

# THE NEW EXTRATERRITORIALITY: *MORRISON V. NATIONAL AUSTRALIA BANK*, LEGISLATIVE SUPREMACY, AND THE PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION OF AMERICAN LAW

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The Supreme Court has recently rewritten another area of law: extraterritorial application of United States federal statutes. Last term, *Morrison v. National Australia Bank* jettisoned decades of settled law, casting doubt on long-accepted practices of statutory construction and instructing the lower courts to turn a deaf ear to indications of congressional intent any subtler than the proverbial meat axe.<sup>1</sup> The straightforward

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1. 130 S. Ct. 2869, 2877-78 (2010). As recently as *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 456 (2007), the traditional analysis tracing its roots to *American Banana Co. v. United Fruits Co.*, 213 U.S. 347, 357 (1909), was still intact. Exactly how far back it can be traced is a matter of some disagreement. The earliest case in the series was probably *American Banana*, but the methodology has changed since that case, which focused almost exclusively on strict territorialism. See *American Banana*, 213 U.S. at 358. *Morrison* recognized that *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-05 (1962), overruled *American Banana*. See *Morrison*, 130 S. Ct. at 2887 n.11 (“These are no longer of relevance to the point (if they ever were), since *Continental Ore* overruled the holding of [*American Banana*], that antitrust laws do not apply to extraterritoriality.”). The “effects test” for antitrust—which also influences the development of the current extraterritoriality law for securities regulation—is ordinarily traced to *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1953). Other early cases in the development of modern extraterritoriality law include: *Lauritzen v. Larson*, 345 U.S. 571, 578 (1953) (dealing with application of U.S. law to a maritime tort that took place outside U.S. territory); *Foley Bros. v. Filardo*, 336 U.S. 281, 284-85 (1949) (dealing with the application of the Eight Hour Law to a contract between the United States and a private contractor for construction work in a foreign country); *Steele v. Bulova*, 344 U.S. 280, 285-86 (1952) (dealing with extraterritorial application of U.S. trademark law); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 384 (1959) (dealing with application of U.S. law to maritime claims for injury

presumption that American law ordinarily does not apply outside the territory of the United States has now morphed into an innovative two-step process that first marginalizes Congress and then showcases judicial creativity.<sup>2</sup>

Judging by the number of contributors to this Symposium who discuss the case, *Morrison's* importance is generally appreciated.<sup>3</sup> But two issues raised by *Morrison* remain to be addressed. The first is the majority opinion's pretensions to judicial modesty; its reworking of the presumption against extraterritorial application of American federal statutes is peddled as an antidote to federal judges run amok.<sup>4</sup> Nothing could be further from the truth; sober examination in the cold light of day reveals that *Morrison's* new approach provides considerably greater opportunity for creative judging than the method it replaces.<sup>5</sup> The second is the potential damage *Morrison's* new approach does to the definition of extraterritoriality, generally.<sup>6</sup> The concept of "extraterritoriality" is important in areas as diverse as the constitutionality of administrative regulation under the Commerce Clause,<sup>7</sup> Due Process limits on interstate and international taxation,<sup>8</sup> and the applicability of the U.S. Constitution to international crimes.<sup>9</sup> *Morrison* requires rethinking of all of these.

This article starts with a brief introduction to *Morrison*, followed by some critical remarks.<sup>10</sup> In most cases, raising the evidentiary standard for rebutting the presumption has the perverse effect of abandoning evidence that actually *does* bear—however imperfectly—on intended territorial

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suffered onboard a foreign vessel outside U.S. territory); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20 (1963) (dealing with application of the National Labor Relations Act to a foreign crew employed on vessels flying foreign flags and owned by foreign subsidiaries of a U.S. company sailing between the United States and other countries). More recent cases include: *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 255 (1991) (dealing with extraterritorial application of Title VII of the Civil Rights Act); *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796 (1993) (dealing with application of The Sherman Act and The McCarran-Ferguson Act to foreign conduct meant to produce, and did in fact produce, some substantial effect in the United States). None of these cases applied to two-step process set out in *Morrison*. See *Morrison*, 130 S. Ct. at 2884 & n.9.

2. See *infra* Part 1(B)(3) and note 57 and accompanying text.

3. See William S. Dodge, *Morrison's Effects Test*, 40 SW. L. REV. 687 (2011); John H. Knox, *The Unpredictable Presumption Against Extraterritoriality*, 40 SW. L. REV. 635 (2011).

4. See *infra* Part 1(B)(3)-(4).

5. See *id.*

6. See *infra* notes 53-55.

7. See discussion *infra* Part 2(A).

8. See discussion *infra* Part 2(B).

9. See discussion *infra* Part 2(C).

10. See *infra* Part 1.

scope.<sup>11</sup> In place of a less-than-perfect evidentiary showing about Congressional intentions, *Morrison* substitutes a purely judicial construct, “focus,” that makes no pretense at all of reflecting what Congress wanted.<sup>12</sup> So much for legislative supremacy.

The second half of the paper shows how this purely judicial construct threatens to undermine cases in related areas that depend on existing definitions of extraterritoriality.<sup>13</sup> The *Morrison* majority’s new definition may cause problems in the precise context in which it was developed. But, even more likely, it may not perform as intended in some of the other settings to which *Morrison* might apply.<sup>14</sup> If Justice Scalia’s approach to extraterritoriality is found to be generally applicable, it will have consequences that might surprise the Justices who voted for it.<sup>15</sup>

#### 1. MORRISON V. NATIONAL AUSTRALIA BANK: TWO BITES AT THE APPLE

*Morrison v. National Australia Bank* involved the efforts of a foreign investor to procure for the members of a foreign investors’ class the benefits of U.S. securities law.<sup>16</sup> Although the defendants included both foreigners and Americans, the securities in question were traded only on foreign exchanges.<sup>17</sup> Various aspects of the allegedly fraudulent conduct occurred in the United States, but the purchase and sale of the securities at issue had not.<sup>18</sup> In an opinion written by Justice Scalia, and joined by Justices Roberts, Kennedy, Thomas and Alito, the Supreme Court affirmed the lower court’s dismissal.<sup>19</sup> Justice Breyer concurred in part and concurred in the judgment;<sup>20</sup> Justices Stevens filed a separate concurring opinion in which Justice Ginsburg joined.<sup>21</sup> The opinion of interest to us here is the majority’s.

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11. See *infra* text accompanying notes 33-34.

12. See *infra* text accompanying notes 52-54.

13. See *infra* Part 2.

14. See *infra* note 99 and accompanying text.

15. See *infra* text accompanying note 101.

16. 130 S. Ct. 2869, 2876 (2010).

17. *Id.* at 2875-76.

18. *Id.*

19. *Id.* at 2875, 2888.

20. *Id.* at 2888 (Breyer, J., concurring in part and concurring in the judgment).

21. *Id.* (Stevens, J., concurring).

### A. *The Morrison Opinion*

Justice Scalia's opinion for the Court cuts back substantially on the extent to which the familiar presumption against extraterritoriality allows U.S. law to be applied to cases having contacts with foreign countries. It explains this cutback in terms of respect for the authority of Congress and the limited role of federal judges in our democratic system of government.<sup>22</sup> At the same time, however, it mitigates the stringency of this new standard by holding that certain cases with foreign elements do not actually involve extraterritorial application of U.S. law.<sup>23</sup> Where a particular contact—the so-called “focus”—towards the United States, the case does not involve extraterritoriality and the presumption is inapplicable.<sup>24</sup>

The end result is that there are now two ways of arguing for the applicability of U.S. law.<sup>25</sup> Either one can claim that Congress intended application of U.S. law to a particular set of facts or one can claim that the particular fact pattern is not extraterritorial in the first place so that the presumption is inapplicable.<sup>26</sup> United States law applies if either the presumption is relevant but rebutted, or the presumption is irrelevant. After a brief elaboration of how the justices in the *Morrison* majority saw their new logic functioning, we will turn to the question of whether they were right.

#### 1. The First Step: Deference to Congress

*Morrison* addresses application to the 1934 Securities Exchange Act of the long-standing presumption that U.S. law is ordinarily not applicable extraterritorially.<sup>27</sup> Justice Scalia's opinion asks first whether Congress provided any guidance sufficient to rebut the presumption. Its opening lines are unremarkable:

It is a “long-standing principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within

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22. See *infra* note 57 and accompanying text.

23. See *infra* text accompanying notes 38-39.

24. See *id.*

25. See discussion *infra* p. 663 (“[T]he proponent of American law now gets ‘two bites at the apple . . . .’”).

26. See *id.*

27. *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (citing the Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2006)).

the territorial jurisdiction of the United States.” . . . This principle represents a canon of construction, or a presumption about the statute’s meaning, rather than a limit upon Congress’s power to legislate . . . It rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters. . . . Thus, “unless there is the affirmative intention of the Congress clearly expressed” to give the statute extraterritorial effect, “we must presume it is primarily concerned with domestic conditions.” . . . The canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law . . . When a statute gives no clear indication of an extraterritorial application, it has none.<sup>28</sup>

The opinion’s sprinkling of citations to previous decisions suggests that its drafters believed this way of framing the issue to be consistent with previous judicial applications of the presumption.

Justice Scalia’s opinion moves almost immediately beyond earlier authority, however, explaining that the presumption against extraterritoriality can only be rebutted by providing affirmative evidence of what Congress actually intended.<sup>29</sup> Judicial policy making, the Court made clear, cannot be defended as an effort to determine what Congress would have thought had the question of international applicability been raised.<sup>30</sup> The opinion castigates the lower courts for misinterpreting the presumption, singling out the Second Circuit for particular criticism, but also “[o]ther Circuits [which]. . . described their decisions regarding the extraterritorial application of [section] 10(b) as essentially resolving matters of policy.”<sup>31</sup>

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28. *Id.* at 2877-78 (internal citations omitted).

29. *Id.* at 2880-81.

Commentators have criticized the unpredictable and inconsistent application of § 10(b) to transnational cases. . . . Others, more fundamentally, have noted that using congressional silence as a justification for judge-made rules violates the traditional principle that silence means no extraterritorial application. . . . The criticisms seem to us justified. The results of judicial-speculation-made-law-divining what Congress would have wanted if it had thought of the situation before the court-demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.

*Id.* (internal citations omitted).

30. *See, e.g., id.* at 2880 (criticizing “[o]ther Circuits [which] . . . described their decisions regarding the extraterritorial application of [section] 10(b) as essentially resolving matters of policy”); *see also id.* at 2881 (“The results of judicial-speculation-made-law-divining what Congress would have wanted if it had thought of the situation before the court-demonstrate the wisdom of the presumption against extraterritoriality.”).

31. *See, e.g., id.* at 2878.

Despite this principle of interpretation, long and often recited in our opinions, the Second Circuit believed that, because the Exchange Act is silent as to the extraterritorial application of [section] 10(b), it was left to the court to “discern” whether Congress would have wanted the statute to apply. . . . This disregard of the presumption against extraterritoriality did not originate with the Court of Appeals panel in this case. It has been repeated over many

The majority denies that its own standard is overly demanding. Justice Scalia rejects, in particular, the concurring opinion's characterization of his approach as a "clear statement" rule. He writes that under his new theory, context as well as textual evidence can be taken into account:

[W]e do not say, as the concurrence seems to think, that the presumption against extraterritoriality is a "clear statement rule," if by that is meant a requirement that a statute say "this law applies abroad." Assuredly context can be consulted as well. But whatever sources of statutory meaning one consults to give "the most faithful reading" of the text . . . there is no clear indication of extraterritoriality here.<sup>32</sup>

The majority's assurances that *Morrison* is not a "clear statement rule" are not entirely convincing, considering the number of times the majority opinion refers to clarity of the evidence as a necessary condition.<sup>33</sup>

Even taking both text and context into account, *Morrison* could not meet the requirement that proponents of U.S. law supply "affirmative evidence" of congressional intent. "In short," the Court concluded, "there is no affirmative indication in the Exchange Act that [section] 10 (b) applies extraterritorially, and we therefore conclude that it does not."<sup>34</sup> It is only a slight exaggeration to say that after *Morrison* nothing but a statutory choice of law provision will be enough to rebut the presumption against extraterritoriality.

Yet all is not lost for proponents of U.S. law; the opinion immediately recognizes a second line of attack. *Morrison* rests, ultimately, on a standardless concept—"focus"—that sneaks judicial values in through the back door after slamming it closed at the front.

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decades by various courts of appeals . . . . That has produced a collection of tests for defining what Congress would have wanted, complex in formulation and unpredictable in application.

*Id.* See also *id.* at 2878-79 ("[T]he Second Circuit had excised the presumption against extraterritoriality from the jurisprudence of [section] 10(b) and replaced it with the inquiry whether it would be reasonable (and hence what Congress would have wanted) to apply the statute to a given situation."); *id.* at 2879 ("[The effects test] became the north star of the Second Circuit's [section] 10(b) jurisprudence, pointing the way to what Congress would have wished. . . . The Second Circuit never put forward a textual or even extra-textual basis for these tests.")

32. *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010) (internal citations omitted).

33. See, e.g., *id.* at 2877 (referring to "the affirmative intention of the Congress clearly expressed"); *id.* at 2878 ("When a statute gives no clear indication of an extraterritorial application, it has none."); *id.* at 2883 ("[W]hatever sources of statutory meaning one consults to give 'the most faithful reading' of the text . . . there is no clear indication of extraterritoriality here.")

34. *Id.* at 2883.

## 2. The Second Step: Focus

The second step involves a determination of whether the presumption against extraterritoriality is even applicable.<sup>35</sup> The presumption, the opinion argues, only applies to extraterritorial cases, and not to domestic ones.<sup>36</sup> Determining whether the dispute before the Court is extraterritorial or domestic, reasons Justice Scalia, requires identifying the “focus” of the substantive law in question.

The “focus” that the majority refers to is a relative newcomer to the jurisprudence of extraterritoriality.<sup>37</sup> It seems to be some sort of center of gravity—the essence of the cause of action—such that if the focus is situated in the United States the fact pattern as a whole can be treated as domestic.<sup>38</sup> Just as a case that is entirely internal to U.S. territory—all of the parties, all the alleged injury, all of the property, and all of the activities point to the United States—does not call for application of the presumption,

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35. *See id.* at 2883-84.

36. *Id.*

Petitioners argue that the conclusion that § 10(b) does not apply extraterritorially does not resolve this case. They contend that they seek no more than domestic application anyway, since Florida is where HomeSide and its senior executives engaged in the deceptive conduct of manipulating HomeSide’s financial models; their complaint also alleged that Race and Hughes made misleading public statements there. This is less an answer to the presumption against extraterritorial application than it is an assertion—a quite valid assertion—that that presumption here (as often) is not self-evidently dispositive, but its application requires further analysis. For it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case. The concurrence seems to imagine just such a timid sentinel, but our cases are to the contrary.

*Id.* (internal citation omitted).

37. Justice Scalia cited two earlier cases for this “focus” analysis. *See id.* at 2884 (“In *Aramco*, for example, the Title VII plaintiff had been hired in Houston, and was an American citizen. . . . The court concluded, however, that neither that territorial event nor that relationship was the “focus” of congressional concern . . . but rather domestic employment.” (internal citations omitted)). However, the application here was very different. In *Morrison*, the “focus” concept was elevated to being a sufficient basis for the application of U.S. law; the two earlier cases did not do this. *See, e.g., E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 255 (1991) (“This conclusion is fortified by the other elements in the statute suggesting a purely domestic focus.”).

38. When one looks at the evidence that the *Morrison* Court considered in deciding in which factor to find the focus, one finds the same sort of discussion of the statute as is commonly found in earlier cases deciding extraterritoriality the traditional way. The Court cites to cases dealing with substantive issues concerning securities law, leading the Court to conclude, for example, that “[t]hose purchase and sale transactions are the objects of the statutes solicitude. It is those transactions that the statute seems to “regulate.” *Morrison*, 130 S. Ct. at 2884. Material of this sort is common in past cases dealing with extraterritorial application of U.S. law. *See, e.g., Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795-96 (1993); *id.* at 813-18 (Scalia, J., dissenting); *Aramco*, 499 U.S. at 248-56; *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454-56 (2007).

neither does any other case that has its “focus” in the United States. It is not that the location of the focus in the United States rebuts the presumption; it simply makes the presumption irrelevant.<sup>39</sup> Determination that the focus of the case is situated within the United States thus obviates the need for a tedious and most probably fruitless search for suitable proof of what Congress intended.

This argument has a certain intuitive appeal. It is undeniable that the presumption against the application of U.S. law has no relevance for cases without foreign elements, that is, purely domestic cases. In the ordinary domestic antitrust or securities fraud case the presumption is never brought to bear, and it is not clear (if it were brought to bear) how it could be rebutted. Where would one look for specific, affirmative indications that our securities or antitrust laws apply to cases arising in the United States? Domestic legislation does not ordinarily specify that it applies to cases within the United States; this is taken for granted. The application of this presumption to purely domestic disputes just does not make much sense.

The presumption that U.S. law *does* ordinarily apply to cases with only domestic elements and the presumption that U.S. law *does not* ordinarily apply to cases with foreign elements are mirror images. Justice Scalia therefore seems to be on firm ground when he points out the need to distinguish which cases are which.<sup>40</sup> *Morrison* takes the logic one step further though, arguing that U.S. domestic law automatically extends to some *mixed* cases that are neither wholly domestic nor wholly foreign.<sup>41</sup> According to *Morrison*, the reason is that some mixed cases are not really extraterritorial.<sup>42</sup> The cases that are not extraterritorial are the ones said to have a U.S. “focus.”<sup>43</sup> For example, after surveying all the evidence, Justice Scalia concluded that the focus of a securities dispute was the transaction between the parties, so that if the transaction took place in the United States the presumption would not apply:

[W]e think that the focus of the Exchange Act is not upon the place where the deception or originated, but upon purchases and sales of securities in the United States. . . . Those purchase-and-sale transactions are the objects of the statute’s solicitude. It is those transactions that the statute seeks to “regulate” . . . it is parties or prospective parties to those transactions that the statute seeks to “protec[t]” . . . . And it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions and

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39. *See supra* notes 35-36.

40. *See Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2883-84 (2010).

41. *See id.* at 2884.

42. *See id.*

43. *See id.*



other securities, to which [section] 10(b) applies.<sup>44</sup>

The Court identified the focus as including all purchases or sales taking place in the United States, or a security listed on a domestic stock exchange.<sup>45</sup> Since on the facts of *Morrison* the transaction did not take place in the United States, and the stocks were not listed in an exchange in the United States, the case could not be treated as a domestic case; it was extraterritorial, and the presumption against extraterritoriality would still apply to bar the application of American securities law.<sup>46</sup> If the transaction had taken place in the United States, however, or the stocks had been listed on an American stock exchange, the case would have to be treated as if it were purely domestic and would escape the presumption against application of American law.

The end result of *Morrison*'s two-step reasoning is that the proponent of American law now gets "two bites at the apple," or two different ways to show that U.S. law applies. The plaintiff can either try to show that Congress wanted its law to apply, or else argue that the case is sufficiently domestic, so that no congressional mandate need be shown to justify the statute's application. United States law applies, in other words, if either (1) the case is sufficiently tied to the United States (because the focus occurred there) so that Congress does not need to specify that U.S. law applies, or (2) Congress indicated sufficiently and unambiguously its preference that U.S. law should apply so that it does not matter that the focus is located somewhere else.

### B. Assessment

The possibility that the presumption against extraterritorial application of a statute can be circumvented simply by declaring the presumption inapplicable creates a major loophole. Rather than undertaking a thankless (and probably fruitless) search for indications about what Congress wanted, a court need only decide that the presumption against extraterritoriality is inapplicable because the "focus" of the substantive law in question is something that took place in the United States. The irony is that the

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44. *Id.* (first alteration in original) (internal citations omitted).

45. *See, e.g., id.* at 2886 ("The transactional test we have adopted [is] whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange . . .").

46. *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2888 (2010) ("Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.").

evidentiary standard needed to invoke the loophole—which no one pretends has been authorized by Congress—is considerably lower than the evidentiary standard needed to satisfy the presumption—a presumption that supposedly reflects what Congress wanted. *Morrison* makes it more difficult than before to base the result on what Congress wanted and easier than before to base the decision on undeniably judge-made concepts.

On closer scrutiny of these considerations it appears that, while citing the principle of legislative supremacy, Justice Scalia's opinion has actually increased the opportunity for judicial policy making and diminished the importance of congressional preferences. Given the novelty of the approach it is not surprising how many questions remain unanswered. Among the open questions are: whether this second step is really necessary; the relative priority of the two steps; the role of judicial creativity; and the potential for inconsistencies with what Congress expected or wanted.

### 1. Are Two Steps Really Necessary?

A preliminary question is whether this new apparatus is really necessary. It seems doubtful. The traditional one-step approach accommodated the same result without a second step, without a new concept, and without self-congratulatory pronouncements about deference to the elected branches.<sup>47</sup>

*Pasquantino v. United States* is such an example.<sup>48</sup> Decided only five years earlier, *Pasquantino* held a federal wire fraud statute applicable to a scheme to defraud Canada of tax revenues that was undertaken in the United States.<sup>49</sup> The presumption against extraterritoriality was held to be satisfied because “[i]n any event, the wire fraud statute punishes frauds executed ‘in interstate or foreign commerce’ . . . so this is surely not a statute in which Congress had only ‘domestic concerns in mind.’”<sup>50</sup> Justice Thomas wrote for the majority:

[O]ur interpretation of the wire-tap statute does not give it “extraterritorial effect.” . . . Petitioners used U.S. interstate wires to execute a scheme to defraud a foreign sovereign of tax revenue. Their offense was complete the moment they executed the scheme inside the United States; “[t]he wire fraud statute punishes the scheme, not its success.” . . . This domestic element of petitioners’ conduct is what the Government is punishing in

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47. See, e.g., *Pasquantino v. United States*, 544 U.S. 349, 371-72 (2005).

48. *Id.*

49. *Id.*

50. *Id.* (internal citation omitted).

this prosecution, no less than when it prosecutes a scheme to defraud a foreign individual or corporation, or a foreign government acting as a market participant.<sup>51</sup>

What is interesting about *Pasquantino*, for present purposes, is the majority's reasoning about "what the Government is punishing": it was the petitioners' (domestic) planning and preparation, the Court concluded, which was sufficient under U.S. law to establish the offense.<sup>52</sup> *Pasquantino* did not employ the terminology of "focus" and did not create a major loophole in the presumption; it simply interpreted the statute using common sense.

Five years later, *Morrison* modified the terminology and reasoning without improving in any way on the analysis.<sup>53</sup> Writing that the central "focus" of the regulatory scheme was the purchase and sale, the majority opined that "[t]hose purchase-and-sale transactions are the objects of the statute's solicitude. It is those transactions that the statute seeks to 'regulate.'"<sup>54</sup> It then concluded that if the purchase and sale took place in the United States, the case was a domestic case and application of U.S. law would not be extraterritorial.<sup>55</sup>

The common thread is that certain contacts—one or perhaps two—are distinctive as somehow being the special object of the statute. The difference is that, in the traditional setting, this line of reasoning is part of the attempt to interpret the statute, and is therefore integral to the application of the presumption against extraterritoriality. By the time it reappears in *Morrison*, the concept is detached from application of the presumption and not part of an effort to determine what Congress intended. The *Morrison* court provides no reason to suggest why this change in terminology, which moves the process further away from statutory interpretation, is somehow necessary.

Most importantly, *Pasquantino*'s conclusion is obviously subject to congressional correction while *Morrison*'s is less clear. Yet if the answer is that *Morrison*'s conclusion about "focus" is also subject to congressional correction, then how is it different from (let alone better than) simply treating every part of the analysis as statutory interpretation, as *Pasquantino* does? The utility of a two-step process is far from clear.

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51. *Id.* at 371 (emphasis added) (second alteration in original).

52. *See id.*

53. *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2883-84 (2010).

54. *Id.* (emphasis added).

55. *Id.* at 2884-85.

## 2. The Relative Priority of the Two Steps

The next reason for skepticism about *Morrison*'s new approach relates to the priority of the two steps. Initially, it is not clear why the majority opinion sets the two steps out in the order that it does. The opinion asks first about the existence of any congressional guidance rebutting the presumption against extraterritorial application, and only then asks to which cases the presumption applies.<sup>56</sup> One might think that the line between extraterritorial and domestic cases should be drawn first, thus identifying the scope of the presumption, and the presumption applied to the extraterritorial cases afterwards. Logically, the second step is really in the nature of a threshold question, a precondition for the relevance of the first.

It is arguable that the order is not important; the result would be the same either way. The opinion as a whole sets out two different paths to the application of U.S. law, either one of which is adequate. United States law will be applied if *either* the focus occurred in the United States *or* Congress otherwise made some deliberate provision for application of U.S. law. Which alternative is considered first does not affect the conclusion. This argument has some truth to it. However, the order in which the questions are asked does influence which prong a decision is likely to rest on. In any case, with a fact pattern satisfying both prongs, the first question asked will dispose of the case. By placing the presumption against extraterritoriality first, the opinion increases the likelihood that the decision will be based on that part of the analysis.

Does this matter? Logically, no; but, from a more political perspective, possibly yes. The first step of the majority's analysis is clearly and self-consciously grounded on deference to the elected branches.<sup>57</sup> The consistent theme throughout this section of the majority opinion is that judges are not authorized to think creatively about what Congress would have, should have, or could have, wanted.<sup>58</sup> By placing the presumption first in line, the *Morrison* Court gives greater visibility to the decision's overtly ideological commitment. Future courts will have to address the first question, congressional intent, as a precursor to the second. Even if the first step of the analysis is not dispositive, rehearsing its merits in case after case effectively reinforces the Court's position. The Court's way of ordering the analysis thus increases the visibility and apparent importance of the

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56. *Id.* at 2884 n.9 ("Although it is true, as we have said, that [section] 10(b) has no extraterritorial effect does not resolve this case, it is a *necessary first step* in the analysis." (emphasis added)).

57. *See id.* at 2877-78, 2881.

58. *See id.* at 2881.

decision's chief ideological component: legislative supremacy.

### 3. *Morrison* and Judicial Creativity

The impression thus created, however—that congressional intent is the most important concern—is quite misleading. Overall, the standard of proof for rebutting the presumption against extraterritoriality is so restrictive that it is almost impossible to base decision on that consideration. Filling the vacuum is the new concept of “focus,” which is a judicial creation. The Court's professions of deference to Congress in the first step of the analysis are simply a distraction from a more important, but less obvious consideration: the judicial creativity involved in resolution of the second step.

*Morrison* brings about this change in orientation by ruling out certain indications of congressional intent that would otherwise be taken into account.<sup>59</sup> In the ordinary domestic context, as in the traditional approach to extraterritoriality, interpretation of statutes takes at least three different forms. The first includes explicit intent of Congress (*express intent*); the second includes factual inference about what Congress actually wanted but did not clearly state (*implied in fact intent*); and a third includes reasoning about what Congress would probably have wanted under the circumstances, considering all remaining available evidence about actual congressional policies and priorities (*constructive intent*). While the first is more probative than the second, and the second more probative than the third, in domestic cases there is no categorical bar to using any of these. Neither, until *Morrison*, was there a categorical bar in extraterritoriality disputes.<sup>60</sup>

*Morrison*, however, holds that application of U.S. law to international cases must be shown to have been the affirmative and clear intent of Congress.<sup>61</sup> In cases with international elements, it categorically bars the third type of argument and probably also rules out most or all of the second. The evidence that *Morrison* eliminates from consideration might not be the most probative evidence that one would like; it is, however, closer to determination of congressional intent than the concept that replaces it. The *Morrison* opinion seems to assume that it is better for judges to ignore congressional preferences that are insufficiently articulated than to do their best, on less than perfect evidence, to determine what Congress was

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59. See *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2892 (2010) (Stevens, J., concurring).

60. See *id.* at 2891-92.

61. *Id.* at 2877 (Scalia, J., majority).

probably thinking.

Moreover, the gap created by disallowing inference about actual or constructive intent is filled by adding in an analysis of the statute's "focus." Focus is not determined by consulting affirmative intent of Congress; tellingly, the sort of protestations about a single-minded search for actual congressional intentions that characterized *Morrison's* first step are nowhere in evidence.<sup>62</sup> The evidence that the majority opinion consults resembles more nearly the proof of "constructive intent" that the Court specifically ruled out for purposes of rebutting the presumption.<sup>63</sup> Therefore, once the analysis moves into this second step—which (since the presumption will rarely be rebutted) it typically will—a decision to apply U.S. law cannot be attributed to the will of the elected branches.

The way that the standard is presented obscures the degree to which the effect of *Morrison's* rule is to impose a higher standard on Congress. *Morrison* is, in effect, a judicially imposed requirement that Congress express itself more clearly in international applications of a statute than is required in domestic applications, on pain of having its wishes ignored. *Morrison's* two-step approach is the logical equivalent of a rule stating that where the focus of the dispute is not in the United States—as determined in accordance with a judicially crafted standard—then for U.S. law to apply Congress must indicate its wishes clearly. To dislodge the judicially crafted standard, in other words, a clear affirmation of congressional intent must be shown. The presumption that results is not so much a presumption against extraterritoriality, but rather a presumption in favor of the judicially crafted definition of focus. Whatever this is, it is not judicial deference.

Justice Scalia's insistence that extraterritoriality must be supported by unambiguous evidence of Congressional intent is a convenient rhetorical platform for delivering an ideological message.<sup>64</sup> But the predictable consequence is that this standard will not be met and the best available evidence will have to be disregarded. The *Morrison* majority told the lower courts, in effect, that if Congress doesn't "affirmatively" spell things out, then they have no authority to try to figure out what Congress wanted.<sup>65</sup> The unintended consequence of the Court's insistence on the highest standards of proof at the first stage is likely to be the increased importance of judicial creativity in the second. Closet judicial activists now have the best of both worlds: grand protestations of deference to the elected branches together with virtually total flexibility to decide the case as they see fit.

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62. See *id.* at 2883-86.

63. See *id.* at 2879-81.

64. See *id.* at 2892 (Stevens, J., concurring).

65. *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2881 (2010) (Scalia, J., majority).

#### 4. Contradicting Congress

The lack of deference to Congress is not a purely theoretical problem; in certain cases, the *Morrison* approach may actually result in contradicting the result that Congress wanted. A key problem with *Morrison*'s two-step approach is that the first-step analysis of congressional intent, which the Court recognizes as the authoritative policy of the elected branches of government, is not the end of the matter. If the *Morrison* majority is assumed to be correct *arguendo*—namely, if one assumes that its grudging refusal to consider ambiguous evidence is an accurate way to determine what Congress wanted—then why isn't that conclusion dispositive? Adding another step to the calculation—a step that has no basis in legislative preference—can only dilute the legitimacy of the Court's conclusion.

Of course, if the presumption is rebutted at the first step, and U.S. law held applicable, then that *is* dispositive and the legitimacy of the ultimate conclusion is not in doubt. But if the presumption is *not* rebutted, as will usually be the case, then the proponent of U.S. law has another chance. He or she can try to establish enough connection with the U.S. that the “focus” of the dispute is local, the case is domestic, and U.S. law applies even though no evidence has been offered that this is what Congress wanted.

What makes this result problematic is that the decision at the first step not to apply U.S. law ought to create something of a negative inference. This is particularly clear (although not in theory limited to) the case where the statute includes a choice of law provision. If the choice of law provision is not satisfied, the substantive law in question seemingly should not apply.<sup>66</sup> Assume, for example, that there is sufficient evidence to satisfy the Court that Congress affirmatively and explicitly concluded that the securities act should be applicable whenever the defendant is an American national. Assume, also, that (as per *Morrison*) the “focus” of the securities law is determined to be the location of the transaction.

If a case arises in which the defendant is foreign but the transaction occurred in the United States, then the first step does not support application of U.S. law, but the second step does. Under *Morrison*, U.S.

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66. Does a plot to defraud a foreign government of tax revenue violate the federal fraud statute? According to the Court, “[b]ecause the plain terms of [section] 1343 criminalize such a scheme, and because this construction of the wire fraud statute does not derogate from the common-law revenue rule . . . it does.” *Pasquantino v. United States*, 544 U.S. 349, 353 (2005) (reaching this holding despite the dissent's argument about the presumption against extraterritoriality).

law applies even though the choice of law provision suggests the contrary.<sup>67</sup> But this cannot be the right result. Where Congress' intention is clear (e.g., because there is a choice of law provision in the statute), the statute should apply only if the defendant is American. Surely it is not open to a federal judge to decide that despite the failure to satisfy an explicit choice of law provision there is, nonetheless, an implicit alternate basis for application of U.S. law.

##### 5. Conclusion: The Best as Enemy of the Good?

Where there is an inadequate volume of ambiguous evidence about Congress' intentions, there are two possible responses. The judge can still make his or her best efforts to construe the statute in the face of uncertainty. In the alternative, the judge can disregard whatever particularized evidence does exist and apply a presumption. *Morrison* changes this calculation about what to do when the evidence is minimal. Because the standard for legislative clarity is raised, the probability that the case will be decided on particularized evidence is reduced. Fewer cases by far will be decided according to the usual methods of statutory construction—making the best decision possible of whatever evidence can be found—while more cases will be decided by applying the presumption than under the traditional view. But *Morrison* adds a third possible outcome to the mix: U.S. law can be applied in cases where something that happened in the United States is the focus of the dispute.

Of the three alternatives—decide on the basis of whatever minimal evidence can be found, decide on the basis of a generalized presumption but no specific evidence, and decide on the basis of whether the United States is the “focus” of the dispute—the *Morrison* solution is the worst, from the point of view of respect for Congress. Basing application of U.S. law on the judicially created concept of “focus”—established using evidence that would not qualify to rebut the presumption against extraterritoriality—can hardly be explained or defended as respect for the policies and preferences of the elected branches of government in a democracy.

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67. Because the defendant was not an American—and because the nationality of the defendant was singled out by Congress—the presumption against extraterritoriality is still applicable. Although the presumption has been rebutted for certain situations (those where the defendant is American), it still applies in all cases where the defendant is of foreign nationality. As the *Morrison* Court put it, “[W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms.” *Morrison*, 130 S. Ct. at 2883.



## 2. MORRISON AND RELATED APPLICATIONS OF THE CONCEPT OF EXTRATERRITORIALITY

The changes that *Morrison* might potentially bring about are not limited to its original context, namely, the international reach of federal statutory law. Extraterritoriality plays a role in other areas of law, as well.<sup>68</sup> Sometimes the importance of the concept turns on idiosyncratic and fact-specific applications of particular federal statutes, such as the Outer Continental Shelf Lands Act, the National Labor Relations Act, or the McCarran-Ferguson Act.<sup>69</sup> But there are also several well-defined areas in

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68. In addition to the contexts discussed in this article, extraterritoriality has been cited as a relevant consideration in other contexts. See, e.g., *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) (the right to travel); *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 271-72 (1980) (Full Faith and Credit Clause); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985) (Due Process Clause's limitations on state choice-of-law); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (federal limits on state choice-of-law questions); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 377 (2000) (foreign relations law); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 707 (1988) (service of process); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 U.S. 1431, 1440 (2010) (class action suits).

69. The Court considered whether the Outer Continental Shelf Lands Act preempted Iowa tax law in *Shell Oil Co. v. Iowa Department of Revenue*. 488 U.S. 19, 32 (1988) ("For the reasons set out above . . . [w]e hold that the OCSLA prevents any state, adjacent or inland, from asserting extraterritorial taxing jurisdiction over OCS lands but that the inclusion of income derived from the OCS in the unitary tax base of a constitutionally permissible apportionment formula does not amount to extraterritorial taxation by the taxing state."). The Court considered the McCarran-Ferguson Act in *Federal Trade Commission v. Travelers Health Ass'n*, 362 U.S. 293 (1960). The Nebraska statute provided, "No person shall engage in this state in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of insurance. No person domiciled in or resident of this state shall engage in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of insurance in any other state territory, possession, province, country, or district." *Id.* at 295-96. The Court was "asked to hold that the McCarran-Ferguson Act operate[d] to oust the Commission of jurisdiction by reason of [Nebraska's] attempted regulation of its domiciliary's extraterritorial activities." *Id.* at 297-98. "[T]he impediments, contingencies, and doubts which constitutional limitations might create as to Nebraska's power to regulate any given aspect of extraterritorial activity serve only to confirm the reading" the Court gave to the Act, which did not favor Nebraska. *Id.* at 302. In *Oil, Chemical and Atomic Workers, International Union, AFL-CIO v. Mobil Oil Corp.*, the Court had to decide "whether under [section] 14(b) [of the National Labor Relations Board Act], Texas' right-to-work laws [could] void an agency-shop agreement covering unlicensed seamen who, while hired in Texas and having a number of other contacts with the State, spend[t] the vast majority of their working hours on the high seas." 426 U.S. 407, 409-10 (1976). "[T]he union [did] not claim that Texas' contacts [were] so minimal as to make the application of the Texas laws in any way unconstitutional. Nor [did] respondent argue that Congress lacked the power, if it wished, to prohibit state right-to-work laws altogether." *Id.* at 413 n.6. The question was "whether Texas' contacts with this employment relationship [were] adequate to call into play [section] 14 (b)'s mandated deference to State law." *Id.* at 417. "[B]ecause most of the employees' work [was] done on the high seas, outside the territorial bounds of the State of Texas, Texas' right-to-work laws [could not] govern the validity of the agency-shop provision at issue here" *Id.* at 420. The Court found that because "[f]ederal policy favors permitting such

which extraterritoriality plays a sustained and central role.

Three areas that we will examine are: Due Process Clause and Commerce Clause scrutiny of state regulatory authority;<sup>70</sup> Due Process and Commerce Clause scrutiny of state power to tax;<sup>71</sup> and the extraterritorial application of the Bill of Rights and other federal protections for the individual.<sup>72</sup> The first two of these examples involve restrictions on the activities of the individual states of the United States (“states” in the domestic context). In both of these areas, *Morrison* creates an additional opportunity for states to argue that the exercise of power is constitutionally permissible because it is actually domestic and not extraterritorial.<sup>73</sup>

The last of the three—the scope of the federal protections for the individual—is more complex. Reclassifying certain problems as domestic rather than extraterritorial provides an added opportunity for arguing that federal norms extend to the situation under consideration. As in some other contexts, *Morrison*, therefore, results in a potential expansion of federal authority. But since expanding the scope of federal provisions for protection of the individual means expanding judicial scrutiny of the actions of the federal elected branches, applying *Morrison* to norms such as these has the indirect consequence of restricting the power of Congress and the Executive.

In all three of these areas, the question arises whether the *Morrison*’s logic should be applied generally in all contexts where that logic seems to apply, or whether it should be restricted to its original domain. This question is substantial and challenging enough to be left for another day.

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agreements unless a State or Territory with a sufficient interest in the relationship expresses a contrary policy via right-to-work laws,” it remained “fully consistent with national labor policy” in concluding that “[when] the predominant jobsite is outside the boundary of any State . . . no State has a sufficient interest in the employment relationship and . . . no State’s right-to-work laws can apply.” *Id.* at 420-21. In *Department of Revenue of Kentucky v. Davis*, two Kentucky residents claimed that “Kentucky’s differential taxation of municipal bond income impermissibly discriminate[d] against interstate commerce in violation of the Commerce Clause.” 553 U.S. 328, 336 (2008). The Court, “[u]nder the resulting protocol for dormant commerce clause analysis,” asked “whether [the] challenged law discriminate[d] against interstate commerce.” *Id.* at 338. The Court reasoned that “[a] discriminatory law is ‘virtually *per se* invalid’ . . . and will survive only if it ‘advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.’” *Id.* The Court continued, “Absent discrimination for the forbidden purpose, however, the law ‘will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.’” *Id.* at 338-39 (alteration in original) (citation omitted).

70. See *infra* Part 2(A).

71. See *infra* Part 2(B).

72. See discussion *infra* Part 2(C).

73. See *infra* note 99 and accompanying text.

A. *Extraterritorial Regulation, the Dormant Commerce Clause, and Due Process*

One of the areas of law that has been significantly influenced by the concept of extraterritoriality is state regulation of interstate activities under the Due Process and dormant Commerce Clauses. There are several strands of Commerce Clause analysis. One is that states are not supposed to discriminate against interstate commerce; another (of uncertain status today) is the *Pike v. Bruce Church, Inc.* balancing test, which asks whether the state action in question places an undue burden on interstate commerce.<sup>74</sup>

The type of Commerce Clause limitation that is important here is neither of these; it is the Commerce Clause prohibition on state regulation of conduct that takes place entirely (or nearly so) within another state. In this context, it works in tandem with the Due Process Clause, which plays a similar role in restricting “extraterritorial” regulation. As the Court explained in *BMW of North America, Inc. v. Gore*, “Alabama may insist that BMW adhere to a particular disclosure policy in that State,” but it “does not have the power to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents.”<sup>75</sup>

*Healy v. Beer Institute*<sup>76</sup> is a good example of how the Commerce Clause is used to invalidate state regulatory extraterritoriality. *Healy* addressed the impact of that clause on a Connecticut regulation adopted under the state’s Liquor Control Act.<sup>77</sup> The regulation at issue required out-

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74. 397 U.S. 137, 142 (1970). In declining to join Part IV of the Court’s opinion in *Davis*, which dealt with whether the *Pike* balancing test applied in that case, Justice Scalia argued for abandoning the *Pike* test altogether:

The Court declines to engage in *Pike* balancing here because courts are ill suited to determining whether or not this law imposes burdens on interstate commerce that clearly outweigh the law’s local benefits, and the “balancing” should therefore be left to Congress . . . . The problem is that courts are less well suited than Congress to perform this kind of balancing in every case. The burdens and the benefits are always incommensurate, and cannot be placed on the opposite balances of a scale without assigning a policy-based weight to each of them. It is a matter not of weighing apples against apples, but of deciding whether three apples are better than six tangerines. Here, on one end of the scale (the burden side) there rests a certain degree of suppression of interstate competition in borrowing; and on the other (the benefits side) a certain degree of facilitation of municipal borrowing. Of course you cannot decide which interest “outweighs” the other without deciding which interest is more important to you. And that will always be the case. I would abandon the *Pike*-balancing enterprise altogether and leave these quintessentially legislative judgments with the branch to which the Constitution assigns them.

*Davis*, 553 U.S. at 360 (Scalia, J., concurring in part). In his concurring opinion, Justice Thomas further argued that the “negative commerce clause” should be discarded in its entirety as having no basis in the Constitution. See *id.* at 361 (Thomas, J., concurring).

75. 517 U.S. 559, 572-73 (1996).

76. 491 U.S. 324 (1989).

77. See *id.* at 326.

of-state beer distributors to affirm that their posted prices were, at the moment of posting, no higher than the prices at which they were selling the same products in the neighboring states.<sup>78</sup> The motivation underlying the regulation was the desire that Connecticut's sellers be competitive with liquor stores within a short driving distance.<sup>79</sup> If Connecticut prices were higher than those in nearby states, Connecticut residents would simply drive across the state lines to buy.<sup>80</sup>

The Supreme Court held that the regulation, on its face, violated the Commerce Clause by discriminating against interstate commerce.<sup>81</sup> It pointed out that the posting rule applied only to shippers engaged in interstate commerce and not to those engaged solely in Connecticut sales.<sup>82</sup> Of greater relevance here, however, is the majority's alternative basis for decision. The distributors also argued that the Connecticut statute "regulated out-of-state transactions . . . in violation of the Commerce Clause,"<sup>83</sup> and the Supreme Court agreed.<sup>84</sup>

The Court's opinion relied on an earlier Supreme Court case, *Brown-Forman Distillers Corp. v. New York State Liquor Authority*.<sup>85</sup> *Brown-Forman* invalidated a New York law that prohibited interstate distributors from charging more in New York than for the same item in any other state during the month that followed.<sup>86</sup> The *Brown-Forman* Court noted, "[O]nce the distiller has posted prices in New York, it is not free to change its prices elsewhere in the United States during the relevant month. Forcing a merchant to seek regulatory approval in one state before undertaking a transaction in another directly regulates interstate commerce."<sup>87</sup> The *Brown-Forman* Court explained why the Commerce Clause was relevant to the constitutional validity of extraterritoriality in the following terms:

Taken together, our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions: First, the "Commerce Clause . . . precludes the application of the state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the state." . . . Second, a statute that directly controls commerce of current wholly outside the

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78. *Id.* at 326, 328-29.

79. *See id.* at 326-27.

80. *Id.* at 326.

81. *Healy v. Beer Inst.*, 491 U.S. 324, 340 (1989).

82. *Id.* at 340-341.

83. *Id.* at 330.

84. *Id.* at 337, 340.

85. *See id.* at 335-37 (relying on *Brown-Forman*, 476 U.S. 573 (1986)).

86. 476 U.S. at 575, 585.

87. *Id.* at 582 (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality opinion)).

boundaries of the state exceeds the current limits of the enacting state's authority and his invalid regardless of whether the statutes extra territorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the state.<sup>88</sup>

*Healy* also cited another extraterritoriality decision, *Edgar v. MITE Corp.*,<sup>89</sup> as "significantly illuminat[ing] the contours of the constitutional prohibition on extraterritorial legislation."<sup>90</sup> In *MITE Corp.*, a plurality of the Court struck down the Illinois Business Takeover Act, which required that a takeover offer for a target company having specified connections to Illinois not become effective until 20 days after notifying Illinois's Secretary of State.<sup>91</sup> During this time the offer was to be subject to administrative evaluation.<sup>92</sup> The plurality in *MITE Corp.* noted that "[t]he limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts."<sup>93</sup> In both contexts, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister states and exceed the inherent limits of the State's power."<sup>94</sup> The plurality found the statute violated the Commerce Clause because it "directly regulate[d] transactions which [took] place across state lines, even if wholly outside the state of Illinois."<sup>95</sup> While a plurality opinion itself, *MITE Corp.* has since been upheld in *CTS Corp. v. General Dynamics Corp. of America*.<sup>96</sup>

*Morrison* is potentially relevant to this strand of Due Process and Commerce Clause reasoning. If applied in this context, its logic might require reversing some existing Commerce Clause and Due Process decisions. *Morrison*'s relevance stems from its reinterpretation of the concept of extraterritoriality through the addition of a new concept: "focus." Consider, for example, the fact pattern in *Healy*. In *Healy*, there were contacts between the distributors and Connecticut and also between the

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88. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (citing *Brown-Forman*, 476 U.S. at 579, 581-83).

89. 457 U.S. 624 (1982) (plurality opinion).

90. *Healy*, 491 U.S. at 333 n.9. Other cases falling under this category include: *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *S. Pac. Co. v. Ariz. ex rel Sullivan*, 325 U.S. 761 (1945); and *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966).

91. *MITE Corp.*, 457 U.S. at 626-27, 646.

92. *See id.* at 627.

93. *Id.* at 643.

94. *Id.* (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)).

95. *Id.* at 641.

96. *CTS Corp. v. Gen. Dynamics Corp. of Am.*, 481 U.S. 69, 80-81 (1987).

distributors and other states.<sup>97</sup> The beer distributors were interstate in their operation, delivering to both of the two.<sup>98</sup> It seems fairly plausible to argue that the main “focus” of the Connecticut regulators “solicitude” (to use the language of *Morrison*) was Connecticut; interest in prices in the state of New York was at best secondary, a means to the end of encouraging Connecticut sales.

If a court were to determine that the focus of the challenged statute was in Connecticut, then (under the *Morrison* reasoning) the regulation that provoked the constitutional challenge would not be extraterritorial, but domestic. Since the Commerce Clause/Due Process challenge rested on the extraterritoriality of Connecticut regulation, and since there is no comparable constitutional basis for challenging a domestic regulation, it seems that the opposite result should have been reached.<sup>99</sup> The statute, apparently, should have been upheld.

*MITE Corp.* might have to be revisited, as well. In *MITE Corp.*, there were connections to Illinois as well as to other states.<sup>100</sup> It can be argued that the Illinois regulatory structure was “focused” on the Illinois aspects of the takeover. If this argument was successful then, under the second step of *Morrison*, the entire dispute would be reclassified as domestic. Domestic disputes can of course be regulated by domestic regulators.

*Morrison* itself gives no clues about whether its reasoning will be used to reexamine Commerce Clause and Due Process challenges to “extraterritorial” regulation. The logic of the opinion appears to call for this extension; it redefines as a matter of straightforward common sense reasoning the characterization of a problem as “extraterritorial.” If taken literally, this interpretation of how the concept of extraterritoriality should be understood is equally applicable in the context of state regulatory authority. Yet, applying *Morrison* in this literal fashion would upset decades of precedent interpreting the Commerce and Due Process Clauses. Moreover, it is not entirely clear whether it would be desirable to extend *Morrison* to apply to such circumstances.<sup>101</sup> It seems fair to assume that the *Morrison* majority did not mean to take a position on this matter when it wrote its opinion; the question, therefore, remains to be decided.

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97. *Healy v. Beer Inst.*, 491 U.S. 324, 326-27 & n.2 (1989).

98. *Id.*

99. This argument does not take into account the possibility of a challenge on other Commerce Clause grounds; for example, the claim that the Connecticut regulation discriminated against out-of-state distributors.

100. *See Edgar v. MITE Corp.*, 457 U.S. 624, 641 (1982).

101. *See discussion infra* Part 2(B).

*B. Extraterritoriality and Taxation: The Commerce and Due Process Clauses*

Extraterritoriality has also long been a staple concept in the Due Process and Commerce Clause review of inter-jurisdictional taxation, in particular state taxation of corporations.<sup>102</sup> State taxation is constitutionally infirm when there is an inadequate connection between the state and the taxpayer.<sup>103</sup> Thus, for example, *Quill Corp. v. North Dakota* invalidated on Commerce Clause grounds a state effort to tax out-of-state mail order businesses with no physical presence within the state.<sup>104</sup> Similarly, *State Board of Insurance v. Todd Shipyard* held that due process prohibits state taxation of insurance contracts where the only connection between the state and the contract is that the insured risk was located there.<sup>105</sup>

The word extraterritoriality is not always used to describe the problem;<sup>106</sup> more elaborate explanations of the role of the two clauses sometimes explain the constitutional requirement as being a “link” or “minimum connection” between the taxed activity and the taxing state.<sup>107</sup>

102. See, e.g., *Exxon Corp. v. Wisc. Dep’t of Revenue*, 447 U.S. 207, 219-20 (1980) (“The Due Process Clause of the Fourteenth Amendment imposes two requirements for such state taxation: a ‘minimal connection’ or ‘nexus’ between the interstate activities in the taxing State, and ‘a rational relationship between the income attributed to the State and the intrastate values of the enterprise’” (citing *Mobil Oil Corp. v. Comm’r of Taxes*, 445 U.S. 425, 436 (1980))). See also *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 268 (1978); *Nat’l Bellas Hess, Inc. v. Dep’t of State of Ill.*, 386 U.S. 753, 756 (1967).

103. See *Exxon Corp.*, 447 U.S. at 219-20.

104. 504 U.S. 298, 301-02, 317-18 (1992).

105. 370 U.S. 451, 454-57 (1962). This decision could not rely on the Commerce Clause because the McCarran-Ferguson Act, 15 U.S.C. § 1011-12, grants states unusual latitude for regulating the business of insurance. See *id.* at 452.

106. See, e.g., *Exxon Corp.*, 447 U.S. at 221 (“The company had the ‘distinct burden of showing by “clear and cogent evidence” that it results in extraterritorial values being taxed.’” (quoting *Norfolk & W. R.R. Co. v. N.C. ex rel Maxwell*, 297 U.S. 682, 688 (1936))); *Trinova Corp. v. Mich. Dep’t of Treasury*, 498 U.S. 358, 387 (1991) (Scalia, J. concurring) (“The only issue, then, is whether the tax violates the Due Process Clause by taxing extraterritorial values.”).

107. E.g., *Meadwestvac Corp. v. Ill. Dep’t of Revenue*, 553 U.S. 16, 24-25 (2008).

The Commerce Clause and the Due Process Clause impose distinct but parallel limitations on a State’s power to tax out-of-state activities . . . The Due Process Clause demands that there exist some definite link, some minimum connection, between a state and person, property or transaction it seeks to tax as well as a rational relationship between the tax and the values connected with the taxing state. . . . The Commerce Clause forbids the states to levy taxes that discriminate against interstate commerce or that burden it by subjecting activities to multiple or unfairly apportioned taxation . . . The broad inquiry subsumed in both constitutional requirements is whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state—that is, whether the state has given anything for which it can ask return.

*Id.* (internal quotation marks omitted). See also *Exxon Corp.*, 447 U.S. at 210.

The first issue is whether the Due Process Clause of the Fourteenth Amendment prevents the State from applying its statutory apportionment formula to the total corporate income of the

However, it is clear that extraterritoriality remains the central issue. The opening sentence of the Court's most recent tax decision reads simply, "The Due Process and Commerce Clauses forbid the States to tax extraterritorial values."<sup>108</sup>

Today, cases are relatively infrequent in which the corporate taxpayer has no contact at all with the taxing state; states are generally not so unsophisticated as to tax an entity with no connection at all.<sup>109</sup> The mere fact that the taxpayer is subject to the tax jurisdiction of a particular state, however, does not mean that it is subject to that state's taxation of one hundred percent of its assets, wherever located.<sup>110</sup> Allowing a single state to tax one hundred percent of the assets would be unfair both to the taxpayer and to other states that wish to tax the same income or property. An allocation must therefore be made through an apportionment formula that effectively divides the assets among the different states in which the taxpayer is present, owns property, or earns income.<sup>111</sup>

There is of course no single correct way to apportion assets. Many states, predictably enough, devise their apportionment formula so as to impose their levies on as large a share as possible of the taxpayer's wealth.<sup>112</sup> The taxpayer naturally enough plays a similar game of "accounting hide and seek," framing its corporate structure and adjusting its accounting methods so as to insulate its major assets from the power of states with the highest tax rates. The most frequently litigated issue in modern Supreme Court tax cases is therefore whether a state's apportionment formula satisfies constitutional standards.

Allegations of extraterritoriality typically arise in situations where an apportionment formula uses the value of assets in other states as one consideration in calculating the amount the taxpayer owes. Such use of the

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taxpayer when the taxpayer's functional accounting separates its income and the three distinct categories of marketing, exploration and production, and refining, and when the taxpayer performs only marketing operations within the State. The second issue is whether the Due Process Clause permits the State to subject to taxation under its statutory apportionment formula income derived from the extraction of oil and gas located outside the State which is used by the refining department of the taxpayer, or whether the State is required to allocate such income to the situs state. The third issue is whether the Commerce Clause requires such an allocation to the situs State.

*Id.*

108. *Meadwestvaco Corp.*, 553 U.S. at 19 (internal quotation marks omitted).

109. *See, e.g., infra* notes 115-19 and accompanying text.

110. *See Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 170 (1983).

111. *See generally* FREDINAND P. SCHOETTLE, STATE AND LOCAL TAXATION: THE LAW AND POLICY OF MULTI-JURISDICTIONAL TAXATION, 713-54 (2003).

112. *See, e.g., Container Corp.*, 463 U.S. at 183 (discussing the facts of *Hans Rees' Sons, Inc. v. N.C. ex rel Maxwell*, 283 U.S. 123 (1931)).



value of assets in other states is not *per se* unlawful; for example, there are legitimate reasons that the taxing State might want to take into account the overall size of the corporation.<sup>113</sup> Most of the apportionment formulas facing Due Process and Commerce Clause challenges have, accordingly, been upheld.<sup>114</sup> For example, *Exxon Corp. v. Wisconsin Department of Revenue* upheld a Wisconsin apportionment formula that took into account not only marketing, but also exploration, production and refining.<sup>115</sup> It did so even though the taxpayer performed only marketing operations within the state.<sup>116</sup> Similarly, in *Moorman Manufacturing Co. v. G.D. Bair*, the Court held that Iowa's single factor formula did not result in extraterritorial taxation in violation of the Due Process Clause or the Commerce Clause.<sup>117</sup> *Trinova Corp. v. Michigan Department of Treasury* presented "the principal question . . . whether the three-factor apportionment formula of the Michigan single business tax violates either the Due Process Clause or the Commerce Clause of the Federal Constitution."<sup>118</sup> The apportionment formula was upheld.<sup>119</sup>

*Morrison* is potentially relevant in the tax context for the same reasons as it was in the regulatory context. What potentially triggered the application of *Morrison* in the regulatory context was the description as "extraterritorial" of a state's attempts to regulate conduct that had important connections with other states.<sup>120</sup> Similarly, *Morrison* is potentially relevant in tax cases where the taxpayer has property or income in states other than the taxing state, because a tax scheme that takes into account the property or income located elsewhere can be challenged as "extraterritorial." If this

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113. See, e.g., *Mobil Oil Corp. v. Comm'r of Taxes of Vt.*, 445 U.S. 425, 440-41 (1980) ("Superficially, intercorporate division might appear to be a more attractive basis for limiting apportionability. But the form of business organization may have nothing to do with the underlying unity or diversity of business enterprise. Had appellant chosen to operate its foreign subsidiaries as separate divisions of a legally as well as a functionally integrated enterprise, there is little doubt that the income derived from those divisions would meet due process requirements for apportionability.").

114. See also *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 32 (1988) ("[T]he inclusion of income derived from the [Outer Continental Shelf Lands Act] in the unitary tax base of a constitutionally permissible apportionment formula does not amount to extraterritorial taxation by the taxing state."); *Container Corp.*, 463 U.S. at 197 (1983) ("[W]e cannot conclude that the California tax at issue here is preempted by federal law or fatally inconsistent with federal policy.").

115. 447 U.S. 207, at 212-14, 218-19 (1980).

116. *Id.* at 212-13 ("Appellant had no exploration and production operations over farming operations in Wisconsin; the only act to be carried out in that State was marketing.").

117. 437 U.S. 267, 281 (1978).

118. 498 U.S. 358, 361 (1991).

119. *Id.* at 387.

120. See discussion *supra* Section 2(A).

characterization is accepted, then the attempt to tax may be held unconstitutional.

*Morrison* potentially changes this result by altering the contours of the concept of extraterritoriality. If the taxing state is the “focus” of the exercise of tax power, then, under the logic of *Morrison*, the dispute would not be extraterritorial but domestic. In the Supreme Court cases mentioned above, the taxing authorities all had substantial connections to the taxpayer.<sup>121</sup> It would be understandable if a court decided that the focus state was the taxing authority. If so, it seems the cases should probably be re-characterized as domestic; the extraterritoriality problem would then be resolved.

The consequence of applying *Morrison* is that a case where taxation might otherwise be invalidated for extraterritoriality becomes a case where the law may be upheld. *Morrison* accomplishes this by turning “extraterritorial” taxation or regulation into regulation or taxation of a domestic occurrence. *Morrison* effectively increases the reach of state authority. As was observed in the context of state regulatory authority, however, it does not appear that the *Morrison* majority had in mind the impact of their logic in other contexts, such as these.<sup>122</sup> It therefore remains to be seen whether this logical corollary of *Morrison*’s redefinition of extraterritoriality will have been given practical effect.

### C. *Extraterritoriality and the Protection of Individual Rights: The War on Terror and the War on Drugs*

A third category includes cases delimiting the territorial reach of U.S. federal protections of individual rights, in particular constitutional protections. This category includes a number of different constitutional provisions: the Fourth Amendment, the Fifth Amendment, the Suspension Clause, and the Due Process Clause, among others.<sup>123</sup> A related group of cases involves the territorial applicability of international treaties and conventions that protect the individual.<sup>124</sup> We will focus below on cases

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121. See, e.g., *supra* notes 115-19.

122. See *supra* Part 2(A) for a discussion of extraterritoriality and state regulation.

123. See, e.g., *Marshall v. Marshall*, 547 U.S. 293, 299 (2006) (dealing with “domestic relations” and “probate” exceptions to federal jurisdiction in bankruptcy); *Munaf v. Gerene*, 553 U.S. 674, 679 (2008) (dealing with jurisdiction of U.S. Courts over habeas petition filed on behalf of U.S. nationals suspected of crimes allegedly committed in Iraq); *United States v. Louisiana*, 394 U.S. 11, 16-17 (1969) (dealing with delimitation of internal waters and whether U.S. federal law or international law should apply).

124. See, e.g., *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 158 (1993) (dealing with

concerning the protection of individuals in the context of the war on terror and the war on drugs.

For reasons explained above, *Morrison* potentially alters the results in such cases by extending the reach of a constitutional provision that might otherwise not be applicable outside the United States.<sup>125</sup> It accomplishes this reversal by supplying a second line of argument for validating application of U.S. law to cases with foreign elements. The second line of argument is that the case is in fact domestic, and not extraterritorial, because the focus of the norm in question is on activities taking place within the United States.<sup>126</sup> There are also situations in which *Morrison* might alter the reasoning of the decision, without changing the result. And, finally, there are cases in which *Morrison* would only confirm the decision that has already been reached.

#### 1. The War on Drugs and the Applicability of Criminal Procedural Protections

*United States v. Verdugo-Urquidez* illustrates the potential application of *Morrison* to the question of the extraterritoriality of the Constitution.<sup>127</sup> The reasoning in *Verdugo-Urquidez* is already similar enough to *Morrison*'s that only relatively minor adjustments would have to be made. *Verdugo-Urquidez* is therefore a good example of the intuitive appeal of the *Morrison* logic in the constitutional context.

The defendant, a citizen and resident of Mexico, was alleged to be a leader of a violent criminal organization in Mexico responsible for smuggling large volumes of narcotics into the United States.<sup>128</sup> Acting in cooperation with American law enforcement, the Mexican police seized him and handed him over to U.S. officials at the United States-Mexico border.<sup>129</sup> Within hours, they searched his two houses in Mexico; no warrant had been obtained.<sup>130</sup> Facing trial in the United States, the defendant argued for the exclusion of the seized evidence on the basis of the Fourth Amendment.<sup>131</sup> The Supreme Court found that the Fourth

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whether the Immigration and Nationality Act and the Refugee Convention apply to forced repatriation to Haiti of Haitians intercepted on the high seas).

125. See *supra* Part 1(A)(2).

126. *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010).

127. 494 U.S. 259 (1990).

128. *Id.* at 262.

129. *Id.*

130. *Id.* at 262-63.

131. See *id.* at 263.

Amendment exclusionary rule did not prohibit admission of the fruits of the search.<sup>132</sup>

The opinion in *Verdugo-Urquidez* easily lends itself to reformulation in *Morrison's* terms. The arguments used by the majority to deny his claim can without difficulty be rephrased in terms of the "focus" of the relevant constitutional forms. The similarity to *Morrison* lies in the Court's analysis of which activities were most significant for purposes of the relevant constitutional provision. Since the defendant alleged a Fourth Amendment violation, the "focus" of the constitutional provision was in Mexico and the application of the U.S. Constitution would be extraterritorial. As a result, the presumption against extraterritoriality would apply, imposing a burden that the defendant could not meet. Because there would not be sufficient evidence to rebut the presumption, the Fourth Amendment would not apply.

The Court recognized that if the issue of admissibility had been a matter for the Fifth Amendment, rather than the Fourth Amendment, then the defendant's claim would have been stronger.<sup>133</sup> Violation of the Fifth Amendment infringes on the defendant's right at trial, and the trial was taking place in the United States.<sup>134</sup> Violations of the Fourth Amendment, in contrast (said the Court) take place in the field—Mexico—in the place where the search is performed.<sup>135</sup> The exclusion of the illegally seized evidence at trial, in United States, is only a judicially created remedy for a violation that occurs elsewhere.<sup>136</sup>

*Verdugo-Urquidez*, decided many years prior to *Morrison*, made what was essentially the same argument but only using only slightly different terminology. The key to determining applicability was determination of the focus of the norm in question. For the Fourth Amendment, the focus was the illegal search.<sup>137</sup> For the Fifth Amendment, the focus would be the trial.<sup>138</sup> The reasoning in *Morrison* lends itself easily to this distinction. From this perspective, the *Morrison* logic appears to be nothing more than simple common sense.

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132. See *id.* at 264 ("For purposes of this case, therefore, if there were a constitutional violation, it occurred solely in Mexico. Whether evidence obtained from respondent's Mexican residences should be excluded at trial in the United States is a remedial question separate from the existence *vel non* of the constitutional violation." (citing *United States v. Calandra*, 414 U.S. 338, 354 (1974))).

133. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264-65 (1990).

134. *Id.* at 264.

135. *Id.* at 264, 275.

136. See *id.* at 271.

137. *Id.* at 274-75.

138. *Id.* at 264.

## 2. The War on Terror and the Availability of Habeas Corpus Relief

Finally, a pair of cases concerning the availability of habeas corpus raises the question whether *Morrison* should have any effect on that area of law. *Rasul v. Bush* and *Boumediene v. Bush* were War on Terror cases involving the rights of prisoners held at the Guantánamo Bay Naval Base.<sup>139</sup> The prisoners were aliens and not American citizens; they had been taken into custody at various places around the world in connection with the war on terror.<sup>140</sup> The prisoners sought a procedural opportunity to challenge their confinement and framed their complaint as an application for habeas corpus.<sup>141</sup> The government's response included the claim that habeas was not available as a remedy in such circumstances, because the individuals in question were all incarcerated outside the United States and were not Americans.<sup>142</sup>

The first of the two cases, *Rasul*, was resolved through interpretation of 28 U.S.C. § 2241, the federal habeas statute.<sup>143</sup> The Court construed the statute as allowing the plaintiffs relief.<sup>144</sup> Following the decision in *Rasul*, Congress amended the federal habeas statute, thereby putting an end to the claim that habeas relief should be available as a statutory matter.<sup>145</sup> The second of the two cases, *Boumediene*, was then filed; it dealt with the geographical reach of the federal Constitution's Suspension Clause, which protects the constitutional right to habeas corpus from being suspended.<sup>146</sup> Again, the prisoners were held entitled to the writ's protection.<sup>147</sup>

As in *Verdugo-Urquidez*, these cases did not rely on *Morrison* itself; *Morrison* had not yet been decided. However, there are places in the opinions where lines of argument quite similar to *Morrison*'s can be found. One of the *Rasul* majority's arguments, in particular, was actually quite compatible with the logic of *Morrison*. Relying on historical accounts dating back to the drafting of the Constitution and even earlier, the Court concluded,

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139. See *Rasul v. Bush*, 542 U.S. 466, 470 (2004); *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).

140. *Rasul*, 542 U.S. at 470-71; *Boumediene*, 553 U.S. at 734.

141. *Rasul*, 542 U.S. at 471-72; *Boumediene*, 553 U.S. at 734.

142. *Boumediene*, 553 U.S. at 739; see *Rasul*, 542 U.S. at 472-73.

143. See *Rasul*, 542 U.S. at 473-75, 484.

144. *Id.* at 481 ("Application of the habeas statute to persons detained at the [Guantanamo] base is consistent with the historical reach of the writ of habeas corpus.").

145. The Detainee Treatment Act of 2005, § 1005(e), Pub. L. No. 109-148, 119 Stat. 2741, and the Military Commissions Act of 2006, § 7(a), Pub. L. No. 109-336, 120 Stat. 2637 (codified as amended at 28 U.S.C. § 2241(e) (2006)); see also *Boumediene*, 553 U.S. at 723-24.

146. See *Boumediene*, 553 U.S. at 765.

147. *Id.* at 771.

[B]ecause “the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody,” a district court acts “within [its] respective jurisdiction” within the meaning of [section] 2241 as long as “the custodian can be reached by service of process.”<sup>148</sup>

One of the dissenting opinions recognized clearly the nature of the majority’s argument, restating it in a way that emphasized its similarity to the argument in *Morrison*. “[T]he status of Guantánamo Bay,” the dissent declared, “is entirely irrelevant to the issue here. The habeas statute is (according to the court) being applied *domestically*, to ‘petitioners custodians’, and the doctrine that statutes are presumed to have no extraterritorial effect simply has no application.”<sup>149</sup>

What is interesting about these two cases goes deeper than the simple observation that both could be restated using terms familiar to the *Morrison* Court. That fact would be hardly remarkable; it should not be surprising when courts behave consistently with one another. Rather, the most interesting thing about the two opinions is a certain sort of *inconsistency*. The *Morrison* logic derived from a majority opinion written by Justices Scalia and signed by Justices Roberts, Kennedy, Thomas, and Alito while the dissenting opinion that *critiqued* the *Morrison* logic in *Rasul* was joined by exactly the same justices.<sup>150</sup> The justices that wrote the *Morrison* majority opinion are the ones that dissented in *Rasul* and *Boumediene*;<sup>151</sup> the positions that these four justices took in *Morrison* were diametrically opposite to the positions that they took in *Rasul*. If “extraterritoriality” and the presumption against it are unitary logical constructs, it is difficult to say why a line of reasoning that persuaded Justices Scalia, Roberts, Thomas and Alito in the context of securities law should leave the same justices so thoroughly unconvinced in the context of a federal habeas statute.

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148. *Rasul*, 542 U.S. at 478-79 (quoting *Braden v. 30<sup>th</sup> Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 495 (1973)); see also *id.* at 483-84 (“[N]o party questions the District Court’s jurisdiction over petitioners’ custodians. . . . Section 2241, by its terms, requires nothing more.” (internal citation omitted)).

149. *Id.* at 500 (Scalia, J., dissenting) (second emphasis added).

150. The majority in *Morrison* constituted of Justices Scalia, Roberts, Kennedy, Thomas and Alito. *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 1874 (2010). Four out of these five had dissented in the earlier cases. Justices Scalia, Thomas and Alito dissented in both *Boumediene* and *Rasul*, while Justice Roberts (who was not on the Court for *Rasul*) dissented in *Boumediene*. *Boumediene*, 553 U.S. at 730; *Rasul*, 542 U.S. at 468.

151. See discussion *supra* note 97; see also *Boumediene*, 553 U.S. at 849-50 (Scalia, J., dissenting) (“Today the Court warps our Constitution in a way that goes beyond the narrow issue of the reach of the Suspension Clause, invoking judicially brainstormed separation-of-powers principles to establish a manipulable ‘functional’ test for the extraterritorial reach of habeas corpus (and no doubt, for the extraterritorial reach of other constitutional protections as well).”).

The most likely explanation for difference in treatment seems to be as follows. The *Morrison* logic has the overall effect of extending the reach of the norm that is being interpreted. It does this by singling out one occurrence—the “focus” of the norm—and treating the entire problem as domestic whenever that one occurrence takes place within the jurisdiction.<sup>152</sup> In the context of federal securities law, this strategy has the consequence of adding to the reach of federal law. Since the presumption against extraterritoriality otherwise makes it nearly impossible to establish applicability of the securities law (the standard of proof being so exacting) treating some cases as purely domestic—even when they have connections to more than one state—ensures that at least these transactions will be regulated.

In the context of federal habeas, either constitutional or statutory, the consequences of *Morrison* also extend the geographical reach of the norm. However, because the norm is a limitation on federal power—it protects the rights of prisoners against the custodian—the end result of increasing the reach of the norm is that federal power is actually more limited than it would otherwise be. The consequence, ironically, is that if *Morrison*’s reasoning is applied generally—for instance, in all cases where there is an issue of extraterritoriality of state regulatory authority or of the reach of constitutional or statutory provisions—it may in some situations have exactly the opposite result of what the *Morrison* majority would have anticipated.

### 3. CONCLUSION

At this point, some tentative hypotheses about *Morrison*’s underlying logic and its consequences can be formulated:

- *Morrison*’s second step, requiring the identification of “domestic” cases and “focus” of the statute, is a reaction to the decision’s overly restrictive first step, placing an unrealistic burden of proof on the party seeking to rebut the presumption;
- The *Morrison* logic about domestic cases is judge-made, as is the restrictive burden of proof that *Morrison* imposes. The doctrine of

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152. This is a familiar strategy from the conflict of laws, where different theoretical approaches all tend to select a single factor and rely on it to the exclusion of every other factor. This phenomenon, and the problems that it creates, is analyzed in Lea Brilmayer & Raechel Anglin, *Choice of Law and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1127 (2010) (criticizing “the common assumption that judges can determine the correct choice of law by identifying one particular, theoretically exceptional contact that, even when standing alone, dominates the choice of law process and dictates the result”).

- legislative supremacy does not support it;
- The second step of the *Morrison* argument in most circumstances has the consequence of extending the reach of the norm to which it is applied;
  - There are situations where this logic coincides with common sense and precedent, and the *Morrison* opinion performs an important service by unifying these applications;
  - It is important, however, to apply this logic consistently and to vary its application only when there is a principled basis for different treatment and not as a result of political attitudes towards outcomes.

There may be a principled way to differentiate the contexts, and to apply the *Morrison* line of reasoning in one context but not the other—some reasoning, that is, other than the simple political position that state power should be enhanced at all costs. However, until there is adequate practical and intellectual attention to all of the ramifications of the definition of extraterritoriality, the “new extraterritoriality” is bound to bring us problems and surprises.