evidence of legislative intent should be understood as including such agency interpretations, which could be seen as providing evidence of legislative preferences. \textit{See} Elhauge, \textit{supra} note 22, at 79-111 (reviewing judicial deference to agency interpretations under the \textit{Chevron} doctrine). Looking at these interpretations might also be justified on the ground that agencies with expertise in foreign policy are in a better position than courts to take into account the political preferences underlying the statute and the effects that its extraterritorial application would have on foreign policy. \textit{See generally} Curtis A. Bradley, \textit{Chevron Deference and Foreign Affairs}, 86 Va. L. Rev. 649 (2000).

\textsuperscript{58} \textit{See} Shapiro, \textit{supra} note 24, at 934 (distinction between “clear-statement” canons and canons that allocate burdens but allow courts to look at all relevant information “may be more a matter of degree than of kind, but it does have analytical and practical value”).
such as U.S. ships at sea and U.S. bases under exclusive U.S. control.\(^{59}\) Under the new proposal, places within U.S. control would not be subject to a presumption against the application of federal law. The second difference between the two canons has to do with the strength of the evidence necessary to overcome them. While the Rehnquist presumption may be overcome only with explicit evidence that Congress intended the statute to apply beyond U.S. sovereign territory,\(^{60}\) the proposed canon would require such evidence only if there were no basis for U.S. jurisdiction under international law. If there were any basis for jurisdiction, such as nationality or effects, then the presumption could be overcome on the basis of any relevant evidence of legislative intent, as well as consistent agency interpretations.

The proposal is akin to the approach taken by the Court in its 2004 decision in Hoffman-LaRoche v. Empagran, insofar as that decision looked to international limits on jurisdiction to guide its interpretation of a U.S. statute.\(^ {61}\) The proposed canon would not, however, follow Empagran in looking to the Restatement (Third) of Foreign Relations Law. The Restatement responds to the problem of potentially overlapping jurisdictions by providing that even if there is a basis (in territoriality, nationality, or otherwise) for application of a statute to a particular situation, a state may not exercise jurisdiction if it would be “unreasonable” to do so.\(^ {62}\) To inform the decision whether an exercise of jurisdiction would be unreasonable, Section 403 of the Restatement provides a list of factors, including links to the regulating state and the extent to which another state has an interest in regulating the activity.\(^ {63}\) This aspect of the Restatement has been strongly criticized as not reflecting principles of customary international law.\(^ {64}\)

The proposed canon would agree with the Restatement’s bases for jurisdiction, but not follow it into the far more controversial area of interest-balancing. Under the proposal, no presumption against application of U.S. law would apply to situations within sole or primary

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59 See Part II.C infra.
60 Aramco, 499 U.S. at 258.
61 Empagran, 542 U.S. at 164-69.
62 Restatement, supra note 15, § 403(1).
63 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. In effect, drawing on modern trends in conflict-of-laws, the Restatement suggests that courts should determine which state has the most significant relationship with the situation in question.
jurisdiction, regardless of the strength of the interests of another state. And if the situation arose within U.S. jurisdiction, but not its sole or primary jurisdiction, courts would not engage in a balancing test to determine which of the possible jurisdictional claims was most reasonable, but only look for evidence of legislative intent to apply the law.

II. The Development of Judicial Canons Limiting the Reach of Federal Statutes

Adherence to *stare decisis* in construing statutes promotes clarity and continuity, helping to “construct a statutory backdrop against which Congress may legislate and upon which private parties may rely.” For this reason, judges and scholars have regularly (though not universally) emphasized the importance of following precedent in construing statutory language. Although their arguments have usually been directed toward interpretations of specific statutes, they apply at least as well to the application of norms guiding the interpretation of statutes. This is not to suggest that statutory interpretations should never be overturned, only that whether a proposed interpretation is consistent with precedent is a relevant factor in assessing its utility.

As this section explains, the presumption against extrajurisdictional application of federal statutes is in line with the overwhelming majority of Supreme Court precedents. For more than 150 years, from the early nineteenth century to the second half of the twentieth, the Court situated its analysis of the geographic scope of federal law in the context of the international law of legislative jurisdiction. After 1909, the Court employed a two-level presumption, as would the proposed canon: a strict presumption against extension of U.S. law beyond the limits of international law; and a softer presumption against its extension to situations within the territorial jurisdiction of other countries. The Court allowed the first, strict presumption to be overcome only with inescapably clear evidence of congressional intent; the second, which became known as the presumption against extraterritoriality, could be overcome more easily. Only in the last twenty years has the Court adopted two other approaches: a new presumption against extraterritoriality that is both broader in application and harder to overcome than the original; and a rule of reason borrowed from the Restatement (Third) of Foreign Affairs Law.

A. The Original Presumption against Extrajurisdictionality

The Supreme Court first adopted a presumption against extrajurisdictionality in

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65 Tyler, *supra* note 24, at 1417.
construing the very first federal criminal statute, enacted in 1790. Section 8 of that law attempted to criminalize piracy, but its language was broad enough to cover any murder or robbery on the high seas, not just those committed in the course of piracy. In a series of cases decided from 1818 to 1820, the Court narrowed the scope of the statute by looking to the limits of U.S. jurisdiction under international law.

In the first of these cases, United States v. Palmer, the U.S. government prosecuted three men for boarding and robbing a Spanish ship on the high seas. One of the issues presented to the Court was whether the statute applied to robbery on the high seas not directed against U.S. ships or nationals. The U.S. government argued that the statute should be bounded by international limits on jurisdiction. It urged the Court to construe the statute not to reach robbery by a foreign citizen on a foreign ship if it did not constitute piracy, because non-piratical robbery was beyond the jurisdiction of the United States to punish under international law. The Court agreed. It stated 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.” It thus endorsed a strong presumption against interpreting federal statutes to extend extrajurisdictionally.

At the same time, the U.S. attorney argued that the statute should extend to the full reach of U.S. jurisdiction under international law: the law should apply to robbery committed by U.S. nationals even if on a foreign vessel, because the United States has jurisdiction over its own nationals on the high seas, and it should apply to robbery that “amount[s] to piracy, by the law of nations” committed by any person at all, because all nations have the right and duty to

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67 Act of April 30, 1790, § 8, 1 Stat. 112, 113-14 (“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”). The language paraphrases Blackstone’s description of piracy. See 4 Blackstone’s Commentaries, ch. 5, p. 72. Congress was evidently seeking to fulfill its constitutional mandate to “define and punish piracies and felonies committed on the high seas.” U.S. Const. art. I, § 8.


70 16 U.S. at 620.

71 Id. at 631.

72 16 U.S. at 621. Although the Court did not clearly address the question, the defendants were apparently U.S. nationals. Two were described as being “late of Boston,” and one as “late of Newburyport.” Id. at 611.
prosecute piracy. The Court rejected this argument, on the ground that Congress did not intend the statute to run so far. The Court 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.”

The Palmer decision was greeted with strong criticism at the time, because it “appeared to cripple the federal Government’s power to punish pirates.” A year later, Congress effectively overruled the decision by enacting a new statute explicitly criminalizing piracy “as defined by the law of nations,” committed by “any person or persons whatsoever . . . on the high seas.” The act of 1819 did not replace the 1790 law, however, which came before the Court again in 1820, in United States v. Klintock.

The defendant in Klintock was accused of seizing a ship in violation of the 1790 statute. He argued that the law did not apply to him because he had acted on board a foreign ship against another foreign ship, precisely the situation that Palmer had said fell outside the scope of the statute. Perhaps influenced by the strong reaction Palmer had provoked, the Court revised its interpretation of the 1790 law, stating that its general terms “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.” By “common consent” expressed in the law of nations, piracy was the leading example of such an offence. The effect

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73 Id. at 620.
74 Id. at 631 (general terms must be limited not only by jurisdictional bounds, but also “to those objects to which the legislature intended to apply them”).
75 Id. In addition, the Court construed similarly general terms in other provisions of the statute as being limited to offenses on board U.S. ships, and concluded that they therefore “furnish[] strong reason for believing that the legislature intended to impose the same restriction on the general words” in the provision at issue. Id. at 632-33.
76 White, supra note 69, at 731.
78 18 U.S. 144 (1820).
79 He could not be prosecuted under the 1819 statute because he had seized the ship in 1818.
80 Id. at 148.
81 Id. at 152.
82 See 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.”).
of *Klintock* was to extend the reach of the 1790 statute to the limits of U.S. jurisdiction recognized by international law.\(^8^3\)

The Court spelled out the rule it was applying in another 1820 decision, *United States v. Furlong*.\(^8^4\) The defendant, an Englishman, was accused of violating the 1790 statute by committing the “piratical murder” of two other Englishmen on an English ship.\(^8^5\) The Court held that extending the statute to *murder* by a foreigner on a foreign ship would exceed U.S. jurisdiction under international law. Writing for the Court, Justice William Johnson stated that in interpreting the 1790 statute, the Court 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.”\(^8^6\) The Court held that while piracy was within the acknowledged power of Congress to punish, as was murder by U.S. nationals committed on foreign ships, murder by foreigners on foreign ships on the high seas was not.\(^8^7\)

In *Klintock* and *Furlong*, then, the Court took the position that the U.S. government had first proposed in *Palmer*: that the general terms of a statute such as the act of 1790 should be bounded by international limits on jurisdiction, but should not be presumed to stop short of those limits. The Court also followed this approach in cases not involving piracy. For example, in *The Apollon*, a case concerning the seizure of a French ship by a U.S. revenue collector acting under a 1799 federal statute regulating the collection of duties, the Court rejected an expansive interpretation of the statute that would have required the ship to report to the U.S. collector or be subject to seizure, because that interpretation would have taken the law beyond the scope of U.S.

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83 The Court avoided having to overrule *Palmer* by stating that *Klintock*, unlike *Palmer*, concerned a vessel under the control of “persons acting in defiance of all law, and acknowledging obedience to no government whatever.” 18 U.S. at 152. This was disingenuous. By definition, pirates acknowledge obedience to no government, and *Palmer* had made clear that it was examining whether Congress had enacted a law “punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States.” *Palmer*, 16 U.S. at 630-31.
84 18 U.S. 184 (1820). The case is also known as *United States v. Pirates*.
85 The defendant was also accused of violating the act of 1819, by seizing a foreign vessel. 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.
86 18 U.S. at 195-96.
87 Id. at 197-98.
Writing for the Court, Justice Story 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.”

As in the piracy cases, 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. Scholars have often conflated the two, citing Palmer as the first adoption by the Court of a presumption against extraterritorial application of U.S. statutes, and stating that the Court viewed all extraterritorial application of U.S. law as violating international limits on jurisdiction. This interpretation misreads the decisions. By their terms, the criminal statutes at issue in the piracy cases explicitly applied extraterritorially to actions on the high seas. A piracy statute would have been of little use otherwise. The question was whether the statutes applied to certain actions taken by U.S. and foreign nationals in ships not under U.S. flag. After waffling in Palmer, the Court answered that question Yes with respect to everyone accused of piracy on board ships not owing allegiance

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88 The 1799 act provided that any ships that arrived within the limits of a district and departed without reporting to the collector were subject to seizure by the collector. An Act to Regulate the Collection of Duties on Imports and Tonnage, Mar. 2, 1799, § 29, 1 Stat. 648-49 (Collection Act of 1799). The U.S. government argued that by entering the St. Mary’s River, along the border between Georgia and Florida (which at the time was still under Spanish control), the Apollon had entered the district of St. Mary’s, which the statute defined to include the St. Mary’s river. The Apollon, 22 U.S. (9 Wheat.) 362, 368-69 (1824). The U.S. collector had seized the ship after it anchored on the Florida side of the boundary.

89 Id. at 370. Normally, those places and persons would be the nation’s own territories and nationals. Id. After acknowledging that under general principles of the law of nations, a boundary river such as the St. Mary’s “must be considered as common to both nations, for all purposes of navigation,” the Court rejected the government’s argument that the 1799 act extended to ships transiting the river on the way to port in Spanish territory. Id. at 369-70. The Court also applied the presumption against extrajurisdictionality to enforcement, stating that even if the 1799 law were interpreted to require the Apollon to enter a U.S. port, the extraterritorial seizure of the ship would be illegal. Id. at 371.


91 E.g., id. at 10.

92 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 provided more succinctly 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.

93 To the extent that the actions took place on U.S. vessels, the Court probably would have considered them within territorial jurisdiction, because throughout the nineteenth century, the Court regarded U.S.-flag vessels as if they were floating bits of U.S. territory. See St. Clair v. United States, 154 U.S. 134, 152 (1894); Wilson v. McNamee, 102 U.S. 572, 574 (1880); Crapo v. Kelly, 83 U.S. 610, 624 (1872); The Scotia, 81 U.S. 170, 184 (1871); United States v. Smiley, 27 F. Cas. 1132, 1134 (C.C. Cal. 1864).
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. Those were the answers consistent with U.S. jurisdiction under international law: 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.

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 the 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 must have considered that Congress would almost never step over the lines set by international law. The presumption against extrajurisdictionality was thus an application of the canon first stated by the Court in its 1804 decision in Charming Betsy, that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”

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94 Klintock, 18 U.S. at 152.
95 Furlong, 18 U.S. at 196-97.
96 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 sailed through 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. 22 U.S. at 369. It did not do so. After emphasizing the importance of staying within the bounds set by international law on legislative jurisdiction, the Court stated 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.” Id. at 370. It was to avoid that result that the Court interpreted the statute to “compel an entry of all vessels coming into our waters, being bound to our ports.” Id. (emphasis added). The distinction between vessels to which the law applied and those to which it did not apply did not depend on whether the vessels were in U.S. territory, but rather on whether they 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).
97 Id.
98 Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).
B. The Original 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.*99 Unlike the cases discussed in the preceding section, *American Banana* required the Court to determine whether a statute – the Sherman Act -- applied to actions by a U.S. company in another country, not just on the high seas.100 In refusing to extend the law 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.”101 The Court thus seemed to state a presumption against extraterritoriality, not extrajurisdictionality.

Confusingly, however, the Court acted in some respects as if it were applying the presumption against extrajurisdictionality. It stated that its primary reason for construing the statute not to apply extraterritorially 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.”102 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.”103

This conflation of territory and jurisdiction would make sense only if territory were the only recognized basis for jurisdiction. In some respects, Holmes’ opinion came close to making that claim. 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.”104 Although the use of the term “comity” rather than “law” softened the statement,105 the opinion nevertheless

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100 *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.
101 *American Banana*, 213 U.S. at 357 (emphasis added).
102 *Id.* at 355 (emphasis added). 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.” *Id.* at 356.
103 *Id.* at 357 (emphasis added).
104 *Id.* at 356.
105 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.
suggested that the extraterritorial extension of laws was at least akin to, and perhaps simply a form of, extrajurisdictionality, and objectionable in the same way. The problem was that, as American Banana itself recognized, states had other bases for jurisdiction than territory, including universal jurisdiction, jurisdiction over acts harming national interests, and jurisdiction over their nationals. If “English statutes bind British subjects everywhere,” as Holmes acknowledged, why could U.S. statutes not do the same?

After American Banana, the Court had to decide whether it would continue to employ a new, strict version of extrajurisdictionality, treating extraterritorial applications of statutes as if they would violate international limits on legislative jurisdiction, or whether it would acknowledge bases for legislative jurisdiction other than territory, as it had in the past. For most of the twentieth century, the Court followed the second approach. It continued to apply the older presumption against extrajurisdictionality to U.S. ships outside U.S. territory and to foreign ships within U.S. territory. With respect to actions in foreign countries, however, the Court took a two-prong approach. It continued to employ a strict presumption against extending laws beyond jurisdictional bounds, but it often added a softer presumption against applying laws to situations in which another country had territorial jurisdiction. In this sense, the presumption against extraterritoriality emerged as a weaker version of the presumption against extrajurisdictionality.

The following sections describe how the Court applied the presumption against
extraterritoriality to three situations: (1) U.S. ships outside U.S. territory; (2) actions within foreign countries; and (3) foreign ships within U.S. territory.

1. Applying U.S. Laws to U.S. Ships Outside U.S. Sovereign Territory

Before American Banana, the Supreme Court had not employed a presumption against extending statutes to U.S. ships outside U.S. territory. In The Hamilton, for example, written by Justice Holmes just two years earlier, the Court had applied a Delaware statute governing tort claims to a collision between two Delaware ships on the high seas. Although American Banana did not explicitly cast doubt on these cases, its apparent equation of territory and jurisdiction raised the possibility that the Court would begin to restrict application of U.S. laws to U.S. ships at sea. That did not happen. Over the next several decades, the Court continued to extend statutes to U.S. ships without applying a presumption against extraterritoriality.

For example, in United States v. Flores, the Court considered 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 based his defense on the presumption against extraterritoriality, but the Court agreed with the Attorney General that the presumption did not apply, stating, “In the absence of any controlling treaty provision, and any

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107 Old Dominion Steamship Co. v. Gilmore (The Hamilton), 207 U.S. 398, 403, 405 (1907) (“[T]he 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 . . . . [W]e 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.”).

108 In fact, it 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.” 213 U.S. at 355-56.

109 In one early case, the Court did imply that the presumption might apply. In United States v. Bowman, 260 U.S. 94 (1922), 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. 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. Id. at 98. 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.

110 289 U.S. 137 (1933).

111 Id. at 155-56. If the Court had applied the presumption, the language of the statute could have overcome it. The statute 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.” 289 U.S. at 145-46. The only issue was whether the statute 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.” Id. at 155.
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.”

Similarly, in *Skiriotes v. Florida*, a defendant convicted of violating a Florida statute regulating the taking of sponges argued that Florida’s criminal jurisdiction could not extend beyond U.S. territory. The Court rejected the argument, stating that territorial limits were “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.” Since the United States could control its citizens’ actions on the high seas, the Court held, so could Florida.

In these cases, the Court made clear that it would not construe the statutes beyond the jurisdictional limits imposed by international law. In other words, it continued to apply a presumption against extrajurisdictionality. The Court recognized, however, that international law did not limit U.S. legislative jurisdiction to the shores of the United States, and that the United States had valid bases for jurisdiction over its ships outside those boundaries. It did

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112 *Id.* at 159. The Court said 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 was 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.” *Id.* at 158 (citing Mali v. Keeper of the Common Jail (*Wildenhus’ Case*), 120 U.S. 1 (1887)).

113 313 U.S. 69 (1941).

114 *Id.* at 73.

115 *Id.* at 76. Another case in this line is Maul v. United States, 274 U.S. 501 (1927), in which the Court was asked to determine 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, or whether its language should be limited to actions within U.S. waters. 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 exceed international limits on jurisdiction: “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.” *Id.* at 512.

116 The Court’s description of the basis for jurisdiction differed from case to case. In *Flores*, the Court continued to express the view that U.S. ships are floating bits of U.S. territory, as it had in the nineteenth century. *Flores*, 289 U.S. at 156. The Court had stated a decade earlier, however, that the equation of ships with territory was “a figure of speech, a metaphor.” Cunard S.S. Co. v. Mellon, 262 U.S. 100, 123 (1923). In *Cunard*, the Court said that the jurisdiction that the metaphor “is intended to describe arises out of the nationality of the ship . . . and partakes more of the characteristics of personal than of territorial sovereignty.” *Id.* On that basis, the Court held that the Eighteenth Amendment, which prohibited the manufacture, sale, and transportation of intoxicating liquors within “all territory subject to the jurisdiction” of the United States, did not apply to U.S. ships at sea. *Skiriotes* did not base its decision on the idea that a vessel at sea is effectively a floating bit of territory (although it did not reject that view), but rather on “the broader principle of the power of a sovereign State to govern the conduct of its citizens on the high seas.” 313 U.S. at 77-78. However the Court understood the basis for jurisdiction over U.S. ships outside
not, therefore, apply a presumption against extraterritoriality. In this respect, a key consideration may have been that these cases did not involve competing claims for jurisdiction by other states. Cases arising in areas that were subject to the laws of another nation received a more nuanced treatment, as the next section explains.

2. Actions Outside U.S. Territory and within the Territory of Another Country

Cases like American Banana that involved the potential extension of U.S. jurisdiction to another country raised more complicated questions, including a stronger likelihood of conflict with other states. The Court responded by developing an offshoot from the presumption against extrajurisdictionality: a new presumption that Congress does not normally intend U.S. laws to apply to situations within the territorial jurisdiction of another state. This second, softer presumption came to be called the presumption against extraterritoriality.

Although American Banana had suggested that exercises of jurisdiction extraterritorially would interfere with the authority of another sovereign, “which the other state concerned justly might resent,” the Court quickly backed away from any implication that U.S. statutes could never apply to U.S. nationals’ actions in foreign countries. In United States v. Bowman, the Court held that a federal statute criminalizing false claims against the United States or corporations in which the United States owned stock applied to actions by U.S. nationals in Brazil. The Court emphasized that its interpretation did not raise American Banana’s concerns about interference with foreign sovereigns: because 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.” Similarly, in Blackmer v. United States, the Court rejected the argument that the extension of a U.S. statute

U.S. sovereign territory, the critical point is that the Court did not apply a presumption against extraterritorial application of U.S. laws to them. See Steele, 344 U.S. at 291 (Reed, J. dissenting) (describing this line of cases as holding that the presumption against extraterritoriality does not apply when “a statute is applied to acts committed by citizens in areas subject to the laws of no sovereign”). The river in Flores was within the sovereign territory of another country, but it apparently made no effort to exercise jurisdiction over the U.S. ship. Flores, 289 U.S. at 159. American Banana, 213 U.S. at 356. 260 U.S. 94 (1922). The case also concerned actions by the defendants on the high seas. See note 109 supra. Id. at 102. 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.” Id. at 102-03. 284 U.S. 421 (1932).
to a U.S. citizen resident in France violated the jurisdictional limits of international law.\textsuperscript{122}

The Court added another hurdle, however, to the extraterritorial exercise of legislative jurisdiction over U.S. nationals in foreign countries. Even if the United States had jurisdiction under international law, the Court sought evidence that Congress intended to exercise that jurisdiction over situations within the territorial jurisdiction of another country.\textsuperscript{123} Although an offshoot of the older presumption against extrajurisdictionality, this new presumption was weaker than the older one in two respects.

First, it was easier to overcome. Viewed as an expression of the \textit{Charming Betsy} canon, the older presumption required the Court to avoid an extrajurisdictional interpretation of a law if any other interpretation were possible,\textsuperscript{124} and in practice, the Court never found evidence sufficient to overcome it. At first, the Court suggested that the new presumption against extraterritoriality could similarly be overcome only by an explicit statement by Congress,\textsuperscript{125} but later decisions made clear that more general evidence of Congress’ “contrary intent” would suffice.\textsuperscript{126} In \textit{Foley Bros. v. Filardo}, for example, the Court sought such evidence in a wide variety of sources beyond the language of the statute itself, including the structure of the act, the statute’s legislative history, and administrative interpretations of the law.\textsuperscript{127}

Second, the new presumption had a limited scope, applying only to situations within the territorial jurisdiction of another state and, indeed, not even to all of those situations. One early decision stated that the presumption against extraterritoriality did not apply if the “nature of the

\textsuperscript{122} The statute authorized the issuance of subpoenas. In opposing its extension to a U.S. citizen in France, Blackmer’s counsel argued that “[t]his nation is an equal sovereignty, which, in the absence of treaty, can not exercise power extraterritorially.” \textit{Id.} at 424. The Court responded that as a citizen of the 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.” \textit{Id.} at 436-37. In support of the principle of legislative jurisdiction over nationals abroad, the Court cited several international law treatises 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.” \textit{Id.} at 437 n.2. \textit{See also} Steele v. Bulova Watch Co., 344 U.S. 280, 285-86 (1952) (international law does not prohibit the United States from governing the conduct of its own citizens abroad).


\textsuperscript{124} \textit{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”).

\textsuperscript{125} \textit{Bowman}, 260 U.S. at 98; \textit{Chisholm}, 268 U.S. at 31.

\textsuperscript{126} \textit{Blackmer}, 284 U.S. at 421; \textit{Steele}, 344 U.S. at 285.

\textsuperscript{127} 336 U.S. 281 (1949).
offense” allowed the necessary congressional intent to be inferred.\textsuperscript{128} And in cases applying statutes on taxation and treason to U.S. nationals residing abroad, the Court failed even to refer to the presumption.\textsuperscript{129} Whether the cases are viewed as avoiding the presumption or overcoming it, they show that it was often a low bar to the extension of U.S. laws to U.S. nationals in foreign countries.

The lower standard necessary to overcome the new presumption against extraterritoriality followed logically from the concerns underlying both it and the older presumption from which it sprang. The reasons for requiring indisputable evidence of congressional intent before applying U.S. laws beyond international limits on U.S. legislative jurisdiction included not only practical problems with extending the 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.\textsuperscript{130} These concerns did not apply to the same degree to extensions of U.S. law to U.S. nationals in foreign countries. Although the United States could not enforce its laws directly against non-resident nationals, it might use their ties with the United States 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 home.\textsuperscript{131} And extending U.S. laws to U.S. nationals living abroad would often avoid international conflict, since countries acknowledge the legal right of each country to extend its laws to its own nationals.

At the same time, concerns of practicality and conflict were not completely absent in such cases, as they were in applying U.S. law to situations outside the jurisdiction of other states. 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

\textsuperscript{128} \textit{Bowman}, 260 U.S. at 98 (holding that the presumption against extraterritoriality should apply to federal statutes addressing crimes against “the peace and good order of the community,” such as murder and robbery, but not to laws that defend the government against obstruction or fraud, because in the second case, “Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense”). \textit{See also} \textit{Chisholm}, 268 U.S. at 29 (referring to the possibility that, in the absence of a clearer indication of congressional intent, the “circumstances” of a case might justify extraterritorial application).

\textsuperscript{129} \textit{See, e.g.}, \textit{Cook v. Tait}, 265 U.S. 47 (1924) (upholding the imposition of income tax on U.S. citizens residing abroad); \textit{Kawakita v. United States}, 343 U.S. 717 (1952) (upholding conviction of U.S./Japanese dual-national resident in Japan for treason during the Second World War). \textit{See also} United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945) (upholding extension of Sherman Act extraterritorially based solely on conclusion that the application was within the jurisdiction of the United States under international norms).

\textsuperscript{130} \textit{See} note 61 \textit{supra} and accompanying text.

\textsuperscript{131} Oppenheim’s International Law, \textit{supra} note 35, § 138, at 463 & n.9.
law. In particular, as courts began to apply U.S. laws to non-U.S. actors in foreign countries on the basis of their actions’ effects within the United States, other countries objected that the laws imposed inconsistent obligations on their own nationals.  

These considerations indicated that the Court should not automatically apply U.S. laws to foreign countries, even if it had a jurisdictional basis for doing so, without some evidence that Congress intended the laws to apply. At the same time, they suggested that the presumption against applying laws to such situations should be less strict than the presumption against extrajurisdictionality. The presumption against extraterritoriality provided a functional response to these concerns, by erecting a new hurdle to the extension of U.S. laws to foreign countries, but ensuring that the new hurdle would be easier to overcome than the older bar to applying laws extrajurisdictionally.

Unfortunately, the Court did not apply the presumption consistently. As noted, it sometimes ignored the presumption altogether, and it never clarified how the presumption applied to cases involving domestic effects. Moreover, the Court never adequately explained the reasons for the presumption against extraterritoriality, how they differed from those underlying the presumption against extrajurisdictionality, or how the two presumptions worked together. Not until 1949, in Foley Bros., did the Court provide a justification for the presumption against extraterritoriality, and then it said only that the presumption “is based on the assumption that Congress is primarily concerned with domestic conditions.” 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. Too, without further explanation, it was unclear how this justification squared with contemporary decisions by the Court that did not treat the presumption as a bar to application of U.S. law to U.S. ships and nationals within U.S. control but outside U.S. territory.

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132 The leading example is antitrust law, whose extraterritorial application to non-U.S. nationals was upheld in United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). Writing for the Second Circuit, Judge Learned Hand acknowledged the presumption against extrajurisdictionality, stating “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.” Id. at 443. 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.” Id. For a description of the response by foreign governments to the extraterritorial extension of U.S. antitrust law, see Edward Swaine, The Local Law of Global Antitrust, 43 Will. & Mary L. Rev. 627, 641-46 (2001).
133 336 U.S. at 285.
3. Applying U.S. Law to Foreign Ships in U.S. Territory

Before and after American Banana, the Supreme Court looked to the international law of jurisdiction in deciding whether to extend laws to foreign ships within U.S. territory. It did not hold to a consistent line on how that law demarcated the bounds of territorial and flag-state jurisdiction, however. It wavered between two positions: that the internal affairs of a ship were within the sole jurisdiction of the state with flag jurisdiction; and that whether to follow the “internal affairs” norm was up to the discretion of the territorial state.

Early in the nineteenth century, the Court stated that the territorial sovereign had jurisdiction over all foreigners, including foreign ships, within its territory, but that in practice nations did not assert that jurisdiction over foreign warships peacefully admitted to port.134 Forty years later, the Court similarly referred to a general rule of sweeping territorial jurisdiction, but declined to extend patent law to a privately owned foreign ship in U.S. waters.135 By mid-century, countries’ decisions not to apply their laws to foreign ships were described in a treatise as forming a rule of international law: the territorial sovereign only had jurisdiction over matters concerning non-crew members or “the tranquility of the port,” leaving other matters to the exclusive jurisdiction of the flag state.136 As a reflection of customary law, this statement may have gone too far, but over the same period the United States had entered into a number of bilateral treaties that allocated jurisdiction over foreign ships in port along those lines. In 1887, in Wildenhus’ Case, the Court construed one of these treaties and concluded 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.”137

After American Banana, the Court continued to apply U.S. laws to foreign ships in accordance with its views of the limits set by international law on legislative jurisdiction.138 It sometimes treated the Wildenhus “internal affairs” norm as a “well-established rule of international law,”139 or at least “settled American doctrine,”140 but in other cases described the

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137 Mali v. Keeper of the Common Jail (Wildenhus’ Case), 120 U.S. 1, 18 (1887).
139 Id.
140 Lauritzen, 345 U.S. at 586.
norm as committed to the discretion of the territorial state.\textsuperscript{141} This division may reflect differing understandings of the relevant international law.\textsuperscript{142} Nevertheless, the Court did clearly state that in applying U.S. statutes to foreign ships, it would interpret a statute to exceed the jurisdictional limits set by international law only on the basis of “the affirmative intention of the Congress clearly expressed.”\textsuperscript{143} Moreover, it made explicit that this presumption against extrajurisdictionality was simply an application of the Charming Betsy canon, which more generally warned against construing federal statutes to violate international law.\textsuperscript{144}

**C. The Strict Presumption Against Extraterritoriality**

In the early 1990s, the Court dramatically strengthened the presumption against extraterritoriality, applying it more broadly and more strictly than before. At the same time, it detached the presumption from the international rules governing jurisdiction. The result was the creation of a new presumption that supplanted, rather than complemented, the older presumption against extrajurisdictionality.

In 1991, in *EEOC v. Arabian American Oil Co. (Aramco)*, the Court considered a claim by a U.S. national that a U.S. corporation had discriminated against him in violation of Title VII of the Civil Rights Act of 1964.\textsuperscript{145} According to the post-American Banana jurisprudence described above, the Court could have applied both a strict presumption against extrajurisdictionality and a softer presumption against extraterritoriality, since the actions took place in a foreign country. Since the United States would have jurisdiction under international law based on the American nationality of the company and the employee, a clear statement of congressional intent would not have been necessary; the question would be whether the plaintiff could point to any evidence that Congress intended the law to apply to situations arising within foreign territory. Three dissenting justices urged the Court to take exactly this approach.\textsuperscript{146}

Rather than apply the presumptions separately, however, the Court conflated them. Writing

\textsuperscript{141} Cunard S.S. Co. v. Mellon, 262 U.S. 100, 125 (1923); Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 142 (1957). Although *Benz* described the “internal affairs” rule as discretionary, it nevertheless emphasized the potential for international discord and retaliation, and declined to extend U.S. law to a foreign ship in the absence of “the affirmative intention of Congress clearly expressed.” *Id.* at 147.

\textsuperscript{142} See Brownlie, * supra* note 34, at 315-17 (describing different positions on whether territorial states abstain from exercising jurisdiction over the internal affairs foreign flag ships on the basis of law or of discretion). The confusion may stem from different readings of *Wildenhus* itself, which was somewhat ambiguous on whether the general norm that the particular treaty reflected was a matter of comity or “general public law.” *Wildenhus*, 120 U.S. at 12.

\textsuperscript{143} *McCulloch*, 372 U.S. at 22.

\textsuperscript{144} *Id.* at 21-22; *Lauritzen*, 345 U.S. at 578; *Cunard*, 262 U.S. at 133 (Sutherland, J., dissenting).

\textsuperscript{145} 499 U.S. 244 (1991).

\textsuperscript{146} *Id.* at 260-61 (Marshall, J., dissenting).
for the Court, Chief Justice Rehnquist treated cases involving foreign ships in U.S. port, in which the Court had applied the presumption against extrajurisdictionality, as if the cases had concerned the presumption against applying U.S. laws to situations within the territory of another state, to which the Court had previously applied the softer presumption against extraterritoriality. 147 Rehnquist took the strict “clear statement” standard from the cases applying the presumption against extrajurisdictionality and attached it to the presumption against extraterritoriality. 148 The effect was both to heighten the evidence necessary to overcome the presumption against extraterritoriality by requiring a clear statement of Congressional intent, 149 and to treat the presumption as supplanting the older presumption against extraterritoriality. 150

_Aramco_ made the presumption more difficult to overcome; two years later, the Court expanded its scope. In _Smith v. United States_, 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. 151 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. 152 As the previous section describes, in earlier cases concerning situations outside U.S. territory but within sole U.S. jurisdiction, the Court had looked only at whether the application of U.S. law would violate

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147 *Id.* at 248 (citing _Benz_, 353 U.S. at 138; _McCulloch_, 372 U.S. at 10).
148 *Id.* at 248. Specifically, he 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_].” _See also id._ at 258 (referring to the “need to make a clear statement that a statute applies overseas”); Dodge, _Understanding the Presumption, supra_ note 90, 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”).
149 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. The Court has never made clear, however, what evidence of congressional intent, if any, short of a clear statement in the text itself would suffice to overcome the presumption.
150 In dissent, Justice Thurgood Marshall pointed out the majority was “drawing on language from cases involving a wholly independent rule of construction,” and argued that “it is the weak presumption of _Foley Brothers_, not the strict clear-statement rule of _Benz_ and _McCulloch_ that should govern our inquiry here.” _Id._ at 264-66.
152 Although some countries have made territorial claims to parts of Antarctica, the United States does not recognize any such claim. In any event, such claims are effectively frozen under the Antarctic Treaty, Dec. 1, 1959, art. IV, 12 U.S.T. 794.
international limits on jurisdiction.\textsuperscript{153} In Smith, the Court ignored those cases, instead citing Aramco’s statement of the presumption against extraterritoriality and concluding that “[p]etitioner does not assert, nor could she, that there is clear evidence of congressional intent to apply the FTCA to claims arising in Antarctica.”\textsuperscript{154}

Shortly after Smith, the Court showed that the presumption against extraterritoriality had replaced the presumption against extrajurisdictionality in cases involving U.S. ships at sea, in Sale v. Haitian Centers Council, Inc.\textsuperscript{155} 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 outside 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 aliens to a country if their life or freedom would be threatened because of race, religion, nationality, political opinion, or membership in a particular group.\textsuperscript{156} The Court decided that the statute did not apply to U.S. ships outside U.S. territorial waters, largely on the basis of the presumption against extraterritoriality. Again citing Aramco, 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.”\textsuperscript{157} 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, actions within the sole jurisdiction of the United States.

D. The Restatement Rule of Reason

Recent decisions by the Supreme Court appear to retreat from the strict presumption against extraterritoriality and to show a renewed interest in international limits on legislative jurisdiction. In this respect, these decisions are in accord with the Court’s pre-1991 precedents and with the proposal put forward in this article. On closer examination, however, the decisions add to the

\textsuperscript{153} See Part II.B.1 supra.
\textsuperscript{154} Id. at 204.
\textsuperscript{155} 509 U.S. 155 (1993).
\textsuperscript{156} Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 19 U.S.T. 6259 (as amended by the 1966 protocol to the convention); Immigration and Nationality Act, § 243(h).
\textsuperscript{157} 509 U.S. at 173, 188. The Sale Court also cited Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989). In that case, the Court had decided that an explicit statutory exception to foreign sovereign immunity for torts “occurring in the United States” did not apply to an attack on a foreign-flag oil tanker on the high seas. Although Amerada Hess could have reached that conclusion based on the plain meaning of the statutory language, Chief Justice Rehnquist, writing for the Court, instead cited the presumption against extraterritoriality, id. at 440-41, foreshadowing its later use in Sale to prevent the application of U.S. law to U.S. ships.
incoherence of the Court’s jurisprudence.

For example, in its 2004 decision in *Rasul v. Bush*, the Court held that the presumption against extraterritoriality is irrelevant to the application of the federal habeas statute to the aliens detained at the U.S. naval base at Guantanamo Bay, in Cuba, because the United States exercises “complete jurisdiction and control” over the base.\(^\text{158}\) The decision may be seen as a return to the Court’s pre-*Aramco* approach, in which it applied the presumption against extraterritoriality only to situations subject to foreign territorial jurisdiction. Although the base is within Cuban territory, agreements between Cuba and the United States effectively give the United States complete and indefinite control over it,\(^\text{159}\) making it more akin to a U.S. ship on the high seas than to a U.S. company operating in a foreign country. Nevertheless, the degree of U.S. control over Guantanamo Bay is not greater than its control over a Coast Guard vessel or a scientific base in Antarctica, two places that the Court had held eleven years earlier were subject to the presumption.\(^\text{160}\) *Rasul* failed to overrule, distinguish, or even mention these decisions. As a result, it added another inconsistent precedent for lower courts to try to reconcile.

Two weeks before deciding *Rasul*, the Court construed another statute by referring to limits on jurisdiction set by international law. In *Hoffman-La Roche v. Empagran*, the Court announced that it “ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations,” a rule of construction that “reflects principles of customary international law . . . that (we must assume) Congress ordinarily seeks to follow.”\(^\text{161}\) Relying on this rule, as well as the applicable statutory language, the Court concluded that the Sherman Antitrust Act did not apply to claims arising from foreign harm from foreign price-fixing activities.\(^\text{162}\) At first glance, *Empagran*’s reference to international law may appear to return to the Court’s pre-1991 jurisprudence looking to international limits on legislative jurisdiction. In fact, however, the decision takes a new approach, that of the Restatement (Third) of Foreign Relations Law.\(^\text{163}\) As noted above, the Restatement states that even where a possible

\(^{158}\) 542 U.S. 466, 480 (2004).

\(^{159}\) Id. at 471.

\(^{160}\) Smith, 507 U.S. at 197; Sale, 509 U.S. at 155.

\(^{161}\) 542 U.S. at 164 (emphasis added).

\(^{162}\) The Court was construing the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), which provides that the Sherman Act does not apply to “conduct involving trade or commerce . . . with foreign nations” unless that conduct has a “direct, substantial, and reasonably foreseeable effect” on domestic commerce and such effect gives rise to a claim under the Sherman Act. 15 U.S.C. §6a.

\(^{163}\) Empagran, 542 U.S. at 164.
basis for prescriptive jurisdiction exists (such as territory or nationality), international law forbids its exercise if it would be “unreasonable.” To inform the decision whether an exercise of jurisdiction would be unreasonable, the Restatement provides a long list of factors, including the extent to which the activity takes place within the territory of the regulating state, the nationality and residence of the responsible actor, the importance of the activity to the regulating state, and the extent to which other states may have an interest in regulating the activity.

Far from “ordinarily” construing ambiguous statutes in light of a multi-factor reasonableness test, the Court had never before adopted the test as a general canon of interpretation. In the 1950s, the Court did employ a multi-factor test in deciding whether to apply U.S. law to tort claims arising on foreign ships. The Court soon decided not to extend that approach beyond the tort context, however. In 1963, in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, the Court explicitly rejected application of a balancing test to determine the reach of the National Labor Relations Act, instead applying the “well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship.” Later decisions continued to limit the multi-factor approach to tort cases under the Jones Act. The closest the Court ever came to adopting it outside that context was a 1993 case in which four dissenting justices applied the Restatement factors to the possible extension of antitrust law to foreign conduct, but failed to convince the majority to do likewise.

Had the *Hoffman-La Roche* Court made clear that it was adopting a new approach, it would have sent a clear message to lower courts to do likewise. By failing to explain whether its new canon replaced its older ones, or even to acknowledge that its new canon was new, the Court

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165 Other factors include the likelihood of conflict with regulation by another state, the effect of the regulation on “justified expectations,” the importance of the regulation to the international order, and “the extent to which the regulation is consistent with the traditions of the international system.” Restatement, *supra* note 15, § 403(2). The list is not intended to be exhaustive. *Id.* comment b.

166 *Lauritzen v. Larsen,* 345 U.S. 571 (1953); *Romero v. International Terminal Operating Co.,* 358 U.S. 354 (1959). In *Lauritzen,* for example, the Court reviewed the factors that “are generally conceded to influence choice of law in a tort claim,” including the place of the wrongful act, the nationality of the injured person, and the nationality of the shipowner. 345 U.S. at 583, 586, 587. In practice, though, even in these cases the Court relied primarily on the rule of legislative jurisdiction that the flag state normally has jurisdiction over the internal affairs of its ships. *See Lauritzen,* 345 U.S. at 585; *Romero,* 358 U.S. at 384.


168 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) with *Hellenic Lines Ltd. v. Rhoditis,* 398 U.S. 306 (1970) (applying balancing test to suit brought under Jones Act).

increased the incoherence and unpredictability of its jurisprudence. Making matters worse, the multi-factor balancing test is itself notoriously unpredictable. *McCulloch* had rejected it on just that ground, stating that deciding whether to apply U.S. labor law to foreign ships “on a purely *ad hoc* weighing of contacts basis . . . would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice.”

Since *Empagran*, the Court has neither clarified the application of the new canon nor explained its relationship to the earlier ones. In fact, the Court has not applied the Restatement test again. *Rasul*, decided two weeks after *Empagran*, did not mention it. The next year, in deciding whether to apply the Americans with Disabilities Act to a cruise ship in U.S. port, the Court did not try to weigh the contacts of the territorial and flag state, instead referring to *McCulloch’s* internal-affairs rule. Spreading confusion to another area, the Court split three ways on how that rule should be applied. In other recent cases, the Court has cited the presumption against extraterritoriality without referring to the *Empagran* rule of reason. It remains unclear whether the Court will apply *Empagran* outside the antitrust context. More generally, it seems evident that the Court is not any closer to clarifying the canons it uses to construe the geographic scope of federal statutes.

**III. The Principles Underlying the Canons**

The Supreme Court has provided three rationales for canons limiting the reach of federal statutes: a desire to avoid inadvertent international conflicts, an assumption that federal legislation normally addresses domestic concerns, and an interest in preventing the judiciary from interfering with the political branches in issues of foreign policy. It is reasonable to assume that Congress enacts laws against the backdrop of these principles. The following

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170 372 U.S. at 19.
173 See notes 29-31 *supra*. Of course, the canons may also reflect other, unstated objectives. In particular, the strict presumption against extraterritoriality has been accused of arising from the political preferences of the conservative justices who joined the majority opinion. *Eskridge*, *supra* note 22, at 283. *See also* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 Vand. L. Rev. 1, 108-09 (2005) (reaching the same conclusion about the Rehnquist Court’s use of canons generally, on the basis of extensive empirical research). Whether or not the Court may have had such unstated motivations, the question remains which canon best effectuates the *stated* reasons for restricting the scope of federal statutes.
sections argue that the proposed presumption against extrajurisdictionality comports with them better than either the strict presumption against extraterritoriality or the Empagran rule of reason.

A. Avoiding International Conflicts

Avoiding inadvertent international conflicts is an important reason to limit the reach of U.S. statutes, as the Supreme Court has recognized since its earliest cases.\textsuperscript{174} For most of its history, the Court avoided such conflicts by looking to the international law of jurisdiction.\textsuperscript{175} In \textit{McCulloch v. Sociedad Nacional de Marineros de Honduras}, for example, decided in 1963, the Court concluded that “international discord” would result from the application of U.S. labor law to a foreign ship because the application would exceed the limits set by international law, and, as a result, the U.S. law would conflict with the law of the state with jurisdiction.\textsuperscript{176} The Court stated that it could construe the U.S. law to exceed the limits set by international law only on the basis of a clear instruction from Congress.\textsuperscript{177}

This approach is an application of the \textit{Charming Betsy} canon, which requires such a clear statement before a court construes any statute to violate any international obligation, not just those concerning jurisdiction.\textsuperscript{178} It is reasonable to assume that Congress does not want courts to construe statutes in ways that inadvertently undermine international obligations and thereby lead to unintended conflicts between the United States and other countries.\textsuperscript{179} Avoiding violations of the international law of legislative jurisdiction is a particularly important method of preventing conflicts – indeed, that is its whole purpose. As Rosalyn Higgins has said, “There 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

\textsuperscript{174} E.g., \textit{Schooner Exchange}, 11 U.S. at 144; \textit{The Apollon}, 22 U.S. at 370; \textit{American Banana}, 213 U.S. at 356; \textit{Steele}, 344 U.S. at 292 (Reed, J., dissenting); \textit{McCulloch}, 372 U.S. at 21-22; \textit{Aramco}, 499 U.S. at 248; \textit{Empagran}, 542 U.S. at 164.
\textsuperscript{175} See, e.g., \textit{Bowman}, 260 U.S. at 102; \textit{Blackman}, 284 U.S. at 439; \textit{Lauritzen}, 345 U.S. at 577.
\textsuperscript{176} 372 U.S. at 21.
\textsuperscript{177} \textit{Charming Betsy}, 2 Cranch at 118.
\textsuperscript{178} \textit{Wuerth}, supra note 28, at 333 n.181 (“[E]very commentator to consider the \textit{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.” Even those generally skeptical that judicial canons reflect congressional intent may agree that with respect to \textit{Charming Betsy}, the rationale “still carries some force.” \textit{Bradley}, \textit{The Charming Betsy Canon}, supra note 26, at 533 (“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.”).
rancour and chaos."\textsuperscript{180}

The Restatement (Third) of Foreign Relations Law suggests that the way to avoid such conflicts is to have courts take into account factors such as the importance of the activity to the regulating state, other states’ interests in regulating the activity, and the likelihood of conflict between the two regulatory efforts, and conclude on that basis whether U.S. statutes should be restrained to avoid unreasonable applications.\textsuperscript{181} Apart from the objection that this approach does not reflect international law,\textsuperscript{182} the problem here is that the virtually unlimited discretion it would give courts would be highly likely to lead to international conflict. In practice, the result of balancing interests “will usually reflect an understandable bias in favor of the forum’s policy,” since “[t]he interests and values of a foreign state are necessarily more difficult for a municipal court to weigh than those social convictions shared by the court . . . and its own legislature or executive.”\textsuperscript{183} Moreover, the courts’ \textit{ad hoc}, case-by-case inquiry into the relevant factors would itself “inevitably lead to embarrassment in foreign affairs and be entirely infeasible in practice,” as the Supreme Court concluded in \textit{McCulloch} in deciding to reject this approach.\textsuperscript{184}

It might be argued that a better way to avoid international conflict would be to implement the strict presumption against any extraterritorial application of U.S. law. In \textit{Aramco}, the Rehnquist Court described its presumption against extraterritoriality as “protect[ing] against unintended clashes between our laws and those of other nations which could result in international discord.”\textsuperscript{185} Neither the breadth nor the height of the Rehnquist Court’s presumption against extraterritoriality furthers the goal of avoiding international discord, however.

Broadening the presumption against extraterritoriality to extend to areas outside U.S. territory but within complete U.S. control does nothing to avoid disagreements with other states. Since other states have no jurisdiction over those areas, legal conflicts could not arise. Indeed, the Rehnquist Court recognized as much in its decisions applying the presumption against extraterritoriality to a U.S. scientific base in Antarctica and a U.S. ship at sea.\textsuperscript{186} Applying the presumption to such places is worse than useless, because it is more likely to give rise to

\textsuperscript{180} Higgins, supra note 34, at 56.
\textsuperscript{181} Restatement, supra note 15, § 403(2).
\textsuperscript{182} See note 64 supra.
\textsuperscript{183} Maier, supra note 105, at 317.
\textsuperscript{184} 372 U.S. at 19.
\textsuperscript{185} 499 U.S. at 248.
\textsuperscript{186} Smith, 507 U.S. at 204 n.5; Sale, 509 U.S. at 173-74.
conflicts than to avoid them. Failing to extend U.S. laws to places within sole U.S. jurisdiction helps to create law-free zones, where U.S. legislation has no effect and other states have no power to legislate, thus creating the potential for conflicts over U.S. failure to uphold its international legal obligations. Those obligations do not arise from the international law of jurisdiction, which does not require the United States, or any state, to extend all of its laws to every place within its jurisdiction. But other international norms often do require their parties to fulfill obligations with respect to all places subject to their jurisdiction, even when the areas are outside their territory.

Many treaties set out such extraterritorial requirements explicitly. For example, the International Covenant on Civil and Political Rights (ICCPR) 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.” 187 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.” 188 As noted above, treaties requiring the prosecution or extradition of those accused of certain criminal offenses obligate each state party to take the necessary measures to establish jurisdiction not only over such offenses committed within territory under its jurisdiction, but also over the offenses if committed on ships or aircraft registered in that State, or by its nationals. 189 The law of the sea obligates states to regulate certain types of actions under their jurisdiction even though outside their sovereign territory, 190 as does the law

187 International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 2(1).
189 See note 53 supra.
190 E.g., UNCLOS, supra note 39, art. 194(2) (“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.”). Although the United States is not party to UNCLOS, it regards almost all of its provisions as reflecting customary international law. 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.”
pertaining to Antarctica.\footnote{Madrid Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, art. 8, ann. I (requiring each party to assess the environmental impacts of its activities in Antarctica, including in particular its bases and expeditions).}

In other cases, the obligation that states carry out their treaty obligations in good faith\footnote{Vienna Convention on the Law of Treaties, May 23, 1969, art. 26.} argues against cramped interpretations that limit their coverage only to actions within territorial jurisdiction. The failure to recognize this type of international obligation contributed to the Rehnquist Court’s decision in Sale that, on the basis of a strict reading of the presumption against extraterritoriality, the Refugee Protocol and the U.S. statute implementing it did not apply to refugees on a U.S. ship outside U.S. territory.\footnote{Sale, 509 U.S. at 155.} In dissent, Justice Blackmun argued that the Court’s interpretation “flies in the face of the international obligations” imposed by the treaty.\footnote{Id., at 207.} Other critics, including human rights bodies, also met that interpretation with “dismay.”\footnote{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. The U.S. interpretation of its obligations was strongly condemned by the U.N. High Commissioner for Refugees and the Inter-American Commission for Human Rights. Id. at 103-04. See generally Thomas Gammeltoft-Hansen, Extraterritorial Obligations and Refugee Law, in Universal Human Rights and Extraterritorial Obligations (Sigrun Skogly & Mark Gibney eds., 2010).}

Similarly, 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 international human rights law, including the ICCPR.\footnote{See Concluding Observations of the Human Rights Committee, United States of America, ¶¶ 10, 16, U.N. Doc. CCPR/C/USA/CO/3 (Sept. 15, 2006) (rejecting U.S. argument that its obligations under the Covenant, including to provide detainees judicial review of the legality of their detention, did not extend to Guantanamo Bay). 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. Boumediene v. Bush, 553 U.S. ___ (2008).}

Nor does heightening the difficulty of overcoming the presumption against extraterritoriality by requiring a clear statement of congressional intent assist in avoiding conflicts, because it does not distinguish between three very different situations towards which Congress may be reasonably presumed to have different attitudes. 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. When the United States regulates situations within its complete jurisdiction, in the unlikely event of any disagreement it is the other state that will be in violation of international law. It cannot be presumed that Congress seeks to avoid such conflicts. Finally, discord may of course arise in the great middle area in which both states have a claim to jurisdiction. Even though applying U.S. law to such situations does not violate international law (and therefore does not give rise to the kind of conflict that *Charming Betsy* tries to avoid), extending U.S. law abroad on the basis of effects, for example, may give rise to conflicts with countries protesting its application to their nationals. 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.

These concerns justify precisely the canon this article has proposed, which would employ 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. In short, conflicts are likely to result from extensions of jurisdiction contrary to governments’ expectations. Those expectations shape, and are shaped by, the international law of legislative jurisdiction, which must therefore be taken into account in avoiding them.

**B. Addressing Domestic Concerns**

The Supreme Court has occasionally stated that the presumption against extraterritoriality reflects an assumption that Congress normally enacts laws to address “domestic concerns.” The Court has never explained which concerns qualify as “domestic.” The Rehnquist Court seemed to believe that such concerns only include situations within U.S. borders. For example, it cited this rationale in support of applying the presumption against extraterritoriality to prevent extension of U.S. law to a U.S. base in Antarctica. Its narrow view of domestic concerns is not convincing: it seems equally if not more likely that Congress views its normal regulatory role more broadly. Under either the narrow or the broader view, however, the idea that Congress is primarily interested in domestic concerns justifies looking to jurisdiction, rather than territory, to limit the reach of federal statutes. In other words, it supports a presumption against extrajurisdictionality, not a presumption against extraterritoriality.

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198 *Smith*, 507 U.S. at 204 n.5.
The assumption that Congress is concerned only with situations within U.S. territory is questionable. The term “domestic” itself does not refer to territory; it means “of or pertaining to one’s own country,” as opposed to “foreign or international.” It is certainly reasonable to assume that Congress is normally concerned with matters pertaining to the United States. But such matters may include not only actions taken within U.S. borders, but also actions taken outside it when they either affect the United States or are taken by the U.S. government or even, in some cases, its nationals. If holding prisoners on a U.S. military base would implicate U.S. regulatory interests when the base is in North Carolina, for example, there is no reason to think that many or all of the same interests would not be implicated when the base is under 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 seem to apply equally to agencies acting on U.S. ships as to agencies acting in U.S. territory.

It might be objected that it is reasonable to assume that Congress takes territory into account in writing its laws because territory is relevant to the enforcement of the laws, and Congress may be normally presumed not to enact laws that outrun the United States’ ability to enforce them. Such concerns do not apply, however, to areas within the sole jurisdiction of the United States, such as its bases in Antarctica and its ships on the high seas. Even with respect to matters that are not within such jurisdiction, such as foreign actions that cause domestic effects or actions by U.S. nationals abroad, the United States may still be able to call on other countries for enforcement assistance as long as it is acting within the jurisdictional limits of international law. Practical objections to the extension of legislative jurisdiction thus depend primarily on jurisdictional, rather than territorial, considerations, and justify looking to jurisdictional, rather than territorial, limits.

Even if one assumes that Congress is normally concerned only with situations within U.S. sovereign territory, a strict presumption against extraterritoriality makes no sense. Foreign actions can and often do affect conditions within U.S. borders, so that, at least under certain conditions, legislation must address foreign conduct in order to regulate domestic concerns.

200 As noted above, international law prohibits governments from enforcing their laws within the territory of other states. See note 36 supra.  
201 The relatively greater difficulty in enforcement of laws in such situations, however, does support a soft presumption against extending the laws so far.  
202 Born, supra note 90, at 74.
Applying a strict presumption against extending U.S. laws to such foreign actions is directly contrary to the assumption that Congress is primarily interested in addressing domestic concerns. For that reason, William Dodge has argued that there should be no presumption at all against extending U.S. law to such actions.\(^\text{203}\)

But Congress is (or should be) also concerned with the likelihood of international discord that could result from the extension of its laws to situations normally under the jurisdiction of other states, as the previous section of this article explained. Routinely extending federal statutes to the full extent of U.S. jurisdiction under the effects doctrine would undoubtedly give rise to such discord. As Larry Kramer has stated, “Such a step would project our law much farther than has ever been true in the past and, in so doing, would advance U.S. interests only marginally while trampling the interests of other nations. Not only is this wrong as a matter of principle, but it maximizes the likelihood of conflict and friction with other nations.”\(^\text{204}\) As more states exercise the effects basis for jurisdiction, challenges to its legitimacy decrease, but the possibility of conflict between overlapping national laws grows. Because of such concerns, Austen Parrish reverts to the opposite extreme, arguing that the effects basis for jurisdiction is so harmful to foreign relations that courts should extend U.S. statutes extraterritorially only on the basis of a clear statement by Congress.\(^\text{205}\) But his approach ignores the interest the United States may well have in regulating foreign actions with substantial domestic effects.

Is there a way to steer between this Scylla and Charybdis? The Empagran rule of reason would allow courts to take into account both types of considerations, but only at the cost of indeterminate, ad hoc decisions by judges not qualified to assess the relative importance of conflicting regulatory interests. The proposed presumption against extrajurisdictionality would also take both considerations into account, but in a clearer, more predictable way. Because the United States would have a basis under the international law of legislative jurisdiction for regulating foreign actions with direct, substantial effects on the United States or in U.S. territory, courts would not require a clear statement of Congressional intent before extending U.S. laws to

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\(^{205}\) *Id.* at 1493-94.
such situations. But because the U.S. basis for jurisdiction would not be the primary basis (that would belong to the country with territorial jurisdiction), U.S. courts could apply U.S. statutes only after finding some indication of legislative intent to do so. Any such evidence – not necessarily a clear statement – would be enough to extend U.S. law to foreign actions with substantial effects on the United States, but some evidence would be necessary.  

This approach would reflect both the U.S. interest in domestic concerns and the desire to avoid inadvertent conflicts. It would not, of course, always reach the same compromise between these two background principles that Congress would have reached had it considered the issue. In this sense, it would result in under-regulation of some foreign situations with domestic effects. If these instances are sufficiently problematic, however, Congress can overrule them by amending the statute. One might argue that this response would equally well justify no presumption at all, since Congress could similarly correct any sufficiently troubling examples of over-regulation. But, as Einar Elhauge has pointed out, Congress is more likely to overrule mistaken under-regulation of foreign conduct, since “[d]omestic interests are probably more able than foreign ones to gain access to the legislative agenda to override any interpretation that conflicts with [Congress’s] enactable preferences.” Leaning toward under-regulation is therefore more likely to elicit a response from Congress that clearly expresses its own preferred balance, rather than one imagined or provided by courts, between the potentially opposing considerations of addressing domestic concerns and avoiding international conflict that may arise with respect to the application of U.S. law to foreign actions with domestic effects.  

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206 Recall that such evidence could include formal, consistent agency interpretations of the statutory language. See note 57 supra. Posner and Sunstein would go much further in this respect, requiring courts to defer to virtually any Executive Branch interpretations of ambiguous statutes with respect to foreign affairs (including with respect to their extraterritorial scope), even if the interpretations were only made in the course of litigation. They argue that “[b]y virtue of its knowledge and accountability, the executive is in the best position . . . to assess the risks to American interests and the value of applying . . . statutes outside of the nation’s borders.” Eric A. Posner & Cass R. Sunstein, Chevronizing Foreign Relations Law, 116 Yale L.J. 1170, 1227-28 (2007). Jinks and Katyal respond that this proposal would dangerously shift the balance of power between the Executive and Congress, by allowing the Executive to avoid otherwise applicable legal constraints. Derek Jinks & Neal Kumar Katyal, Disregarding Foreign Relations Law, 116 Yale L.J. 1230 (2007). In addition, such deference would enormously increase the unpredictability of federal law in this area, since judicial interpretations would depend on case-by-case Executive interpretations. I agree that the Executive is in a better position than the courts (although not necessarily than Congress) to reach an appropriate balance between these interests. See Bradley, Chevron Deference, supra note 57, at 693-94. But to avoid unpredictable results, only Executive interpretations that are formal, consistent, and made by the agency with relevant expertise should be given weight.  

207 Elhauge, supra note 22, at 204.  

208 Dodge makes a similar preference-eliciting argument in favor of his position: he claims that the conflicts that result from a general application of U.S. law to foreign actions with domestic effects will increase incentives for international agreements to resolve such conflicts. He points to bilateral cooperation agreements that have been
C. Respecting Separation of Powers

The Supreme Court has sometimes suggested that its canons in this area reflect the constitutional separation of powers. The Court has expressed two versions of this concern. The first, far more common version expresses a general reluctance for the judicial branch to insert itself into questions of foreign policy, which should be left to Congress and the Executive. This consideration is unobjectionable, but it supports a presumption against extrajurisdictional, rather than extraterritorial, application of U.S. laws. The second version of the separation-of-powers concern, stated in passing in one of the Rehnquist Court’s decisions, is to avoid legislative encroachment on the authority of the executive branch. This rationale does not withstand scrutiny, and even the Rehnquist Court barely relied upon it.

1. Judicial interference with the political branches’ conduct of foreign policy.

The Court has occasionally stated that one of the bases for the presumption 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 those with responsibility in this area. The concern that courts not interfere with the role of the political branches reflects the concerns over international discord discussed above: courts should avoid construing statutes in ways that lead to inadvertent conflicts with other countries. Of the three canons under consideration, the one that best comports with the limited role of U.S. courts with respect to foreign policy is the presumption against extrajurisdictionality.

By its nature, the Restatement balancing test would provide courts virtually unlimited discretion to decide how far federal statutes should extend. This discretion obviously runs counter to the principle that the other two branches have responsibility for foreign affairs, and creates enormous potential for inadvertent interference with their determination and

reached in antitrust law, a particularly fertile source of conflicts. Dodge, Understanding the Presumption, supra note 90. Such agreements have not been followed by general multilateral agreements coordinating antitrust policy, however. See generally Swaine, supra note 132; IBA Report, supra note 36, at 71-72. Although Elhauge believes that such a “treaty-eliciting” approach can make sense “in theory,” he doubts its utility in the context of antitrust. Elhauge, supra note 22, at 209-10. More generally, estimating the likelihood that increasing conflicts would result in international agreement would involve questions of foreign policy that courts are not equipped to address.

Sale, 509 U.S. at 188.
210 E.g., Palmer, 16 U.S. at 624; Benz, 353 U.S. at 147; McCulloch, 372 U.S. at 21-22.
implementation of foreign policy. Courts are ill-suited to determine and balance different nations’ interests, and that is not their normal role in our constitutional system. Nor can courts simply avoid such interference by applying a strict presumption against extraterritoriality. Narrow constructions of law may well avoid some types of conflicts, but they may also lead to others. As described above, failing to extend U.S. law to areas within its sole jurisdiction may give rise to protests from other states. 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 decisions limiting the jurisdictional scope of a U.S. statute, *United States v. Palmer*, illustrates the point. The case undoubtedly raised politically sensitive issues. The defendants had commissions from a South American republic rebelling against Spain, and determining whether they were revolutionaries or pirates might have involved the Court 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.” Chief Justice Marshall wrote that such questions are “generally rather political than legal in their character, . . . belong[ing] 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.”

Marshall’s characteristic eloquence in describing the “delicate and difficult” questions involved in reviewing acts taken in the course of a revolution should not obscure the fact that he did not defer to the views of the political branches on those questions; he overrode them. There was little doubt at the time 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 Congress responded to the decision limiting the statute by immediately enacting another one. The

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213 See Part III.A supra.
214 16 U.S. at 634.
215 Id.
216 See note 77 and accompanying text.
decision also prevented the Executive from prosecuting the defendants, a prosecution that it was presumably pursuing in full awareness of its implications for foreign relations.

The Empagran rule of reason would place courts in this position in every case, by providing them a completely open-ended list of factors to take into account in deciding whether to apply U.S. law. The Court is on far firmer ground when it limits the reach of statutes not based on vague concerns about the effect of its decisions on foreign affairs – effects that it is unqualified to judge – but rather in light of the bounds of legislative jurisdiction set by international law. Looking to international law for guidance is more suitable for courts better qualified to interpret the law than to conduct foreign policy, and it is more likely to avoid interference with the political branches.

2. Congressional interference with the Executive’s conduct of foreign policy.

In Sale v. Haitian Centers Council, Inc., 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.” This language seems to assume that the freedom of the executive branch to conduct foreign policy must be protected from undue interference by Congress by restricting the extraterritorial scope of federal statutes. But the relationship between the two political branches in foreign affairs is and always has been contested, to say the least. The lines between the authority of Congress and of the President are often too blurry to be suitable for judicial policing, and, in practice, the Court rarely makes the attempt. Sale itself involved a statute governing immigration, an area indisputably subject to regulation by Congress and not

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217 The Court took this position in the succeeding piracy cases. See notes 78-87 and accompanying text.
218 509 U.S. at 188. The statement may have roots in an earlier decision, National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), a case involving a labor dispute at Catholic high schools. The Court announced that before deciding whether the National Labor Relations Board had jurisdiction over the dispute, it had to decide 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. Id. at 501. The Court took this standard and the very language expressing it from McCulloch, even though, as four dissenters pointed out, McCulloch did not raise any question as to the constitutional power of Congress to extend its laws to foreign ships. Id. at 509 n.1. Oddly, 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 relations with foreign nations.” Id. at 500. This was a serious misreading of McCulloch, which actually emphasizes the importance of Congress, stating that it “alone has the facilities necessary to make fairly such an important policy decision.” 372 U.S. at 22 (quoting Benz, 353 U.S. at 147).
220 Id. at 135-36.
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 strict presumption against extraterritoriality promulgated by the Rehnquist Court 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 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. The Coast Guard interdicted Haitian refugees on the high seas in the late 1980s and early 1990s to avoid the application of U.S. law governing treatment of refugees. A decade later, the Bush Administration established a prison at Guantanamo Bay, and instituted secret prisons in other countries, to try to avoid U.S. laws governing treatment of detainees. Far from protecting the respective constitutional roles of the political branches, extending a strict presumption against extraterritoriality to places under sole U.S. authority allows the executive branch to avoid its primary constitutional function: to execute the laws enacted by Congress.

IV. The Goal of Consistency in Application of U.S. Law

Courts should strive to employ interpretive canons that are transparent and consistent enough for Congress, the Executive, and everyone else concerned to be able to predict whether and how they will be used to construe legislation. This goal may never be completely met. No canon is immune from change, or from manipulation by courts in order to reach preferred outcomes. Even applied consistently and in good faith, canons will still be subject to

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221 See Sale, 509 U.S. at 207 (Blackmun, J., dissenting) (“What the majority seems to be getting at . . . is that in some areas, the President, and not Congress, has sole constitutional authority. Immigration is decidedly not one of those areas.”).
222 See Raustiala, supra note 33, at 193-97, 204-07.
223 Tyler, supra note 24, at 1419 (“Many of the canons go a long way toward achieving predictability and continuity in the statutory regime, and for this reason they hold an important place in our legal tradition.”); Sunstein, supra note 23, at 462 (“If properly executed, [the task of generating interpretive principles] will significantly increase the candor and clarity of interpretation, by making the relevant norms explicit . . . [and] provide a clear and structured background against which Congress, administrators, and courts can do their work”); Eskridge & Frickey, supra note 32, at 66 (“by rendering statutory interpretation more predictable, regular, and coherent, interpretive regimes can contribute to the rule of law”); Easterbrook, supra note 22, at 63 (“One thing we wish the legal system to do is to give understandable commands, consistently interpreted.”).
224 See note 173 supra.
interpretive disputes. But that canons are not completely predictable does not mean that they are meaningless, or that it does not matter whether a canon is even capable of predictable application. Only such canons enable courts to produce the interpretive backdrop that allows Congress, the Executive, and others affected by federal statutes to understand how they are likely (albeit not certain) to be applied.

Some scholars suggest that, from this point of view, it is unimportant which canons courts choose, as long as they apply them consistently. Some interpretive approaches are far more predictable than others, however. The Restatement rule that the Supreme Court endorsed in *Empagran*, which asks courts to determine whether exercise of legislative jurisdiction is unreasonable on the basis of an open-ended balancing test, is inherently and famously indeterminate, as even some of its proponents acknowledge. In Larry Kramer’s words, “The considerations being weighed are always imprecise enough to permit several answers and to dictate none. . . . As a result, there is no greater certainty about the correctness of particular outcomes -- only more uncertainty about what those outcomes are likely to be.”

In principle, the Rehnquist Court’s adoption of the strict presumption against extraterritoriality should have resulted in a clear rule: U.S. laws never apply to actions outside U.S. sovereign territory unless Congress clearly expresses a contrary intent. The Court failed, however, to explain how its new canon varied from its previous reliance on jurisdiction. Instead of simply 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 reconcile its newer decisions with its older

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225 See Tyler, supra note 24, at 1420 (The inconsistent application of canons “is not a reason to . . . abandon use of the canons. It is instead a basis to call for more consistent application of those canons that bring normative good to the table and for engaging in a healthy debate over which ones fall into this category.”).

226 Eskridge & Frickey, supra note 23, at 49; Vermeule, supra note 66, at 140.

227 E.g., Born, supra note 90, at 98-99.

228 Kramer, Extraterritorial Application, supra note 204, at 755. He adds that “these problems are exacerbated by the incommensurable nature of the factors being balanced . . . When all is said and done, multifactored balancing invariably degenerates into the worst kind of decision making by intuition; rather than being guided by the test, judges manipulate the considerations to justify a result reached on other, unarticulated (and often poorly understood) grounds.” See also Bradley, Territorial Intellectual Property Rights, supra note 90, 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.”); IBA Report, supra note 36, at 170 (“As with all balancing tests, the reasonableness test has the advantage of flexibility, but risks indeterminacy, inconsistency and an appearance of subjectivity.”).

229 See Part II.C supra.
precedents (or, for that matter, to resolve questions left unanswered by the older precedents) has left lower courts free to pick and choose from virtually any set of decisions they liked.

The solution to this problem might seem to be that the Court re-emphasize the strict presumption against extraterritoriality, making clear that this time it really means what it says, and precedents not consistent with that presumption are no longer valid. The reason why the Court has failed to apply the presumption consistently, however, is that the United States has interests in extending its statutes to certain activities outside U.S. borders, as the previous section of this article explained. Those interests will repeatedly justify interpretations of ambiguous statutes that break through the strict presumption against extraterritoriality, leaving it full of loopholes that cannot easily be reconciled.

This section of the article describes the chaos among the lower courts that has resulted from the Supreme Court’s failure to adhere to a consistent set of canons, and how the proposed presumption against extrajurisdictionality would restore coherence in the application of U.S. law to three important areas: (a) U.S. ships and bases outside U.S. sovereign territory; (b) foreign actions with effects within U.S. territory; and (c) foreign ships in U.S. territory. The proposal would not resolve every potential interpretive dispute – what canon could? – but in each of these areas, and more generally, it would lend itself to far more consistent results than either the strict presumption against extraterritoriality or the Restatement rule of reason.

A. U.S. Ships and Bases Outside the United States

The jurisprudence of the Supreme Court with respect to U.S. ships and bases outside U.S. sovereign territory is in direct conflict with itself. Before the early 1990s, the Supreme Court did not apply any presumption against application of U.S. law to U.S. ships on the high seas. The Rehnquist Court’s decision in Sale v. Haitian Centers Council, Inc., contradicted those decisions but did not overrule them. As a result, lower courts have reached opposite results on the application of law to U.S. ships on the high seas, depending on whether they follow the earlier or later precedents. Similarly, the Supreme Court has issued inconsistent decisions on whether

\[\text{Refer to footnotes for citations.}\]
the presumption against extraterritoriality applies to U.S. bases overseas, holding in *Smith v. United States* that the presumption does apply to a U.S. scientific base in Antarctica,233 and in *Rasul v. Bush* that it does not apply to a military base in Guantanamo Bay, Cuba.234

The confusion among lower courts has been heightened by an influential 1993 decision from the D.C. Circuit, *EDF v. Massey*, which held that the presumption against extraterritoriality was irrelevant to whether the National Environmental Policy Act required the U.S. government to assess the environmental impacts of an incinerator in Antarctica.235 The D.C. Circuit reached the conclusion that the presumption did not apply primarily because it saw the critical action as the decision to approve the incinerator, which was taken in U.S. territory, in Washington, D.C. But the court also said that the presumption does not apply to places over which the United States has “some measure of legislative control,” such as the United States exercises over its research stations in Antarctica.236 *Massey* was decided before the Supreme Court held in *Smith* that the presumption against extraterritoriality did apply to U.S. bases in Antarctica and, by extension, in all foreign countries. After *Smith*, some lower courts applied the presumption to U.S. bases abroad.237 Because *Smith* did not mention *Massey*, however, and the Supreme Court declined to issue *certiorari* to overrule it, some lower courts have continued to draw on *Massey*. The Ninth Circuit, in particular, has cited *Massey* but gone further, deciding that the presumption against extraterritoriality does not apply to *any* lands that it views as being under U.S. legislative control, including not only a U.S. military base in Japan, but also a private apartment building there that the U.S. embassy rents for its employees.238

Under the presumption against extrajurisdictional application of U.S. law proposed in this article, courts would ask first whether international law provides the United States sole or primary jurisdiction over a U.S. ship or base, as it does over U.S. territory. Because U.S.-flag

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Cir. 1991) (in three-way split over whether to apply labor law to foreign nationals, Judge (now Justice) Alito rejected the application of the presumption against extraterritoriality on the ground that “the United States has sovereignty over American-flag vessels”).


236 986 F.2d at 533-34. *Massey* took the quoted language from *Aramco*, 499 U.S. at 248, which was quoting *Foley Bros.*, 336 U.S. at 285. The language had not been at issue in either of those cases, however.


238 *United States v. Corey*, 232 F.3d 1166, 1171 (9th Cir. 2000).
ships on the high seas are within complete U.S. jurisdiction under international law, as complete as U.S. jurisdiction over its own territory, no presumption against application of U.S. law would apply. Scientific bases in Antarctica, a land over which the United States recognizes no territorial claims, are equivalent to ships at sea, in that the state with control over the Antarctic station has complete jurisdiction over it, and, similarly, no presumption against application of U.S. law would apply. The effect would be a return to earlier Supreme Court jurisprudence; Sale and Smith would be considered to be wrongly decided.

The jurisdiction over U.S. military bases in foreign countries is more complicated. There, unlike Antarctica, the foreign country does have territorial jurisdiction, which normally is the primary jurisdiction under customary international law. Without more, that would suggest that under the proposal, application of U.S. law to such bases would have to overcome a soft presumption, by showing some evidence of congressional intent. However, U.S. bases are virtually always subject to a Status of Forces Agreement (or SOFA) between the United States and the host country that gives the United States the right to maintain the base and, inter alia, delineates the scope of each country’s legislative jurisdiction over it.\footnote{See Raustiala, supra note 33, at 138-40.} As a result, whether the United States has primary jurisdiction over a situation arising on a military base would depend on the terms of the treaty giving the United States the right to maintain the base. For example, the SOFA between the Japan and the United States 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.\footnote{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. See also Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948) (deciding whether U.S. labor law applied to a U.S. base on Bermuda in light of the allocation of jurisdiction under the lease agreement between the United States and the United Kingdom).}

Occasionally, the U.S. maintains a base in a foreign country on the basis of an international agreement granting much more extensive rights. The best-known example is probably the agreement between the United States and Cuba that authorizes the United States to “exercise complete jurisdiction and control over and within” 45 square miles along the southeast coast of
Cuba, at Guantanamo Bay. Based on that language, the Supreme Court concluded in *Rasul v. Bush* that the presumption against extraterritoriality did not apply, apparently because it regarded Guantanamo Bay as within the territorial jurisdiction of the United States. Whether or not the base is within its territorial jurisdiction, U.S. jurisdiction over the base is as complete as it is over U.S. territory, until the United States ceases to exercise its rights to occupy the base under the agreement. Therefore, as with U.S. ships at sea and bases in Antarctica, no presumption against application of U.S. law should apply under the proposed canon.

To be clear, the absence of a presumption against application of U.S. law would not mean that every federal statute would necessarily extend to every situation arising on U.S. ships at sea or bases in places such as Antarctica and Guantanamo Bay. In deciding whether to apply a statute to such situations, courts would examine the same factors that they employ to decide whether a statute applies to a situation within U.S. territory, including the statute’s language, purpose, and history, as well as consistent interpretations by agencies charged with implementation of the statute. Those factors could indicate that a statute does not apply to a particular situation outside the United States, just as they could indicate that the statute does not apply to a situation within it. But courts would construe the statutes without a presumption against their application.

**B. Foreign Actions with Effects in U.S. Territory**

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. The Court has occasionally concluded that particular laws, including in the criminal, antitrust, and patent fields, apply extraterritorially to actions that have substantial effects in the United States. It has never defined the scope of an “effects” exception to the presumption against extraterritoriality, however, or even made clear whether one exists, and allowing any exception at all seems to be inconsistent with decisions such as *Aramco*, which emphasize the importance of the presumption. The result has been that lower courts reach inconsistent results depending on

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241 Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418. A later treaty provides that the lease will remain in effect so long as the United States does not abandon its naval station there. Treaty Defining Relations with Cuba, May 29, 1934, art. III, 48 Stat. 1683. See *Rasul*, 542 U.S. at 471.

242 *Id.* at 480.

243 See, e.g., *Cruz*, 932 F.2d at 235 (Alito, J., dissenting).


245 See Kramer, *Extraterritorial Application*, supra note 204, at 751-54.
which line of precedents they follow. For example, the D.C. Circuit has relied on the first set of decisions to conclude that statutes generally apply extraterritorially if they address actions with effects in the United States, while the Second Circuit has said that almost no statute does so other than a few long-standing exceptions such as the Sherman Act. The zigs and zags of the Supreme Court’s jurisprudence make it difficult for those courts to hew consistently to one position or the other, however, and the Ninth Circuit has appeared to take both sides at once.

Criminal statutes appear particularly prone to conflicting interpretations. In United States v. Bowman, the Supreme Court stated that while a presumption against extraterritoriality applied to federal statutes addressing crimes against “the peace and good order of the community,” such as murder and robbery, the presumption did not apply to laws that 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.” On its face, this language seems to refer to the relatively uncontroversial “protective principle” of jurisdiction, according to which a state may extend its laws to actions

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246 See Massey, 986 F.2d at 531 (“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”).

247 Kollias v. D & G Marine Maintenance, 29 F.3d 67, 71 (2d Cir. 1994) (“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.”).

248 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. Sheyokan v. Sibley Int’l, 409 F.3d 414, 420 n.3 (D.C. Cir. 2005). Despite its strong language in Kollias, the Second Circuit has made no effort to apply a strict presumption against extraterritoriality 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. Schoenbaum v. Firstbrook, 405 F.2d 200, 206, reheard as to merits without reconsideration of jurisdiction, 405 F.2d 215 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969); Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1045 (2d Cir. 1983); Morrison v. National Australia Bank Ltd., 2008 WL 4660742 (2d Cir. 2008); S.E.C. v. Burger, 322 F.3d 187, 192-93 (2d Cir. 2003). Other circuit courts have also applied U.S. securities law to foreign actions with domestic effects. See Tamari v. Bache & Co., 730 F.2d 1103, 1107-08 (7th Cir. 1984) (listing cases); but see Carnero v. Boston Scientific Corp., 433 F.3d 1, 8 (1st Cir. 2006) (refusing to apply a whistleblower provision in the Sarbanes-Oxley Act extraterritorially despite the Act’s purpose to protect investors and build confidence in U.S. securities markets).

249 Compare 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) and Pakootas v. Teck Cominco Metals, Ltd., 2004 WL 2578982 (E.D. Wash. 2004), aff’d on other grounds, 452 F.3d 1066 (9th Cir. 2006), cert. denied, 128 S.Ct. 858 (2008) (relying on domestic effects to apply U.S. law to Canadian company releasing toxic wastes into the United States) with Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088 (9th Cir. 1994) (domestic effects do not avoid or overcome the presumption against extraterritorial application of copyright law).
that threaten essential state interests, rather than an expansive view of the “effects” basis for jurisdiction.\footnote{See notes 46-50 \textit{supra} and accompanying text.} The Second Circuit has adopted the narrower reading,\footnote{Kollias, 29 F.3d at 71; United States v. Gatlin, 216 F.3d 207, 211 n.5 (2d Cir. 2000); see also United States v. Martinelli, 62 M.J. 52, 57-58 (Ct. App. Armed Forces 2005) (agreeing with Second Circuit’s view of \textit{Bowman}).} but most other circuit courts have disagreed. Many, including the Third, Fifth, and Eleventh Circuits, “have routinely inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm.”\footnote{United States v. Plummer, 221 F.3d 1298, 1305 (11th Cir. 2000) (reviewing cases). See, \textit{e.g.}, United States v. Philip Morris U.S.A., Inc., 477 F. Supp. 2d 191, 197 (D.D.C. 2007) (“RICO has extraterritorial effect where illegal activity abroad causes a ‘substantial effect’ within the United States”).} Decisions from the D.C. and Ninth Circuits have gone even further, interpreting \textit{Bowman} to say that no presumption against extraterritoriality applies “when the legislation implicates concerns that are not inherently domestic.”\footnote{United States v. Corey, 232 F.2d 1166, 1170 (9th Cir. 2000); see United States v. Delgado-Garcia, 374 F.3d 1337, 1345 (D.C. Cir. 2004) (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”). Divisions have emerged within as well as between circuit courts. See, \textit{e.g.}, Corey, 232 F.3d at 1187 (McKeown, J., dissenting) (arguing that the majority “extends \textit{Bowman} far beyond its holding or any reasonable extension of it”); Delgado-Garcia, 374 F.3d at 1353 (Rogers, J., dissenting) (arguing that majority ignores \textit{Aramco} and \textit{Sale}); Martinelli, 62 M.J. at 68, 77 (Gierke, C.J., and Crawford, J., dissenting on ground that the majority’s interpretation of \textit{Bowman} is too narrow).} But some evidence would be necessary. Courts would not simply assume that statutes applied to foreign actions on the basis of domestic effects.\footnote{This last factor would enable the current U.S. approach to antitrust and securities laws, for example, to continue. Whatever the interpretation of those laws would have been it been first considered under the proposed canon, the long-standing U.S. position would not need to be altered now.} The inadequacy of the Restatement multi-factor balancing test cited in \textit{Empagran} is particularly clear in this context. In virtually every situation involving foreign actions and domestic effects, both countries will have significant connections to the situation. \textit{Empagran} was an extraordinarily easy case, because both the actions and the effects complained of in that
case were foreign. The one effort by members of the Court to apply the Restatement factors to foreign actions with domestic effects, the four-justice dissent in *Hartford Fire Ins. Co. v. California* in 1993, illustrates the indeterminacy of the Restatement approach. Writing for the dissent, Justice Scalia argued that the Sherman Act did not apply to the foreign actions of foreign insurers by emphasizing the number of Restatement factors that pointed against application of U.S. law. Despite his view that it would be “unimaginable that an assertion of legislative jurisdiction [over the actions] by the United States would be considered reasonable,” others have read the Restatement test to reach the opposite conclusion: that U.S. law should apply. Moreover, his opinion illustrates how easily a multi-factor test can be abused – he simply ignored the factors that cut against his position.

**C. Foreign Ships in U.S. Territory**

Cases concerning the application of U.S. law to foreign ships temporarily in U.S. territory are relatively unusual. When they have arisen, however, lower courts have been 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 reached diametrically opposite results. In *Stevens v. Premier Cruises, Inc.*, the Eleventh Circuit cited the *McCulloch* presumption against application of U.S. law the internal affairs of a foreign ship, but concluded that extending the ADA to a cruise ship would not implicate its internal affairs. Four years later, in *Spector v. Norwegian Cruise Line Ltd.*, the Fifth Circuit read the *McCulloch* rule much more broadly, as creating a presumption against the application of any domestic statute to a foreign ship.

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257 240 U.S. 764, 812 (Scalia, J., dissenting).
258 Id. at 819 (in addition to the activity taking place “primarily” in the United Kingdom, and the foreign nationality and residence of the defendants, Great Britain had a heavy interest in regulating the activity, in Scalia’s view, while the importance of the regulation to the United States was slight).
259 Id.
261 Dodge, *Extraterritoriality*, supra note 64, at 141. *See also Kramer, Extraterritorial Application, supra* note 204, at 755 n.31 (Justice Scalia “wanted Aramco, but thought he was prevented from getting it by precedent. So he manipulated the factors in §403(2) to reach what amounts to the same result, perhaps not self-consciously orchestrating so much as intuitively ordering open-ended factors to fit his own idiosyncratic preferences.”).
262 *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1242 (11th Cir. 2000).
263 *Spector v. Norwegian Cruise Line Ltd.*, 356 F.3d 641, 644-46 (5th Cir. 2004), *rev’d*, 545 U.S. 119 (2005). The court also applied the presumption against extraterritoriality on the ground that the ADA would require permanent
The Supreme Court granted certiorari in Spector to resolve the circuit split, but its decision made matters worse. The justices agreed that the Fifth Circuit had misunderstood McCulloch, 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. But they split into three groups, none commanding a majority, on what the internal-affairs rule means. None of the opinions really followed McCulloch, which had treated the internal-affairs as a rule of the international law of legislative jurisdiction, compliance with which was presumed under the Charming Betsy canon. Justice Kennedy treated the rule as a matter of comity; Justice Ginsburg read it not as a rule of international law, but as a court-made norm militating 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; and Justice Scalia saw it as a judicial rule designed to avoid potential conflicts with foreign or international laws.

Under the proposed canon, courts would again situate the internal affairs rule in the international law of legislative jurisdiction. That law provides that a ship flying the flag of one country that is in a port of another may be subject to the concurrent jurisdiction of both. Despite occasional statements (including in McCulloch) that international law does not allow the territorial state to enjoy jurisdiction over the internal affairs of the ship, commentators generally agree that in the absence of a specific treaty to that effect, as in Wildenhus, the decision not to extend domestic law to internal affairs is up to the discretion of the territorial state. For most of the last two centuries, however, international practice has exercised that discretion not to apply domestic laws to the internal affairs of the ship. As a result, the flag state retains primary jurisdiction over the internal affairs of the ship when it is in another state’s port.

Referring to international law thus produces a set of interpretive rules governing the application of U.S. law to foreign ships. If a bilateral treaty between the territorial and the flag state allocates jurisdiction between them over ships in port, then the court should not apply

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266 545 U.S. at 130-33 (Kennedy, J.); 143-45 (Ginsburg, J.); 150-54 (Scalia, J.).
267 Mali v. Keeper of the Common Jail (Wildenhus’ Case), 120 U.S. 1 (1887).
269 See Part II.B.3 supra.
federal law to the ship contrary to the treaty in the absence of an inescapably clear statement by Congress in the law itself. 270 Similarly, courts considering the application of U.S. law to foreign ships in the U.S. territorial sea and exclusive economic zone would be guided by international law addressing jurisdiction over such locations. 271 When no treaty exists allocating jurisdiction over a ship in U.S. port, then the primary (though not exclusive) jurisdiction over the ship’s internal affairs is still with the flag state, and U.S. courts should apply a soft presumption against application of U.S. law. In deciding whether a situation falls within the internal affairs of a ship, courts could be guided by relevant multilateral treaties addressing the internal regulation of the ship. The existence of labor or maritime conventions, for example, placing responsibility on flag states to regulate certain situations would support the conclusion that the flag state is expected to have primary (even if not sole) jurisdiction over such situations. 272

V. Conclusion

This article has argued that since the early 1990s, the Court’s jurisprudence with respect to the reach of federal statutes has become 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 legislative 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

270 See generally 6 Benedict on Admiralty § 2 (2008) (describing history and scope of such treaties).
271 E.g., UNCLOS, supra note 39, arts. 21 (authorizing coastal state to issue laws relating to innocent passage through territorial sea, subject to certain conditions), 56 (setting out rights, jurisdiction, and duties of coastal state in its exclusive economic zone).
congressional intent: that Congress normally intends its statutes to be construed to avoid inadvertent conflicts with other countries, to address domestic concerns, and to respect the separation of powers in the U.S. government. 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.