Symposium—Transnational Securities and Regulatory Litigation in the Aftermath of **Morrison v. Australia National Bank**

An Introduction to the Symposium and an Examination of *Morrison*'s Impact on the Presumption Against Extraterritoriality

*Franklin A. Gevurtz**

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I. INTRODUCTION

Like a stone cast into a pond, the U.S. Supreme Court's 2010 decision in *Morrison v. National Australia Bank*[1] produced an impact, the consequences of which continue to ripple in ever-widening circles. To examine these consequences from both a United States and a European perspective, the Pacific McGeorge Global Center for Business & Development and the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law joined together to conduct a pair of conferences, the first in Sacramento on

* Distinguished Professor of Law, University of the Pacific, McGeorge School of Law.

1. Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869 (2010).

March 1, 2013, and the second in Luxembourg on March 25, 2013. The articles that follow are from papers presented at these sessions.

The consequences emanating from *Morrison* and explored in these articles fall into a couple of circles. The first involves the impact of *Morrison* on the territorial reach of U.S. statutes beyond the securities laws. *Morrison* held that the Securities Exchange Act does not prohibit fraud in connection with the purchase or sale of a security unless the purchase or sale took place in the United States.[2] In reaching this result, the opinion for the Supreme Court placed critical reliance on the presumption against extraterritoriality—the notion that, barring evidence of a contrary intent, courts should presume Congress does not intend U.S. statutes to govern events outside the United States.[3] This presumption did not begin with *Morrison*, and the Supreme Court continues to invoke it after *Morrison*—most recently in limiting the reach of the Alien Tort Statute in *Kiobel v. Royal Dutch Petroleum Co*.[4] *Morrison*, however, marks a significant milestone in the Supreme Court's growing affinity for the presumption and so it is appropriate to use *Morrison*'s impact as a focal point to consider where we stand with respect the territorial reach of U.S. statutes other than just the Securities Exchange Act.

The second consequence of *Morrison* involves the reaction of other nations. For those in Europe or elsewhere outside the United States, the impact of *Morrison* and the subsequent Congressional reaction to *Morrison*[5] is simple: look to your own nations' laws when it comes to private remedies for securities frauds unless you bought or sold the security in the United States. This, in turn, raises the question of whether other nations will fill the resulting void by establishing private remedies such as those existing in the United States for dealing with securities frauds, and particularly some sort of class or collective action.

Three articles in this symposium—my article and the articles by Professor Kenneth Gallant of the University of Arkansas, Little Rock, and by Professor Katherine Florey of the University of California, Davis—explore the impact of

2. *See generally id.*

3. *See generally id.*

4. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1665 (2013).

5. Congress responded to the *Morrison* decision by attempting to resurrect the conduct and effects test for government enforcement actions, while leaving *Morrison* in place for private actions pending further study. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C.A. § XXX (2010) (granting jurisdiction to U.S. courts over government prosecutions of securities frauds in which conduct constituting a significant step in the furtherance of the fraud occurs in the United States or conduct outside the United States has a foreseeable substantial effect in the United States), 929Y (directing the SEC to study how Congress should respond to *Morrison* for private actions). The reference to "jurisdiction" in Section 929B(2), rather than to whether the acts violate Section 10(b), seems to be a mistake resulting from the quick drafting necessary to respond to *Morrison* if the provision was to make it into the Dodd-Frank Act. *See, e.g.*, Marc I. Steinberg & Kelly Flanagan, *Transnational Dealings—Morrison Continues to Make Waves*, 46 INT'L. LAW. 829, 842 (2012).

Morrison's invocation of the presumption against extraterritoriality. Professor Gallant's article, *The Indeterminate International Law of Jurisdiction, the Presumption Against Extraterritorial Effect of Statutes, and Certainty in U.S. Criminal Law*, approaches the matter in light of the policy that those who might face prosecution for violating a criminal law ought to know what law governs their conduct. From this perspective, he finds that the Supreme Court's invocation of the presumption against extraterritoriality in *Morrison* represents a small positive step insofar as it might force Congress to explicitly address the jurisdictional reach of its legislation; thereby aiding the cause of giving fair notice to those whose conduct U.S. laws might reach, as well as placing the jurisdictional decision in the hands of a branch of government that Professor Gallant argues has shown somewhat greater sensitivity to the obligations of international law than has been true of the judiciary. While applauding the Court's general direction, Professor Gallant criticizes some of the Court's specific reasoning insofar as *Morrison*, contrary to the traditional understanding of the reach of criminal statutes, applies the presumption against extraterritoriality to a situation in which some of the elements of the prohibited act occurred within the United States. Professor Florey's article, *Bridging the Divide: The Case for Harmonizing State and Federal Extraterritoriality Principles After* Morrison *and* Kiobel, by contrast, suggests a scenario under which the Supreme Court's invocation of the presumption against extraterritoriality in *Morrison* ironically may produce greater uncertainty as far as whose law applies. Specifically, Professor Florey's thesis is that *Morrison* may move litigants to pursue actions under state law in state courts for conduct to which the presumption against extraterritoriality renders Federal law inapplicable. This is not simply because *Morrison* shuts the door in many cases to the Federal courthouse, but also because the rationale for the presumption against extraterritoriality under *Morrison*—Congress is unconcerned with non-domestic matters—does not on its face have any application to state courts deciding upon the reach of state law claims. Because this may lead to even more jurisdictions applying potentially conflicting laws, and because of the insensitivity of state courts to negative impacts on foreign relations from the application of their laws, Professor Florey is not sanguine about the prospect for more state litigation over events occurring abroad. Accordingly, Professor Florey proposes Federal and state responses to mitigate the problem.

The other two articles in this symposium examine events in Europe, which may or may not fill the void left by *Morrison*. Specifically, these two articles look at the Dutch Collective Settlements Act (*Wet Afwikkeling Collectieve Massachade* or "WCAM"), which empowers an appellate court in Amsterdam to grant judgments enforcing settlement agreements for class or multiple actions brought out of the same event. In *The Dutch Act on Collective Settlement of Mass Damages*, Professor Bart Krans of the University of Groningen provides an upbeat introduction to the WCAM. As Professor Krans explains, the Dutch

statute will strike many as strange insofar as it provides a collective procedure for enforcement of settlement agreements, but no collective procedure for bringing the underlying claims—thereby raising the question of what provides the leverage for the settlement. Still, Professor Krans argues that experience has shown that this unusual approach has worked. By contrast, Professor Xandra E. Kramer of Erasmus University takes a more critical view of the Dutch statute insofar as it purports to bind non-Dutch parties to settlement agreements. The Dutch statute began as a tool to settle cases brought by Dutch victims of the drug, DES.[6] It evolved, however, to encompass settlements of securities fraud cases involving primarily non-Dutch investors for fraud by non-Dutch corporations. Professor Kramer skeptically analyzes whether other nations in the European Union will be under any obligation to recognize the Dutch judgments in such cases.

As mentioned above, my contribution to this symposium focuses on *Morrison*'s impact on the territorial reach of U.S. statutes beyond the Securities Exchange Act. *Morrison* provides more than simply another example in the growing list of decisions in which the Supreme Court invoked the presumption against extraterritoriality as the Court's basis for deciding that U.S. law did not apply to events beyond our border.[7] As recognized by the Supreme Court in its recent *Kiobel* decision, *Morrison* sets the standard for determining whether applying U.S. law to a situation in which some conduct or effect occurs inside the United States and some conduct or effect occurs outside the United States involves the extraterritorial application of U.S. law so as to trigger the presumption against extraterritoriality.[8] In a world in which both the conduct and impact of regulated activities increasingly occur in more than one nation, deciding when applying U.S. law involves extraterritoriality and when it does not is of critical importance to the presumption against extraterritoriality.

Morrison answers the question of whether there is extraterritoriality through a "statutory focus" test: if the thing which is the focus of the statute happens in

6. Students of tort law may recall that the DES cases presented an interesting causation problem insofar as the drug caused injury, but, because a number of manufacturers produced the identical drug and because years passed between pregnant women taking the drug and the later manifestation of injury in their adult children, it was commonly impossible for plaintiffs to prove which manufacturer actually produced the pills the particular plaintiff's mother took. *See generally* O. Lee Reed, *The DES Cases and Liability Without Causation*, 19 AM. BUS. L.J. 511 (1981). Under these circumstances, the need for a collective settlement in which all manufacturers contribute in accordance to their share of the market and all plaintiffs collect out of the common pot is particularly compelling.

7. *Kiobel*, 133 S. Ct. at 1665; Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 177 (1993); Smith v. United States, 507 U.S. 197, 203-204 (1993); EEOC v. Arabian American Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991). *See also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 585-86 (1992) (Stevens, J. concurring) (concurring in the judgment on the basis of the presumption against extraterritoriality instead of standing); *see infra* notes 56-58 (pointing out the increasing use of the presumption against extraterritoriality by the Supreme Court after the *Aramco* decision in 1991 in contrast to the declining use previously).

8. *Kiobel*, 133 S. Ct. at 1669.

the United States, there is no extraterritoriality; if the thing which is the focus of the statute happens abroad, there is extraterritoriality.[9] I critique this test as applied by *Morrison*. My conclusion is that the statutory focus test is utterly unworkable. I will propose an alternative approach in a future article.[10]

My contribution to this symposium will proceed in two parts: Part II of this article lays the groundwork for my discussion of *Morrison*'s approach to determining extraterritoriality and carries out my responsibility as the organizer of this symposium by providing readers who are new to the topic with a brief background regarding the application of U.S. law to transnational securities frauds prior to *Morrison* and a discussion of the *Morrison* case.

Part III of this article then looks at the impact of *Morrison* on the presumption against extraterritoriality, and specifically how *Morrison* handled a situation in which events underlying the plaintiffs' claim occurred both inside and outside the United States. It provides an introduction to the presumption against extraterritoriality, an explanation of the difficulty presented in determining whether there is extraterritoriality in applying a nation's law to situations involving regulated conduct or effect occurring both inside and outside the nation, a discussion of how *Morrison* resolves this question, and an explanation of the fundamental flaw in the test the Court employs.

II. BACKGROUND

The introductory article in a symposium on transnational securities and regulatory litigation in the aftermath of the Supreme Court's *Morrison* decision owes it to those readers not already familiar with the topic to provide a little background about the law in the area prior to the Supreme Court's decision and about the case itself.

A. Application of U.S. Law to Transnational Securities Frauds pre Morrison

Like much in this country that later conservative voices would condemn, application of U.S. securities laws to fraudulent transactions outside the United States started in the 1960s. In *Schoenbaum v. Firstbrook*, the Second Circuit confronted a situation in which directors of a Canadian corporation allegedly defrauded their corporation by having it issue stock cheaply to a couple of other companies in Canada.[11] This diluted the value of stock previously issued by the corporation, some of which traded on the American Stock Exchange, and

9. Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869, 2884-8 (2010).

10. Franklin A. Gevurtz, *Determining Extraterritoriality*, 56 WILL. & MARY L. REV. __ (forthcoming 2014).

11. Schoenbaum v. Firstbrook, 405 F.2d 200, 204 (2d Cir. 1968).

triggered a lawsuit by shareholders in the United States.[12] The shareholders asserted that the directors' action violated Section 10(b) of the Securities Exchange Act,[13] and Rule 10b-5[14] promulgated by the Securities Exchange Commission pursuant to Section 10(b).[15] The combination of this section and rule prohibits fraud in connection with the purchase or sale of a security, and courts hold that private parties injured by the violation have an implied cause of action against the wrongdoer.[16] Figuring that the purpose of the Securities Exchange Act encompasses protecting investors trading on U.S. securities exchanges, the Second Circuit held that the Section 10(b) applied based upon the domestic effect even though the fraud occurred in Canada.[17]

A few years later, the Second Circuit in *Leasco Data Processing Equipment Corp. v. Maxwell*, confronted a situation in which officials of an English company convinced an American company to purchase stock in the English company by misrepresentations taking place in the United States and in England.[18] The Court again held that Section 10(b) and Rule 10b-5 could apply—in this case based upon the occurrence of conduct (some of the misrepresentations) in the United States.[19] The combination of *Schoenbaum* and *Leasco* created what became known as the conduct and effects test to determine the reach of Section 10(b) and Rule 10b-5 with respect to securities fraud having a transnational dimension.[20] Under this test, conduct or effects in the United States might—depending upon a balancing of factors[21]—subject a securities fraud to the reach of the U.S. prohibition. The test spread from the Second Circuit to the other circuits,[22] albeit with some differences.[23]

The early cases developing the conduct and effects test seem not to have provoked too much controversy. This changed over time. In part, increasingly

12. *Id.*

13. 15 U.S.C.A. § 78j(b).

14. 17 C.F.R. § 240.10b-5.

15. *Schoenbaum*, 405 F.2d at 204.

16. *E.g.*, Kardon v. National Gypsum Co., 73 F.Supp. 798, 800 (E.D.Pa. 1947).

17. *Schoenbaum*, 405 F.2d at 209.

18. Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1330 (2d Cir. 1972).

19. *Id.* at 1333.

20. *E.g.*, S.E.C. v. Berger, 322 F.3d 187, 192-93 (2d Cir. 2003).

21. *E.g.*, Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 129-31 (2d Cir. 1998) (balancing various factors in holding that Section 10(b) did not apply); *e.g.*, Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 414 (8th Cir. 1979) (stating that the test looks at a number of factors with no one factor dispositive).

22. *E.g.*, Fed. Sec. and Exch. Comm'n v. Kasser, 548 F.2d 109, 116; *e.g.*, Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 667 (7th Cir. 1998); *e.g.*, *Continental Grain*, 592 F.2d at 414; Grunenthal GmbH v. Hotz, 712 F.2d 421, 424-25 (9th Cir. 1983).

23. *E.g.*, *Kauthar*, 149 F.3d at 665 ("The predominant difference among the circuits, it appears, is the degree to which the American-based conduct must be related causally to the fraud and the resultant harm to justify the application of American securities law.").

aggressive applications of the conduct and effects test provoked reaction. This was particularly true with the use of the test to reach so-called F-cubed cases—those in which the plaintiffs were foreigners, the defendant was a foreign corporation, and the purchases or sales of securities took place on foreign securities markets.[24] Under these circumstances, critics asked what possible interest the United States had in applying its securities fraud law to the plaintiffs' claims simply by virtue of the fact that some of the conduct in creating or promulgating the false or misleading statements took place in the United States.[25]

A second source of reaction arose out of cases in which application of U.S. law highlighted policy tensions. In a case like *Leasco* in which a solitary defrauded investor sued the company that lied to it,[26] no one outside of the defendant was likely to be too upset by the application of U.S. securities laws. With large shareholder class actions against prominent foreign corporations, however, hostile reaction arose.[27] This is not surprising, since such class actions have been controversial in this country.[28] Exacerbating the problem are differences in substantive (such as the fraud on the market presumption[29]) and procedural (with regard to such matters as class actions and contingency fees[30]) laws governing such actions in the United States versus the laws elsewhere.

24. *See, e.g.*, Danielle Kantor, *Note: The Limits of Federal Jurisdiction and the F-cubed Case: Adjudicating Transnational Securities Disputes in Federal Courts*, 65 N.Y.U. ANN. SUR. AM. L. 839, 841 (2010) (discussing F-cubed cases).

25. *See, e.g.*, Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 493-96 (2009) (arguing that including purchasers on foreign stock markets in securities fraud class actions is unnecessary to protect the interests of U.S. investors or the purposes of the Securities Exchange Act).

26. Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1330 (2d Cir. 1972).

27. *See, e.g.*, Staff of the Securities Exchange Commission, *Study on the Cross-Border Scope of the Private Right of Action under Section 10(b) of the Securities Exchange Act of 1934 as Required by Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act* 23-24 (Apr. 2012) (quoting amicus briefs filed in *Morrison* by the British, French and Australian governments, which criticized the United States allowing class actions seeking recovery for securities frauds in connection with trading shares on their markets).

28. *E.g.*, John C. Coffee, Jr., *Re-forming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1534 (2006) ("The standard criticism from the business community, the corporate bar, and some academics has long been that securities class actions disproportionately assert 'frivolous' claims and thereby reduce shareholder welfare on average.").

29. The fraud on the market presumption allows purchasers or sellers of securities in well-developed markets to claim indirect reliance on false statements they may never have heard based upon the theory that such statements impacted the price paid or received by the investors. The U.S. Supreme Court has accepted this presumption, *e.g.*, Basic, Inc. v. Levinson, 485 U.S. 224, 250 (1988), but other nations have rejected it. *E.g.*, Marco Ventoruzzo, *Like Moths to a Flame? International Securities Litigation After Morrison: Correcting the Supreme Court's "Transactional Test*," 52 VA. J. INT'L. L. 405, 414 (2012).

30. *E.g.*, Debra Lyn Bassett, *Implied "Consent" to Personal Jurisdiction in Transnational Class Litigation*, 2004 MICH. ST. L. REV. 619, 625, 628 (2004) (describing systems in other countries without U.S. style class actions); *e.g.*, Ventoruzzo, *supra* note 29, at 412 (describing the impact on securities fraud litigation of differences between the U.S. opt-out class actions and the collective actions in other nations in which members must affirmatively opt into the class, and contingency fees in the United States).

A final source of reaction arose out of the objection that the conduct and effects test lacked clear definition and had devolved into ad hoc and unpredictable judicial decisions.[31] This last complaint loomed especially large in persuading the Supreme Court to seek a simpler test in *Morrison*.

B. Morrison

Morrison was an F-cubed case: the plaintiffs were Australians, who purchased stock in an Australian banking company, through transactions on the Australian stock market.[32] We can blame events in Florida for the case being in the United States. The Australian banking company (National Australia Bank) had purchased a Florida firm, which conducted a business servicing mortgages. A principal asset of such a business is the contracts it has to service mortgages. The value of these contracts, in turn, partially depends on how long the mortgages covered by the contracts will run. The executives of the Florida firm overestimated how long the mortgages would run before homeowners refinanced their mortgages, thereby significantly overestimating the value of the firm's mortgage servicing contracts. Because the National Australia Bank bought the Florida firm, this inflated value showed up on the financial reports which the bank filed in Australia. Eventually, as homeowners refinanced their mortgages faster than the Florida firm's executives predicted, National Australia Bank was forced to write down the value of the contracts held by the Florida firm, leading the bank's stock price to tumble. This, in turn, led parties who bought shares in the Australian bank to sue in U.S. court alleging violation of Section 10(b) and Rule 10b-5. They claimed that the executives of the Florida firm had deliberately exaggerated the expected life of the mortgages and the value of the mortgage servicing contracts.[33]

To the lower courts applying the conduct and effects test, the issue was where the fraudulent conduct took place. The plaintiffs argued it took place in Florida, where the executives overestimated the expected life of the mortgages and the value of its contracts.[34] The lower courts, however, viewed the fraudulent conduct as occurring in Australia, where the bank incorporated the overvaluations into the financial reports it made public.[35] As a result, the District Court for the Southern District of New York dismissed the case and the Court of Appeals for the Second Circuit affirmed the dismissal.[36]

31. *E.g.*, Choi & Silberman, *supra* note 25, at 467.

32. Which a wag might say makes *Morrison* an A-cubed or AAA case.

33. Morrison v. National Australia Bank Ltd., 130 S.Ct. 2869, 2875-76 (2010) (providing the factual background and procedural history).

34. *Id.* at 2883.

35. *Id*. at 2876.

36. The District Court dismissed for lack of subject matter jurisdiction, reflecting the way in which the

When the case reached the Supreme Court, the plaintiffs found an even less hospitable reception. All the justices agreed the plaintiffs should lose. The dispute within the Court involved why. A concurring opinion by Justices Stevens and Ginsburg agreed with the lower courts that the case simply failed under the conduct and effects test.[37] The majority of the Supreme Court justices, in an opinion written by Justice Scalia, took a broader approach to the problem. The majority opinion rejected the entire conduct and effects test. Instead, the majority ruled that Section 10(b) did not apply unless the plaintiffs purchased or sold securities in the United States.[38]

In creating this new rule, the majority opinion proclaimed reliance on the presumption against extraterritoriality. This required the majority to reject arguments that (1) various provisions in the Securities Exchange Act rebutted the presumption against extraterritoriality,[39] (2) that the presumption did not apply because of the conduct in Florida, and (3) that various policies favored a version of the conduct and effects test suggested by the Solicitor General.[40]

III. *MORRISON* AND THE PRESUMPTION AGAINST EXTRATERRITORIALITY

Morrison's significance transcends the question of whether U.S. securities law will reach securities fraud in connection with overseas purchases or sales of securities. The reason lies in the Supreme Court's reliance on the presumption against extraterritoriality. Developing this point requires an introduction to the presumption against extraterritoriality, an explanation of the problem courts face

courts, before *Morrison*, had characterized the issue of whether Section 10(b) reached actions outside the United States. The Supreme Court's opinion in *Morrison* characterized the matter as a merits issue (whether Section 10(b) prohibited the activity in question given where it took place), rather than a subject matter jurisdiction question (whether the nature of the matter was one that a federal court could hear), since federal courts have jurisdiction to hear cases involving the federal securities laws. *Id.* Contributing to the complexity in terminology in this area is the use of the term "prescriptive jurisdiction" to refer to the power of a nation to create law governing events beyond its borders. *E.g.*, Restatement (Third) of the Foreign Relations Law of the United States ["Restatement of Foreign Relations Law"] § 401.

37. *Morrison*, 130 S. Ct. at 2894 (Stevens, J., concurring).

38. *Id.* at 2888.

39. The majority dismissed the arguments that the presumption was rebutted by: (1) the language of Section 10(b), which triggered application of the section upon using a means of interstate commerce (defined to include commerce between foreign nations and any state); (2) the prefatory section of the Securities Exchange Act mentioning that prices set on U.S. securities exchanges are quoted in foreign countries; and (3) Section 30(a) and (b), which showed an intent for the Securities Exchange Act to reach transactions outside the United States. *Id.* at 2877-78. The court relied on the precedent of *EEOC v. Arabian American Oil Co.* (*Aramco*), 499 U.S. 244 (1991), in ignoring the so-called jurisdictional language of Section 10(b) as not to be taken seriously. *Morrison*, 130 S. Ct. at 2877-78. The implication of the language in the act's prefatory section on the reach of Section 10(b) is obscure. The Court, however, misunderstood Section 30(a) and (b). *See infra* notes 117-120 and accompanying text.

40. The Solicitor General proposed certain qualifiers on when conduct in the United States would be sufficient to trigger the statute and argued that the applying the statute to situations in which such conduct exists would help promote honest markets in the United States and prevent the United States from becoming a Barbary Coast from which persons direct fraud at foreign markets. *Morrison*, 130 S. Ct. at 2887-88.

in deciding whether this presumption applies in situations, like *Morrison*, in which some conduct or effects occurs both within and outside the United States, and an exploration of the test the Court employed in *Morrison* for making this determination.

A. The Presumption Against Extraterritoriality

In a simpler time, issues of applying U.S. law beyond the young nation's borders arose on ships, and involved pirates,[41] murder at sea,[42] and customs duties.[43] By the Twentieth Century, an industrialized and powerful United States was dealing with those who used subtler means to enrich themselves at the expense of others. Congress responded with statutes to protect consumers, competitors, workers, investors, and the like.[44] As economic transactions increasingly crossed national boundaries, issues arose regarding the degree to which such statutes applied to events that occurred in other nations. Courts responded with decisions applying or refusing to apply U.S. antitrust laws,[45] employment laws,[46] securities laws,[47] trademark law,[48] as well as a variety of other laws,[49] to activities abroad.

In the course of deciding these cases, the Supreme Court often referred to rules of construction or presumptions regarding Congress' intent with respect to applying U.S. laws to events beyond our borders. So, in its early decisions dealing with murder at sea and enforcing customs duties, the Supreme Court explained that even though a statute used broad, general language regarding its reach, the Court presumed that Congress only intended to legislate within Congress' "authority and jurisdiction;"[50] albeit it is debatable whether this referred to legislating only with respect to events within the territory of the

41. *E.g.*, United States v. Klintock, 18 U.S. (5 Wheat.) 144 (1820).

42. *E.g.*, United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1820).

43. *The Apollon*, 22 U.S. (9 Wheat.) 362, 368-69 (1824).

44. *E.g.*, Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (protecting consumers and competitors from combinations in restraint of trade and monopolization); *e.g.*, Eight Hour Law, 40 U.S.C. §§ 324-25 (1940) (protecting workers through wage and hour regulation); *e.g.*, Securities Exchange Act, 15 U.S.C. §§ 78a et. seq. (protecting investors).

45. *See infra* note 54 and accompanying text; *see* F. Hoffmann-La Roche v. Empagran S.A., 542 U.S. 155, 164 (2004).

46. *See infra* note 55 and accompanying text; *see* Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 617-27 (1990) (discussing cases dealing with extraterritorial application of U.S. employment law).

47. *See supra* Part II.A.

48. Steele v. Bulova Watch Co., 344 U.S. 280, 290 (1952).

49. *E.g.*, Smith v. United States, 507 U.S. 197, 198 (1993) (Federal Torts Claim Act); *e.g.*, Turley, *supra* note 46, at 627-33 (discussing cases dealing with extraterritorial application of U.S. environmental protection laws).

50. *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824).

United States or legislating only within the limits imposed by international law on the permissible reach of a nation's statutes.[51] Justice Holmes' opinion in *American Banana Co. v. United Fruit Co.*[52] marked an important point in the evolution of the law in this area when he stated that the presumed limit is one of territory. Specifically, Justice Holmes asserted that the legality of an act nearly universally depends upon the law of the nation in which it takes place, which, in turn, leads courts to construe statutes only to apply within the nation's territorial limits.[53]

Justice Holmes' strict notions of territoriality subsequently fell out of favor in the very field in which *American Banana* arose, as courts increasingly applied U.S. antitrust laws to overseas conduct that had an effect in the United States.[54] In employment law, however, the Supreme Court continued to invoke a presumption against applying U.S. laws to events beyond our territory (extraterritoriality) in order to construe U.S. law as not reaching labor practices outside the United States.[55] This hit an important milestone in the Court's 1991 decision in *E.E.O.C. v Arabian American Oil Co* (*Aramco*),[56] in which the Supreme Court invoked the presumption against extraterritoriality in order to hold that the Equal Employment Opportunity Act did not apply to the discriminatory firing of an American citizen by an American company, when the firing took place in Saudi Arabia. *Aramco* marked a turning point in the frequency with which the Supreme Court invoked the presumption against extraterritoriality. Whereas, the eight decades between *American Banana* and *Aramco* saw the Supreme Court decreasingly invoke the presumption to restrict the application of U.S. statutes,[57] in the two decades since *Aramco* the presumption has found much greater favor in the Supreme Court's eyes—up through and including its invocation in *Morrison*.[58]

The growing fondness of the Supreme Court toward the presumption against extraterritoriality has, not surprisingly, brought the attention of scholars to the

51. *E.g.*, John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L. L. 351, 363-66 (2010).

52. 213 U.S. 347, 356-57 (1909).

53. *Id.* at 357.

54. *E.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 769 (1993); *e.g.*, United States v. Sisal Sales Corp., 274 U.S. 268, 271 (1927); *e.g.*, United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945).

55. *E.g.*, Foley Bros. v. Filardo, 336 U.S. 281, 282 (1949) (holding that the Eight Hour Law did not apply to employment overseas).

56. EEOC v. Arabian American Oil Co. (*Aramco*), 499 U.S. 244 (1991).

57. William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 91 (1998) (The Supreme Court did not invoke the presumption against extraterritoriality in the four decades after applying it to the Eight Hour Day law in 1949 even though it had opportunities to do so).

58. *Id.* at 87 (listing Supreme Court opinions invoking the presumption against extraterritoriality in the decade following *Aramco*). Just recently, the Supreme Court invoked the presumption in order to limit the reach of claims under the Alien Tort Statue. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1662 (2013).

topic.[59] While these scholars disagree regarding what the Court should do with the presumption,[60] on one point there seems widespread agreement: the Supreme Court has made a hash of the subject.[61] Inconsistencies in the Court's opinions abound. Some opinions rely on the presumption, while other opinions dealing with application of U.S. law to events beyond the nation's borders barely, if at all, mention it.[62] The Court cannot make up its mind about the purposes for the presumption.[63] The Court's opinions differ on the evidence of legislative intent necessary to overcome the presumption.[64] Finally, Supreme Court opinions are confusing or inconsistent regarding when a claim involves extraterritoriality so as to trigger the presumption.[65] While *Morrison* illustrates many of these problems, its primary significance lies in its effort to define when a claim involves extraterritoriality.[66]

59. *See generally* Yaad Rotem, *Economic Regulation and the Presumption Against Extraterritoriality—A New Justification*, 3 WM & MARY POL'Y REV. 229 (2012); *see generally* Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019 (2011); *see generally* Lea Brilmayer, *New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. L. REV. 655 (2011); *see generally* Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110 (2010); *see generally* Knox, *supra* note 51; *see generally* Hannah L. Buxbaum, *Territory, Territoriality and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631 (2009); *see generally* Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455 (2008); *see generally* Dodge, *supra* note 57; *see generally* Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT'L. L. 750 (1995).

60. *E.g.*, Colangelo, *supra* note 59, at 1022 (advocating that courts limit the presumption to situations in which the law comes from unilateral (domestic) as opposed to multilateral (international) sources); *e.g.*, Meyer, *supra* note, 59 at 119 (advocating that courts limit the presumption to situations in which only one nation prohibits the conduct); *e.g.*, Knox, *supra* note 51, at 353 (advocating that courts base the presumption on international law rules regarding jurisdiction to apply a nation's law); *e.g.*, Parrish, *supra* note 59, at 1462 (advocating that courts reject the effects test as a basis for extending the reach of U.S. laws); *e.g.*, Dodge, *supra* note 57, at 90 (advocating that courts base the presumption on the absence of effects in the United States).

61. *E.g.*, Colangelo, *supra* note 59, at 1021, 1028 (arguing that the only thing the scholars writing on the presumption against extraterritoriality agree on is that the law on the subject is a mess).

62. *E.g.*, Kramer, *supra* note 59, at 752-53 (contrasting *Aramco* with *Hartford Fire Ins. Co.* in which the Supreme Court does not explicitly mention the presumption).

63. *Compare* Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869, 2887 (2010) (stating that the presumption against extraterritoriality is not about comity or avoiding conflicts with other nations' laws), *with Kiobel*, 133 S. Ct. at 1664 (quoting *Aramco*'s statement that the presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord").

64. *E.g.*, Dodge, *supra* note 57, at 96-97 (discussing statements by the Supreme Court in *Aramco*, *Smith v. United States*, 507 U.S. 197, 201-04 (1993), and *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 176-77 (1993), with different formulations for the amount of evidence necessary to overcome the presumption).

65. Beyond the problem addressed in this article with the Supreme Court's approach to situations involving conduct or effect in more than one nation, the court has been inconsistent with respect to whether ships or bases constitute U.S. territory for purposes of determining extraterritoriality. *E.g.*, Knox, *supra* note 51, at 390-92.

66. *See infra* Part III.B.

B. The Problem of Identifying Extraterritoriality

The majority opinion in *Morrison* stated that it based its result on the presumption against extraterritoriality. The concurring opinion in *Morrison*, by contrast, viewed the presumption as largely irrelevant. This illustrates that a pivotal question in the case was what constitutes extraterritoriality so as to the trigger the presumption. To the concurring opinion, the Second Circuit's test did not involve extraterritoriality because the Second Circuit's test predicated application of Section 10(b) on a nexus between the prohibited acts and the territory of the United States—specifically that either the prohibited conduct or the effect of the prohibited conduct occur in the United States. To the plaintiffs in *Morrison*, the case before the court did not involve extraterritoriality because the fraud originated in Florida. To the majority, however, the case involved extraterritoriality because the purchase of securities in reliance on the fraud occurred in Australia.[67]

1. A Simple Introduction to Territoriality and Extraterritoriality

To understand these various positions, it is useful to step back from the dispute in *Morrison* and consider the problem more generally. To do so, it helps to use a simple example: defendant shoots and kills victim. Normally, the nation in which the killing takes place applies its law to prosecute the defendant for murder, reflecting the traditional approach under which laws govern events taking place within the nation's territory.[68]

Nations, however, sometimes might prosecute the defendant even if the killing took place in another nation. This might occur, for example, because the victim was a citizen of the nation seeking to prosecute (sometimes referred to as the passive personality principle);[69] or because the defendant is a citizen of the nation seeking to prosecute (referred to as the nationality or active personality principle);[70] or because of some special interest of the nation in the shooting (say

67. *See supra* Part II.B.

68. *E.g.*, Restatement of Foreign Relations Law, *supra* note 36, at § 402, cmt. c ("The territorial principle is by far the most common basis for the exercise of jurisdiction to prescribe."); *e.g.*, International Bar Association, Report of the Task Force on Extraterritorial Jurisdiction 11 (2009), *available at* http://www.ibanet.org/. [hereinafter "IBA Report"] ("The starting point for jurisdiction is that all [nations] have competence over events occurring and persons . . . present in their territory. This principle, known as the 'principle of territoriality,' is the most common and least controversial basis for jurisdiction."). Include within the term "nation" are political subdivisions of nations, such as "states" within the United States of America, that prosecute crimes such as murder committed within the political subdivision.

69. *E.g.*, Restatement of Foreign Relations Law, *supra* note 36, at § 402 cmt. g; *e.g.*, IBA Report, *supra* note 68, at 147 ("Of the 27 [nations] surveyed for this chapter, just over half adopted some version of the passive personality principle of jurisdiction, although generally only for certain crimes.").

70. *E.g.*, Restatement of Foreign Relations Law, *supra* note 36, at § 402(2); *e.g.*, IBA Report, *supra* note 68, at 145 ("Almost all (25 out of 27) of the [nations] surveyed for this chapter grant some degree of jurisdiction to their courts based on the active personality principle, in the sense of criminalising certain conduct by

the victim was undertaking an important task for the government of the nation seeking to prosecute; in which case the nation would be asserting jurisdiction based upon what is often referred to as the protective principle);[71] or because of the special nature of the crime (say the murder was part of a campaign to eliminate all persons of the victim's religion; in which case the nation would be asserting jurisdiction to prosecute based upon what is referred to as universal jurisdiction).[72] In any of these cases in which the nation seeks to prosecute a killing that took place in another nation, one can say that the nation is applying its law extraterritorially.

Applying the concept of extraterritoriality becomes less straightforward as events straddle borders. In the classic example, the defendant, who is standing in one nation, shoots a rifle and kills the intended victim, who is standing near the border in another nation. Now, in which nation's territory does the wrong occur: the nation of the act or the nation of the injury? While some early court opinions talked of this as a situation in which the defendant's conduct occurred in both nations—based upon the metaphysical notion that the defendant's conduct traveled with the bullet[73]—the general view is that this situation involves conduct in one nation (where the defendant pulled the trigger) and an effect in another nation (where the bullet struck the victim).[74] Hence, this example illustrates that prohibited conduct may have a connection to a territory either by occurring there or by creating an effect there. Moreover, whether one views the situation through the lens of where conduct and effect occur, or through the lens of where the necessary elements of a crime took place, the example shows that situations can arise in which one might say that a prohibited act occurs in more than one nation. In such an event, the critical question for purposes of the presumption against extraterritoriality is whether either nation would be applying its law extraterritorially if, in this example, it prosecuted the shooter for murder.

There are three answers to this question: yes, no, and maybe. The affirmative answer follows from what I will label the "half-empty" viewpoint because it requires all contacts to be within a single nation in order to establish territoriality.

nationals under domestic law.").

71. *E.g.*, Restatement of Foreign Relations Law, *supra* note 36, at § 402(3); *e.g.*, IBA Report, *supra* note 68, at 150 ("Of the 27 [nations] surveyed for this chapter, 22 have enacted legislation based on some form of the protective principle.").

72. *E.g.*, Restatement of Foreign Relations Law, *supra* note 36, at § 404; *e.g.*, IBA Report, *supra* note 68, at 153 ("A majority of the [nations] surveyed for this chapter (25 out of 27) provide for some form of universal jurisdiction to be exercised by national courts.").

73. *See, e.g.*, Simpson v. State, 17 S.E. 984, 985 (Ga. 1893) ("[I]f a man in the state of South Carolina criminally fires a ball into the state of Georgia, the law regards him as accompanying the ball, and as being represented by it, up to the point where it strikes.").

74. *See, e.g.*, Restatement (Second) of the Foreign Relations Law of the United States § 18 illustration 2 (1965); *see generally, e.g.*, STEPHEN C. MCCAFFREY, UNDERSTANDING INTERNATIONAL LAW 178 (2006) (referring to subjective and objective territoriality as where the act and the injury occur, respectively).

Under this view, both nations in the cross-border shooting example would be applying their law extraterritorially if they prosecuted the defendant for murder because they would be prosecuting a crime of which some of the conduct or effect (or the elements) took place in another nation.[75] At the other extreme is what I will label the "half-full" viewpoint because it requires only some contact within a nation in order to establish territoriality. Under this view, neither of the nations in the cross-border shooting example would be applying law extraterritorially if either prosecuted the defendant for murder because, for both, at least some the conduct or effect (or elements) of the crime took place in that nation.[76] In between these two viewpoints are middle grounds. Under such middle grounds, one nation might be applying its law extraterritorially and one might not. For example, a highly traditional view would be that a nation punishing conduct (pulling the trigger) within the nation's territory would not be applying its law extraterritorially, while a nation punishing conduct that occurred elsewhere would be applying its law extraterritorially, even though the conduct elsewhere produced an effect (the death) within the nation's territory.[77]

2. *Applying the Concepts to Transnational Securities Fraud and Situations Introducing Greater Complexity*

Turning from murder to securities fraud, it is easy to imagine a parallel to the cross-border shooting example: a person may send a false or misleading communication from one country to a recipient in another country, and the recipient acts upon the communication to purchase a security. Indeed, a review of one's email inbox may suggest that cross-border fraudulent solicitations are far more frequent than cross-border shootings.[78] The situation facing the Second Circuit in *Leasco*—from which, as stated above,[79] stemmed the conduct component in the Second Circuit's conduct and effects test—provides an example: the defendant in England made false or misleading statements in transatlantic telephone calls and mailings to the plaintiff in the United States.

Actually, things in *Leasco* were more complicated than a simple cross-border fraudulent solicitation. In addition to the calls and mailings from England to the

75. *E.g.*, Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1218 n.3 (1992) (using the term extraterritoriality to refer to a case in which at least one relevant event occurs in another nation).

76. *See, e.g.*, Restatement of Foreign Relations Law, *supra* note 36, at § 402(1)(2), cmt. d (treating situations in which either conduct or effect occurs within a nation as creating jurisdiction to apply a nation's law based upon territoriality).

77. *E.g.*, Parrish, *supra* note 59, at 1456 (discussing traditional approach under which application of a statute based upon effects, but not conduct, is extraterritorial).

78. It is amazing how many large estates are going unclaimed in other nations, a share of which can be yours for only $5,000.

79. See note 18 *supra* and accompanying text.

United States,[80] the defendant's representatives also made false or misleading statements to the plaintiff's representatives during meetings that took place both in the United States and in England (where the plaintiff's representatives agreed to purchase the stock). The facts in *Morrison* also illustrate complexity in locating the fraudulent conduct. As stated earlier,[81] the fraud originated in Florida with the executives of the Australian bank's Florida subsidiary allegedly manipulating estimates to make the subsidiary's assets appear more valuable than they were. The Australian bank incorporated its subsidiary's overestimate in the bank's financial statements, which the bank released in Australia (but also in the United States, since the bank's American Depository Receipts ("ADRs") were traded on the New York Stock Exchange).[82] Executives of the subsidiary also allegedly made misleading statements in Florida touting the subsidiary's prospects. One could argue, as the lower courts in *Morrison* did, that the conduct in Florida did not directly lead to the plaintiffs' reliance in Australia so as to be the source of the effect in Australia. The notion is that the fraud concocted in Florida does not hurt the plaintiffs who bought their stock in Australia until the bank repeats it in Australia.[83] Of course, if there is no fraud in Florida, there is nothing misleading for the bank to repeat in Australia.[84]

Not only can it be challenging to decide where the relevant conduct occurs in a securities fraud, but locating the effects also can get tricky. In *Schoenbaum*, as mentioned above,[85] a fraud practiced on a Canadian corporation by its directors involved the low-price issuance of stock in Canada. The rather indirect effect in the United States was to dilute the value of shares in the Canadian company trading on the American Stock Exchange. In *Leasco*, one might ask whether the effect of the misrepresentations is the purchase of shares in England, or the depletion of the U.S. plaintiff's bank account in the United States resulting from

80. Which the court, perhaps harkening back to the archaic view that the shooter's conduct traveled with the bullet, treated as conduct in the United States.

81. *See supra* Part II.B.

82. *See, e.g.*, Securities Exchange Commission, Form 20-f, *available at* http://www.sec.gov/about/forms/form20-f.pdf (providing the form for registering ADRs listed on a national stock exchange, which includes financial reporting requirements). ADRs give their owners the right to convert them into stock in the company. Foreign companies, like National Australia Bank, often issue and list ADRs, instead of their stock, in securities markets in the United States.

83. Morrison v. Australia National Bank Ltd., 547 F.3d 167, 176 (2d Cir. 2008). The parallel might be to one who loads the rifle in one jurisdiction and fires it in another.

84. It might be easier to deny a connection between the plaintiffs' trades in Australia and the misleading statements by the Florida subsidiary's executives or the misleading filings by the bank in the United States. Even here, however, a causal link probably exists, since, with global communication, someone presumably would have noticed the inconsistency if the bank's U.S. filings or the executives' statements had not matched the bank's Australian misstatements. *See, e.g.*, Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 44-48 (2007) (discussing the impact of fraudulent representations in the United States on prices in foreign markets).

85. *See supra* Part II.A.

purchasing shares that were not worth what the defendant led the plaintiff to believe.[86]

While economic crimes, such as securities fraud or antitrust violations,[87] commonly involve complex situations in which both the conduct and effect of the prohibited acts might occur in a number of jurisdictions, it does not take much imagination to change the simple cross-border shooting example before it too starts raising troubling issues in determining the location of the relevant conduct or effect. For instance, instead of a shooting, consider a bombing: one defendant assembles the bomb in one nation and brings it to a second defendant in a second nation, who then mails it from the second nation to the victim in a third nation, where the bomb explodes; assume, however, the victim survives until being moved to a fourth nation where the victim dies, leaving orphaned children in a fifth nation. If all five nations sought to prosecute, which, if any, would be attempting to apply law extraterritorially?

3. The Need for Goldilocks

The potential for an ever expanding territorial connection based upon some attenuated conduct or effect occurring in the United States led the majority opinion in *Morrison* to reject the notion that the presumption against extraterritoriality is irrelevant so long as some conduct or effect occurs in the United States. Actually, the Second Circuit in its conduct and effects test did not reject a role for a presumption regarding the reach of statutes so long as there is some conduct or effect in the United States. Instead, the Second Circuit stated that it presumed Congress would not wish to apply the Securities Exchange Act based upon so little conduct or effect in the United States that this would offend what the Second Circuit referred to as foreign relations law[88]—by which the court

86. *See supra* Part II.A.

87. Kramer, *supra* note 59 at 751-52 (pointing out that prior to the Supreme Court's 1993 decision in *Hartford Fire Insurance*, the Supreme Court had only applied to Sherman Act to conduct outside the United States in cases in which some of the anticompetitive conduct also occurred inside the United States); Case C-89/85, Åhls Tröm Osakeyhtiö v. Comm'n, 1988 E.C.R. 5193, 5243 [Wood Pulp] (holding that price fixing by wood pulp producers outside the European Union violated European Union law when the conspiracy was implemented (by selling at the illegally agreed prices) in the European Union). The classic antitrust case imposing liability for overseas conduct based upon effects in the United States employed a highly expansive view of effects. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945). In the relevant portion of the case, the court condemned a cartel of foreign producers of aluminum who agreed to limit production. Even though the limit covered only production of aluminum outside the United States, the court held that this overseas conduct created an effect in the United States because less worldwide supply of aluminum would mean higher aluminum prices in the United States. *Id.*

88. *E.g.*, Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972) ("absent the clearest language, Congress will not be assumed to have meant to go beyond the limits recognized by foreign relations law").

meant the principles laid out in the Restatement of this title.[89] Hence, no one was really asserting a "half-full" viewpoint in *Morrison*.

On the other hand, no one was really arguing for a "half-empty" viewpoint either. Even the majority opinion in *Morrison* did not argue that any conduct or effect outside the United States triggered the presumption against extraterritorially. The reason for this is pretty obvious: If each nation's courts apply a presumption against extraterritoriality whenever any conduct or effect occurs in another nation, then no nation might prosecute cross-border misconduct, such as the classic cross-border shooting example, in the all too common[90] situation in which legislatures neglect to specify the territorial reach of statutes (which, of course, is why one has the presumption). Not only is this a poor result as a policy matter, but also it is difficult to imagine that this is what legislatures have in mind.[91]

Moreover, the potentially expansive reach of conduct and effects in an era of globalization is a double-edged sword. The majority in *Morrison* feared that plaintiffs could often point to some minor conduct or effects in the United States in order to render the presumption a timid watchdog against extraterritoriality. On the other hand, with globalization, defendants can often point to some minor conduct or effects outside the United States with the hope of turning the presumption into a pit bull attacking reasonable efforts to apply U.S law. Hence, lest some minor conduct or effects either inside or outside the United States too easily defuse or trigger the presumption, we need to search for a reasonable middle ground between the "half-empty" and "half-full" viewpoints.

C. Morrison*'s Statutory Focus Test for Identifying Extraterritoriality*

The opinion for the Court in *Morrison* invoked a test of statutory "focus" in order to resolve when a claim involves extraterritoriality: if the event which is the focus of the statute occurs in this country, there is no extraterritoriality, if the event which is the focus of the statute occurs abroad, there is.[92] In applying this test to the situation before it, the Court in *Morrison* decided that the focus of the

89. *Id.* (looking to sufficient conduct in the United States under the examples set out in the Second Restatement of Foreign Relations Law); Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 129 (2d Cir. 1998) (applying the Third Restatement of Foreign Relations Law reasonableness criteria).

90. At least in common law jurisdictions. Kenneth S. Gallant, *The Indeterminate International Law of Jurisdiction, the Presumption Against Extraterritorial Effect of Statutes, and Certainty in U.S. Criminal Law*, 27 PAC. MCGEORGE GLOBAL BUS. AND DEV. L.J. 219 (2014).

91. Indeed, after an English court once held that neither nation could prosecute when a blow was struck in one country and death ensued in another country, the English Parliament passed legislation to overturn this rule. *E.g.*, S.S. Lotus, (France v. Turkey) 1927 P.C.I.J. (ser. A) No. 10 at 65, 73 (Moore, J. dissenting) (relating this example).

92. *See generally* Morrison v. National Australia Bank Ltd., 130 S.Ct. 2869 (2010).

Section 10(b)'s prohibition of fraud in connection with the purchase or sale of securities is the purchase or sale.[93] Hence, Section 10(b) reaches fraud in connection with purchases or sales of securities in the United States, but, following the presumption against extraterritoriality, the Court presumed Congress did not intend Section 10(b) to reach fraud in connection with purchases or sales of securities outside the United States—as in the stock purchases by the *Morrison* plaintiffs in Australia.[94]

This, however, raises the question of how the Court decides what is the focus of the statute; in other words, if statutory focus provides the test for determining extraterritoriality, what is the test for determining statutory focus? Unfortunately, the Court in *Morrison* provided no general standards, but instead simply made a determination for the statute before it.[95] Hence, we must examine how the Court in *Morrison* decided that the focus of the Section 10(b)'s prohibition of fraud in connection with the purchase or sale of securities is the purchase or sale (rather than the fraud) and from this example deduce what it means to be the focus of the statute for purposes of determining extraterritoriality.

1. Morrison*'s Method for Identifying the Statutory Focus*

Morrison identified the purchase or sale of securities as the focus of Section 10(b) based upon five arguments.[96] The first is simply that Section 10(b) only penalizes fraud in connection with the purchase or sale of a security.[97] This, however, simply begs the question. While it is true that Section 10(b) does not penalize fraud that is not in connection with the purchase or sale of a security, the section also does not address the purchase or sale of a security without fraud.[98] This does not tell us as between the fraud and the purchase or sale, which is the dog and which is the tail (or which is the focus, to use the Court's language).[99]

Next, the Court pointed to the statute's prologue (not to mention the statute's title), which makes it clear that Congress intended in the Securities Exchange Act to regulate national (in other words U.S.) securities exchanges.[100] One pesky problem with this argument is that Section 10(b) is expressly not limited to exchange traded securities, as Congress painfully made clear by stating that the section covers fraud in connection with "the purchase or sale of any security registered on a national securities exchange or any security not so registered."[101]

93. *See id.* at 2884.

94. *See id.* at 2885.

95. *See generally id.*

96. *See infra* Part III.C.2.

97. *Morrison*, 130 S.Ct. at 2887.

98. *See* Employment of Manipulative and Deceptive Devices Act, 17 CFR 240.10b-5 (2013).

99. *See id.*

100. *Morrison*, 130 S.Ct. at 2881-82.

101. 15 U.S.C. § 78j (2010). The Court is stretching in its footnote rejoinder that Congress must have

The Court also invoked Section 30(a) and (b) of the Securities Exchange Act,[102] which, the Court argued, shows that Congress did not intend the act to reach transactions outside the United States unless specifically provided in a regulation.[103] Section 30(a) prohibits a broker or dealer from effecting transactions in securities of U.S. companies on foreign securities exchanges in violation of regulations promulgated by the SEC to prevent evasion of the Securities Exchange Act.[104] Section 30(b) provides that the Securities Exchange Act does not apply to "any person insofar as he transacts a business in securities without the jurisdiction of the United States," unless the person does so in violation of the SEC regulations referred to in Section 30(a).[105] At first glance, these provisions seem to support *Morrison*'s result, and, indeed, one may wonder why it was even necessary for the Court to invoke the presumption against extraterritoriality instead of simply citing Section 30(b) for the proposition that the Securities Exchange Act does not apply to transactions outside the United States unless the SEC has promulgated a regulation specifically calling for such application.

A more careful reading of Section 30(b), however, reveals that the section does not prevent provisions of the Securities Exchange Act from applying to transactions outside the United States; rather it precludes provisions of the act from applying to "any person insofar as he transacts a business in securities" outside the United States.[106] In *Schoenbaum*, the Second Circuit consulted the definitions section of the Securities Exchange Act—always a good idea—and concluded that Section 30(b)'s reference to a person who "transacts a business in securities" refers to brokers, dealers, and banks.[107] Hence, Section 30(b) is

meant domestic transactions when referring in Section 10(b) to the purchase or sale of any security not registered on a national securities exchange, because otherwise it would have been simpler for the section just to say the purchase or sale of any security. The obvious flaw in this rejoinder is that it would have been simpler for Congress to say the purchase or sale of any security in the United States if the reason Congress used this verbose language was to indicate that it only wanted to cover domestic transactions. A more likely rationale for what is obviously a long-winded way of saying the purchase or sale of any security is to make it clear that Congress meant Section 10(b) to reach any security whether registered or not, which is different from many other provisions of the Securities Exchange Act. *E.g.*, Securities Exchange Act, §§ 12(a) (registration requirement for companies listing shares on a national securities exchange), 14(a) (proxy solicitation rules for companies with shares listed on a national securities exchange), 16(b) (dealing with short swing trades by insiders of companies with shares listed on a national securities exchange); *e.g.*, 15 U.S.C. §§ 78l(a), 78n(a), 78p(b) (1934).

102. *Morrison*, 130 S.Ct. at 2885.

103. *Id.*

104. 15 U.S.C. § 78dd(a).

105. 15 U.S.C. § 78dd(b).

106. *See generally id.*

107. Schoenbaum v. Firstbrook, 405 F.2d 200, 208 (2d Cir. 1968). Specifically, Section 3(4) of the Securities Exchange Act (15 U.S.C. § 78c(4)) defines a broker as "any person engaged in the business of effecting transactions in securities for the account of others." Section 3(5) (15 U.S.C. § 78c(5)) defines a dealer as "any person engaged in the business of buying and selling securities . . . for such person's own account."

creating an exemption to the Securities Exchange Act's regulation of brokers, dealers and banks when they conduct securities operations outside the United States.[108] Section 30(a), in turn, is authorizing the SEC to issue regulations creating exceptions to the exemption if the SEC determines that brokers or dealers are exploiting the exemption in 30(b) to evade the act when conducting overseas trading in securities issued by U.S. companies.[109] None of this supports the argument that Section 30(a) and (b) shows an intent by Congress that the Securities Exchange Act's provisions generally not apply to transactions overseas; on the contrary, if, as the *Morrison* court presumed, Congress intended the overall Securities Exchange Act not to apply to securities transactions abroad then it is impossible to understand why Congress would have found it necessary specifically to exclude the actions of brokers, dealers, and banks insofar as they conduct their business outside the United States from the act, and Section 30(b) is useless.[110]

Critically, Section 3(5) excludes from the definition of a dealer "a person that buys or sells securities . . . for such person's own account, but not as a part of a regular business." This distinction between persons who buy and sell securities for their own account as part of a business (dealers) and persons who buy and sell securities for their own account, but not as part of a regular business, (not dealers) makes it clear that the person who "transacts a business in securities" language in Section 30(b) does not encompass ordinary investors who purchase or sell a security (such as the plaintiffs in *Morrison*). Nor, of course, is a non-trading corporation, such as National Australia Bank, which files misleading financial reports, a person who transacts a business in securities. Both the definition of broker and the definition of dealer in Section 3 expressly exclude banks even when banks engage in the business of making various securities transactions that would otherwise bring them within the definition of a broker or dealer. Based upon this, *Schoenbaum* concluded that the reason Section 30(b) used the person who "transacts a business in securities" language instead of just saying brokers and dealers is to include banks in the exemption from coverage under the act when the banks conduct securities operations outside the United States. *See id.*

108. *Id.*

109. *See* 15 U.S.C. § 78dd(b).

110. This explanation of Section 30(a) and (b) not only shows that these provisions do not support the court's focus argument, but also explains the argument that Section 30(b), in fact, rebuts the presumption against extraterritoriality. Specifically, while Section 30(b) shows Congress wished to limit the reach of the Securities Exchange Act with respect to certain transactions abroad, it also shows that Congress assumed that provisions of the act could reach transactions abroad and expressly prevented that when, with brokers, dealers and banks, Congress concluded this overstepped its intent. One might argue that disregarding the negative implication of Section 30(b) is consistent with some prior statements of the Supreme Court treating the presumption against extraterritoriality as a "clear statement rule." Specifically, in *Aramco*, the Supreme Court invoked a clear statement rule to disregard a provision in the Equal Employment Opportunity Act that appeared to have the same sort of negative implication that exists in Section 30(b). 499 U.S. 244, 253 (1991) (rejecting a negative implication argument based upon the alien exemption provision). The court's opinion in *Morrison*, however, does not disregard Section 30(b) based upon a clear statement rule under which only affirmative expressions of extraterritorial coverage count. For one thing, as just discussed, the opinion simply missed the negative implications of Section 30(b). Indeed, had the court only meant to disregard Section 30(b) as insufficient to rebut the presumption because of a clear statement rule, the court would not have returned to the section in support of its "focus" argument that Congress did not wish the Securities Exchange Act to apply to transactions abroad. Moreover, the opinion disclaims an intention to apply a clear statement rule. Morrison v. National Australia Bank Ltd., 130 S.Ct. 2869, 2883 (2010) ("But we do not say . . . 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.").

A fourth argument by the Court pointed to the Securities and Exchange Commission's interpretation of the reach of the 1933 Securities Act's prohibition on selling unregistered securities.[111] The SEC has interpreted the Securities Act generally not to require registration for securities sales outside the United States,[112] which, the Court argued, evidences an understanding that the federal securities laws do not apply to sales taking place abroad.[113] Actually, the court's characterization of the SEC interpretation is a misleading oversimplification insofar as the SEC historically did not, and in its current rule does not, draw a bright line for the registration requirement based solely upon the location of the sale.[114]

The Court's final argument looked to complaints in various amicus briefs filed by foreign governments and business groups about the interference with foreign securities regulation created by extending Section 10(b) to transactions abroad.[115] This is a straightforward policy argument, which Justice Scalia, presumably reflecting his advocacy of a textual approach to statutory interpretation, sought to disguise by arguing that Congress would have addressed the conflicts with foreign regimes created by extending private Section 10(b) suits to foreign sales had Congress intended Section 10(b) to reach such sales.[116]

2. *The Fundamental Flaw in* Morrison*'s Approach*

In the end, of course, the misunderstandings and flawed logic evident in the Court's arguments based upon these statutory provisions is all water under the bridge; albeit there is a certain irony in a Supreme Court Justice, who recently coauthored a book advocating a textual approach to reading statutes,[117] doing

111. *Id.* at 2885.

112. Regulation S, 17 C.F.R. § 230.901 (2013).

113. *Morrison*, 130 S.Ct. at 2885-86.

114. *See, e.g.*, Don Berger, *Offshore Distribution of Securities: The Impact of Regulation S*, 3 TRANSNAT'L. LAW. 575, 585 (1990) (discussing SEC interpretations, prior to Regulation S, of the application of the Securities Act registration requirement to overseas transactions, which viewed the registration requirement as applying to some sales to Americans overseas, and detailing the requirements of Regulation S, which excludes sales of securities outside the United States from the Securities Act registration requirement depending upon elaborate tests to address possible impacts of foreign offerings on U.S. markets).

115. *Morrison*, 130 S.Ct. at 2885-86. This seems to contradict other portions of the court's opinion in which it says that comity and avoiding conflicts with other nations' laws is not the issue; rather the issue is Congress' intent. See generally *id.*

116. *Id.* at 2886. Not only does this ignore the fact that legislation typically fails to address all the issues that arise with domestic applications, but the court's argument is especially problematic insofar as courts created the private right of action for violation of Section 10(b) and Rule 10b-5. *See supra* note 16 and accompanying text. This, of course, makes it rather difficult for Congress to have anticipated how to reconcile with foreign laws the ground rules for such a later judicially created action.

117. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

such a poor job of it. The critical point is what these arguments tell us the Court means when it refers to the focus of the statute for purposes of determining if a situation involves extraterritoriality.

None of these arguments really show that the sale is the focus of Section 10(b), in the sense that it is somehow of greater concern to Congress than is the fraud (instead of the fraud being of greater concern than is the sale). As the Court actually applied the test, the sale is the so-called focus of Section 10(b) simply because it is the conduct which, according to the Court, Congress intended must occur in the United States in order to trigger the statute.[118] Moreover, the Court determined that this is Congress' intent using (albeit poorly) the normal tools of statutory construction, looking at the statute's language (the limitation of overseas coverage in Section 30(a) and (b) argument), purpose (the intent to regulate U.S. securities exchanges argument), administrative interpretation (the SEC interpretation of the territorial reach the 1933 Securities Act argument), as well as policy considerations (the clash with foreign regimes argument).[119] In other words, these arguments were, for the most part, simply normal statutory construction arguments trying to show that Congress did not intend to regulate overseas sales.[120]

At first glance, one may be tempted to say that this is a sensible approach to what is, after all, an issue of statutory interpretation. The problem, however, is that if the Court can conclude that Congress did not intend to regulate overseas sales based upon statutory language, overall purpose, administrative construction, policy, or the like, what is the point of invoking the presumption against extraterritoriality? Put differently, there is not much utility to a test for determining extraterritoriality if, to apply the test, the Court must decide whether Congress intended the statute to reach the situation facing the Court. After all, the purpose for determining if the situation before the Court involves extraterritoriality is so the Court can invoke the presumption against extraterritoriality as a means to decide what Congress intended. The end result is that the *Morrison* court created a test that is entirely circular, since it requires the Court to determine whether Congress intended the statute to reach the situation in order to invoke the presumption to determine whether Congress intended the statute to reach the situation.

IV. CONCLUSION

Justice Scalia's opinion for the Court in *Morrison* excoriated the Second Circuit for engaging in "judicial-speculation-made-law—divining what Congress

118. *Morrison*, 130 S.Ct. at 2888.

119. *See generally id.*

120. *See generally id.*

would have wanted if it had thought of the situation before the court."[121] Instead of such judicial lawmaking, the Court's opinion claimed to find its answer in the presumption against extraterritoriality.[122] In fact, however, a presumption regarding extraterritoriality no more dictated the Court's approach than it did the Second Circuit's. This is because, in order for the Court in *Morrison* to decide whether the situation triggered the presumption against extraterritoriality under its statutory focus test, the Court's opinion in *Morrison* engaged in the same sort of divination of Congressional intent that it so condemned in the Second Circuit.[123]

In the end, *Morrison*'s statutory focus test is useless if the presumption against extraterritoriality is to serve any real function in cross border situations in which some conduct or effect exists both within and outside the nation. In a future article, I will suggest a better approach.[124]

121. *Id.* at 2881.

122. *Id.*

123. While not having anything to do with the presumption against extraterritoriality and so beyond the scope of this Article, one might argue that there still was a difference in methodology between the approach to determining Congressional intent used by the Second Circuit in developing and applying the conduct and effects test and the approach Justice Scalia used to determine that Congress did not intend the statute to cover fraud in connection with purchases and sales of securities outside the United States. The former involved a fairly free-ranging determination of whether it would effectuate the broad purposes of the statute to apply it to the situation at hand. *See, e.g.*, Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 421 (8th Cir. 1979) ("We frankly admit that the finding of subject matter jurisdiction in the present case is largely a policy decision."). Justice Scalia's opinion, by contrast, invokes the language in various specific provisions in the securities laws in support of his conclusion that Congress only intended to regulate transactions in the United States. Given how weak Justice Scalia's textual analysis was (*see supra* Part III.C.2), it may have been more honest for Justice Scalia simply to engage in the same sort of broad purposes and policy argumentation used by the Second Circuit.

124. *See supra* note 10.