JUSTIFYING THE PRESUMPTION AGAINST EXTRATERRITORIALITY: CONGRESS AS A FOREIGN AFFAIRS ACTOR

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I. INTRODUCTION

Substantive law has a way of creeping into federal courts' statutory interpretation techniques,[1] and international law is no exception. The presumption against extraterritoriality is an interpretive principle whereby federal courts avoid reading U.S. statutes as applicable on foreign soil without Congress's clear indication to the contrary.[2] While the Supreme Court's traditional justifications for the presumption against extraterritoriality are comity and Congress's general focus on domestic concerns, the Supreme Court's recent alterations to the presumption wear those justifications thin.[3]

This annotation offers an alternative justification for the presumption: Instead of primarily enforcing comity or preserving

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1. *See generally* WILLIAM N. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION 341–87 (2d ed. 2006) (discussing substantive canons of statutory interpretation and their normative justifications).

2. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 (AM. L. INST. 2018).

3. *See* discussion *infra* Section II. While these principles provide some support for the presumption against extraterritoriality, it is implausible that the presumption in its current form is best suited to preserve those principles.

Congressional intent, the presumption functions as a Constitutional avoidance canon that maintains checks and balances between the political branches in the realm of international affairs. By recognizing that U.S. foreign policy is a shared space among the legislative and executive branches, the presumption prevents the president from unilaterally acting on the basis of statutes with ambiguous geographical application. If the presumption is to fulfill this goal, it should be strengthened in order to overcome both *Chevron* deference[4] and the traditional latitude the Supreme Court gives the president in foreign affairs.[5]

II. HISTORICAL ORIGINS AND CURRENT MANIFESTATION OF THE PRESUMPTION

The Supreme Court established a process for determining whether to apply the presumption against extraterritoriality, most notably employed in *Morrison v. National Australia Bank Ltd.*,[6] but later retrofitted into a two-step test in *RJR Nabisco, Inc. v. European Community*.[7] First, the court analyzes whether the presumption is rebutted with a "clear, affirmative indication" from Congress.[8] If not, the court proceeds to ask whether the defendant's actions within the statute's focus occurred in the United States.[9] For instance, in *Morrison*, Section 10(b) of the Securities Exchange Act of 1934[10] contained a prohibition on wire fraud that did not reach an Australian security sale. First, the Court found that statute's jurisdiction over relevant transactions "between any foreign country and any State" was insufficient to rebut the presumption against extraterritoriality.[11] Proceeding to the second prong of the inquiry, the Court concluded that the transaction relevant to the statute's focus, a security sale, happened in Australia, not the United States, and was therefore impermissibly extraterritorial.[12]

The *Morrison-Nabisco* approach marks the most recent revision to

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4. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (establishing that reasonable agency interpretations of ambiguous statutes that the agency is charged with implementing are entitled to deference from the court).
5. *See* discussion *infra* Section III.
6. 561 U.S. 247 (2010).
7. 136 S. Ct. 2090 (2016).
8. *Id.* at 2101.
9. *Id.*
10. 15 U.S.C. § 78j.
11. *Morrison*, 561 U.S. at 262 (quoting statutory language in 15 U.S.C. § 78c(a)).
12. *Id.* at 266–67.

the presumption in a string of changes since its nineteenth century inception.[13] Scholars trace the presumption's origin to the *Charming Betsy*,[14] where the Supreme Court held that U.S. law did not apply to a property claim over a ship sold on a Danish-controlled island to a U.S. citizen sailing under the Danish flag.[15] The court's rationale emphasized comity, declaring that acts of Congress "ought never to be construed to violate the law of nations if any other possible construction remains."[16] In the early twentieth century, the Supreme Court in *American Banana Co.* added the rationale that Congress usually means to legislate only on U.S. territory.[17] While the presumption fell into disuse between approximately 1950 and 1989,[18] it was revived in *EEOC v. Arabian American Oil Co* (*Aramco*), when the Supreme Court treated it as a clear statement rule, again citing comity concerns.[19] The *Morrison* and *RJR Nabisco* approach determined that purpose-based evidence of Congressional intent, rather than a clear textual statement per se, is sufficient to overcome the presumption, revising *Aramco*.[20] The Supreme Court has also used the presumption to avoid meddling in foreign affairs in other recent cases.[21]

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13. *See* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1591–94 (2020) (discussing the presumption's evolution from its earlier form in Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), and its recharacterization in Foley Bros. v. Filardo, 336 U.S. 281 (1949)); EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 258 (1991) (turning the presumption into a "clear statement" rule).

14. Dodge, *supra* note 13, at 1589–90 (beginning discussion of the presumption's origins with Murray v. Schooner Charming Betsy (*The Charming Betsy*)), 6 U.S. 64 (1804).

15. *The Charming Betsy*, 6 U.S. at 68–69.

16. *Id.* at 118.

17. *Am. Banana Co.*, 213 U.S. at 357 (refusing to extend U.S. antitrust law to business conducted on banana plantations in Panama, since a statute is assumed to "be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power").

18. Dodge, *supra* note 13, at 1595.

19. *Aramco*, 499 U.S. at 255 (finding that the Civil Rights Act did not apply to a U.S. employer's alleged discrimination against a U.S. citizen employed in Saudi Arabia and holding a clear statement necessary to "ascribe to [Congress] a policy which would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce.").

20. *Compare* RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2102 (2016) (indicating that a clear textual statement is not necessary to overcome the presumption since the statute's context can be consulted as well), *with Aramco*, 499 U.S. at 258 (calling the presumption a clear statement rule).

21. *E.g.*, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013)

In sum, the test for applying the presumption in its current two-step form has been justified on two principal grounds: comity and Congress's generally domestic concerns. However, these rationales only tepidly support the presumption as it is applied today.

III. LIMITS OF EXISTING JUSTIFICATIONS

The comity justification is limited under *Morrison* because the presumption against extraterritoriality attaches "regardless of whether there is a risk of conflict between the American statute and a foreign law." [22] If there is no risk of conflict with a foreign law, it is not apparent that extraterritorial application of a U.S. statute interferes with the interests of other sovereign countries. The Supreme Court may have made the presumption into a bright line, over-inclusive rule to clarify guidance to lower courts,[23] but if administrative simplicity were the Supreme Court's true motive in modifying the presumption, it could have instituted a simpler alternative framework. Namely, the test could be whether the statutory text clearly requires extraterritorial application. If the statute is ambiguous, the Court could ask whether an extraterritorial reading risks conflicting with relevant foreign or international laws. This seems no more difficult to administer than the *Morrison-Nabisco* two-step analysis of statutory focus and directly addresses respect for other sovereigns. Accordingly, comity seems to be a secondary motivator for the presumption.

The second justification, that Congress is "primarily concerned with domestic conditions,"[24] is also a lukewarm basis for the modern presumption. It is arguable that Congress's domestic focus should always factor into statutory interpretation, and therefore Congressional intent might not need to be presumed ahead of time, domestic or otherwise. *Kiobel* provides a good example of how the modern presumption is of limited use if the Supreme Court's goal is to identify what Congress truly meant. Although the majority's reasoning drew upon the focus of the Alien Tort Statute (ATS) on limiting the causes of action that can support claims under

("unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the [Alien Tort Statute], because the question is not what Congress has done but instead what courts may do.").

22. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010).

23. The *Morrison* court's discussion of historical difficulties in applying the presumption suggests it found its test easier to administer. *See id.* at 258 (discussing then-prevalent tests to determine whether regulated activity counted as extraterritorial or not).

24. *Id.* at 255 (quoting *Aramco*, 499 U.S. at 248).

international law, its opinion relied upon an analysis of Congress's original intent when passing the ATS in 1789.[25] Congress's typically domestic concern was irrelevant, as the ATS is by definition concerned with international law. However, because the court's focus analysis entailed looking to typical interpretive sources to triangulate the statute's meaning, it nonetheless arrived at the conclusion that the ATS does not apply to human rights violations occurring overseas.[26] This outcome implies that ex ante presumptions about Congress's goals did less to inform the court's conclusions than a careful consultation of standard statutory interpretation tools. Congress's domestic focus, then, like comity, does not completely justify the use of the presumption against extraterritoriality in recent Supreme Court cases.

IV. CHECKS AND BALANCES IN EXTRATERRITORIAL APPLICATION OF U.S. LAW

An alternative justification for the presumption against extraterritoriality is its role in promoting checks and balances in the regulation of overseas activity. Under this view, the presumption functionally serves as a Constitutional avoidance canon, ensuring that Congress decides whether to regulate activity abroad pursuant to its Commerce Clause powers[27] rather than letting the president or judiciary interpret their way to overseas law-making.

Existing substantive canons perform a similar function in the domestic sphere. For instance, the non-delegation canon curtails expansive statutory grants of power to the president by forcing Congress to be explicit.[28] Congress therefore shoulders the burden of clarifying certain ambiguous grants of presidential power, theoretically enhancing legislative accountability.[29] The federalism canon of *Gregory v. Ashcroft* plays a similar function: Congress must clearly state any desire to enter sensitive areas of state interest.[30] However, these existing constitutional canons do not extend into the realm of international affairs. Following *Curtiss-Wright*, the Supreme Court has

25. *Kiobel*, 569 U.S. at 109 (discussing the original offenses imagined to be violations of the laws of nations).

26. *Id.* at 118, 124.

27. U.S. CONST. art. I, § 8, cl. 3 (giving Congress power to "regulate Commerce *with foreign Nations*, and among the several States, and with the Indian Tribes") (emphasis added).

28. Indus. Union Dep't v. Am. Petroleum Inst. (*Benzene*), 448 U.S. 607 (1980).

29. ESKRIDGE ET AL., *supra* note 1, at 362.

30. Gregory v. Ashcroft, 501 U.S. 452 (1991).

taken the position that the executive branch has inherent power to oversee foreign policy,[31] implying that the non-delegation canon is not applicable to the president's overseas actions.[32] As such, the court's concern around an overactive president creating legislation by fiat is currently cabined to the domestic context.

That said, the *Curtiss-Wright* decision and its implications are not per se a constitutional consensus.[33] Just as the president has the power to make treaties (with Senate approval), serve as commander-in-chief, and receive ambassadors,[34] the constitution gives Congress the power to declare war, set rules of naturalization, and regulate commerce with foreign nations and Indian tribes.[35] The constitution has therefore not clearly designated the president as predominant in foreign affairs.

To honor this delicate interplay between branches, the court could use the presumption against extraterritoriality as it does the *Benzene* canon: to force Congress to be clear when extending the country's legal reach overseas. Making Congress own its international regulations—instead of leaving all interpretive judgments to the president—could force it to take its constitutional role in foreign affairs more seriously.

V. CHECKS AND BALANCES ON DISPLAY IN DODD-FRANK

The court's use of the presumption against extraterritoriality as a checks-and-balances mechanism can already be seen in the financial regulation context. Shortly after the *Morrison* court limited the Securities Exchange Act domestically, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which imposed regulations to safeguard against systemic risks to the U.S.

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31. United States v. Curtiss-Wright, 299 U.S. 304, 320 (1936) (characterizing the president as having "delicate, plenary, and exclusive power . . . as the sole organ of the federal government in the field of international relations").

32. *But see* Kent v. Dulles, 357 U.S. 116 (1958) (using the non-delegation canon to limit the president's statutory authority to grant passports). However, while granting passports has international implications, this ruling applied to a U.S. citizen on U.S. soil and therefore did not challenge the president's authority abroad. *Id.*

33. *See, e.g.,* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 183 (1990) ("The courts have too readily read *Curtiss-Wright* as standing for the proposition that the executive deserves an extra, and often dispositive, measure of deference in foreign affairs above and beyond that necessary to preserve the smooth functioning of the national government.").

34. U.S. CONST. art. II, §§ 2–3.

35. U.S. CONST. art. I, § 8, cl. 3–4, 11.

financial system.[36] Dodd-Frank contained an explicit extraterritoriality provision applying its mandate to swap transactions abroad with a "direct and significant connection with activities in, or effects on, commerce of the United States."[37] The same provision also gave the Commodity Futures Trading Commission (CFTC) the authority to promulgate rules to prevent evasion of the above.[38] The D.C. District Court then found in *SIFMA* that CFTC rules promulgated under this section were valid and that the statutory language was clear enough to overcome the presumption against extraterritoriality.[39] In this case, the court effectively waited for Congress's go-ahead before applying U.S. financial law abroad. Congress specifically weighed the value of comity against its regulatory objectives following the 2008 financial crisis and made the difficult foreign policy decision that systemic financial safeguards outweighed the harm of potentially alienating other countries. The journey from *Morrison* to *SIFMA* guided the political branches through the proper constitutional scheme of Congressional law-making and presidential execution.

VI. IMPLICATIONS

Accepting that the enforcement of checks-and-balances on the political branches is a central goal of the presumption against extraterritoriality means recognizing that the presumption must be strengthened to fulfill this purpose. Currently, the presumption can be overcome by a reasonable agency interpretation of a statute under *Chevron*.[40] This means that although the court might not impute extraterritorial intent to Congress, the president and executive agencies could extend domestic regulations abroad when the geographical scope of the delegating statute is textually ambiguous. Allowing the executive branch such latitude while imputing a generally domestic intent to Congress frustrates the constitutional scheme of checks-and-balances, effectively shifting the power to make law with extraterritorial application from the legislature to the executive. The presumption therefore needs at least comparable weight to agencies' interpretations under *Chevron*. Practically speaking,

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36. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010).

37. *Id.* § 722(d)(i). A swap transaction is a type of financial contract.

38. *Id.*

39. Sec. Indus. & Fin. Mkts. Ass'n v. U.S. Commodity Futures Trading Comm'n (*SIFMA*), 67 F. Supp. 3d 373 (D.D.C. 2014).

40. Dodge, *supra* note 13, at 1627–28; RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 cmt. e (AM. L. INST. 2018).

this might mean elevating the presumption to a clear statement rule requiring Congress to explicitly declare its intent to regulate overseas activity in the statutory text rather than allowing purpose-based evidence of Congressional intent to overcome the presumption.

More generally, the checks-and-balances justification undercuts the common position that the president is the predominant authority on foreign affairs. Instead, by emphasizing Congress's power to regulate commerce with foreign nations, the revised canon would advance the understanding that foreign affairs law is a shared space between the executive and legislative branches.[41] Revising and reinforcing the presumption against extraterritoriality is a small but useful part of this much bigger project.

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41. *See generally* KOH, *supra* note 33, at 153–207 (arguing that Congress has a significant role to play in U.S. foreign policy and proposing legislation that would enhance its oversight of presidential action abroad).