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Extraterritorial Confusion: The Complex Relationship Between Bowman and Morrison and a Revised Approach to Extraterritoriality

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EXTRATERRITORIAL CONFUSION: THE COMPLEX RELATIONSHIP BETWEEN BOWMAN AND MORRISON AND A REVISED APPROACH TO EXTRATERRITORIALITY

I. INTRODUCTION

In 1994, Ramzi Yousef planted a “test bomb” aboard an international flight from the Philippines to Japan.\(^1\) During a layover, Yousef disembarked the plane.\(^2\) On the second leg of the flight, the test bomb detonated successfully, resulting in the death of a Japanese passenger and the injury of several other innocent civilians.\(^3\)

Authorities eventually detained Yousef, and an investigation indicated that the test bomb was practice for a more devious plan, in which Yousef intended to place similar bombs onboard several United States-bound commercial aircraft.\(^4\) Yousef was extradited to the United States and found guilty of planting and detonating the bomb on the Philippine commercial flight.\(^5\) Yousef challenged this conviction, questioning how he could be charged for a bombing that took place wholly outside of the United States in which none of the victims were U.S. citizens or residents.\(^6\) The United States’s answer to his challenge was extraterritoriality.\(^7\)

\(^1\) United States v. Yousef, 327 F.3d 56, 80–81 (2d Cir. 2003). In preparation for this bombing, Yousef and several other co-conspirators bombed a movie theater in Manila, resulting in the injury of several patrons. \(\text{Id. at } 79.\)

\(^2\) \(\text{Id. at } 81.\) Yousef exited the plane during a layover in Cebu, another city located in the Philippines. \(\text{Id.}\)

\(^3\) \(\text{Id. at } 79.\)

\(^4\) \(\text{See id. at } 81–82, 110.\) (“The bombing of the Philippine Airlines flight at issue in Count Nineteen, which killed one Japanese national and maimed another, was merely a test-run that Yousef executed to ensure that the tactics and devices the conspirators planned to use on United States aircraft operated properly.”).

\(^5\) \(\text{Id. at } 80, 82.\) Yousef was convicted and found guilty of other offenses as well, including the 1993 bombing of the World Trade Center. \(\text{Id. at } 79–80.\)

\(^6\) \(\text{Id. at } 88.\) For this crime, Yousef was charged with violating 18 U.S.C. § 32(b), which allows for the prosecution of those placing bombs on foreign, civilian aircraft regardless of where the act is committed. \(\text{Id. § 32(b) prescribes jurisdiction over foreign offenders if they are “found within the United States.” Id. (quoting 18 U.S.C. § 32(b)). Yousef argued that he was not “found in the United States” but was instead extradited against his will for the perpetration of other crimes; however, the court found the extradition was sufficient to fulfill this requirement. Id. at 88, 90.}\)

\(^7\) \(\text{Id. at } 87–88.\) Extraterritoriality is the exercise of enforcing a law beyond a nation’s boundaries. \(\text{See infra note 9 and accompanying text (explaining the definition of extraterritoriality). While 18 U.S.C. § 32(b) explicitly prescribes extraterritoriality, Yousef challenged such extraterritorial jurisdiction. Id. at 91. The court found jurisdiction proper under the protective principle of international law. Id. at 91–92.}\)
Traditionally, the United States has combated some forms of international conduct by giving extraterritorial effect to some federal laws. Extraterritoriality, the exercise of enforcing a law beyond national boundaries, is by no means a new issue; however, it is one that has garnered some attention as of late. In the last twenty years, the world has become more global, and it is common for the substance of many crimes to have connections in more than one country. However, extraterritoriality regularly results in an encroachment upon another nation’s sovereignty.

The United States’s treatment of extraterritoriality is inconsistent. The United States, in its early beginnings, appeared to foster

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8 See Charles Doyle, Cong. Research Serv., RL 94–166, Extraterritorial Application of American Criminal Law 7 (2010), http://www.fas.org/sgp/crs/misc/94-166.pdf (explaining how the “nature and purpose of a statute” may call for it to apply extraterritorially); Jeffrey A. Meyer, Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law, 95 MINN. L. REV. 110, 111–14 (2010) (discussing the United States’s use of extraterritorial jurisdiction to punish crimes abroad that have a harmful effect on the nation). Throughout this Note, I will be using the term “geoambiguous” to characterize laws that are nondescript in their extraterritorial reach. I have borrowed this term from Professor Jeffrey A. Meyer’s article, Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law. Id. at 114.

9 See Meyer, supra note 8, at 122–24 (discussing how the development of international organizations, borders, and legal norms leads to an inevitable increase in extraterritorial conduct). Extraterritorially applying laws to combat heinous conduct does not always result in an international uproar, but is nevertheless a contentious issue. See Anthony J. Colangelo, A Unified Approach to Extraterritoriality, 97 VA. L. REV. 1019, 1048–49 (2011) (discussing the controversial extraterritorial extension of federal statutes by Congress). Extraterritoriality is especially controversial when it is prescribed unilaterally or when a federal statute is silent on its geographic scope. Id. This Note focuses solely on the United States’s approach to extraterritoriality. A comparative analysis with other nations is beyond the scope of this Note.


international law and restrained its use of extraterritoriality. This approach changed in the 1920s, and courts suddenly became more lax in allowing laws, particularly criminal laws, to apply extraterritorially. But the U.S. Supreme Court’s recent decision in *Morrison v. National Australia Bank Ltd.* appears to reinforce a strict presumption against extraterritoriality. It seems that the only thing consistent is the courts’ inability to effectively define and manage the limitations of extraterritoriality.

The emergence of new global issues has brought the presumption against extraterritoriality under fire. Crimes are becoming more intricate and complex, and continual developments call for the United States to alter the way it applies federal laws extraterritorially. To

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15 See 130 S. Ct. 2869, 2878 (2010) (“When a statute gives no clear indication of an extraterritorial application, it has none.”).

16 See Knox, supra note 12, at 650 (discussing the Supreme Court’s inconsistent treatment of the presumption against extraterritoriality).


18 See Phillip R. Trimble, Commentary, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT’L L. 53, 57 (1995) (asserting that, as technology advances, government regulation of private behavior is imperative). Paul Schiff Berman has noted:

> [T]he growth of global communications technologies, the rise of multinational corporate entities with no significant territorial center of gravity, and the mobility of capital and people across borders mean that many jurisdictions will feel effects of activities around the globe, leading inevitably to multiple assertions of legal authority over the same act, without regard to territorial location.

properly combat such issues without overstepping congressional authority, this Note endorses a new approach to extraterritorially applying federal laws—one that allows the United States to adequately maintain national security and combat criminal offenses that specifically target the United States and its citizens while simultaneously minimizing unexpressed statutory interpretations and encroachment on the sovereignty of other nations.

This Note first discusses the meaning, history, and development of extraterritoriality within the United States. Second, this Note analyzes the treatment of the presumption against extraterritoriality, why its application reflects courts’ public policy concerns, and why international principles of law have been abused, resulting in increased extraterritorial interpretation. Finally, this Note provides a solution to extraterritoriality by endorsing a Modified-Exception Test, which emphasizes national security and promotes a clear statement, literal reading of statutes while providing an exception for extraterritorial application.

II. BACKGROUND

Extraterritoriality is a beneficial means of governmental assertion of authority over international conduct that causes domestic harm. Part II.A first discusses statutory construction and the definition of extraterritoriality, as well as the traditional approaches to interpreting the extraterritorial reach of geographically silent statutes. Second, Part II.B provides the history of extraterritorial application of federal laws that are silent in their territorial scope. Finally, Part II.C discusses the current state of extraterritoriality.

19 See infra Part II (discussing the background and history of extraterritoriality).
20 See infra Part III (explaining why the Court’s presumption against extraterritoriality in Morrison v. National Australia Bank Ltd. is facially a strong policy, but fails to foster consistent, predictable results).
21 See infra Part IV (creating a new test that balances the approaches of Morrison and Bowman while giving full consideration to the conduct in question and the contemplation of the actor).
22 See United States v. Bowman, 260 U.S. 94, 102 (1922) (noting that the government has the right to protect itself and its property); see also RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 33(1) (1965) (noting the state’s ability to protect itself from threats to its security).
23 See infra Part II.A (explaining the definition of extraterritoriality and its effects on the sovereignty of other nations).
24 See infra Part II.B (discussing the development of extraterritoriality and the effect that Morrison may have on such application).
25 See infra Part II.C (discussing the current state of extraterritoriality and the unclear effect of Morrison on Bowman and the treatment of criminal statutes).
A. The Precise Meaning of Extraterritoriality and the Issue of Statutory Construction

A law is extraterritorial when it regulates activities beyond a nation’s borders. Congress has the ability to explicitly construct laws to apply extraterritorially; however, extraterritoriality is problematic when a statute is silent on the issue. The general relationship between extraterritoriality and national sovereignty is complex, and courts have yet to find a uniformed balance. A state’s sovereignty is built on the idea of autonomy and the ability to regulate conduct within its borders. Extraterritoriality often involves an invasion of sovereignty, resulting in strained relations between states. The seriousness of the crime, even if...
it explicitly targets a particular nation, does not necessarily alleviate such tensions.31

Theories that stress the importance of sovereignty insist that extraterritorial application of laws encroach upon a nation’s ability to govern itself and suggest that increased pressure should instead be placed on nations to prosecute crimes domestically.32 However,

31 See Colangelo, supra note 9, at 1025, 1027 (discussing how “the risk of jurisdictional overreach, clashes with foreign law, and applying U.S. national values and preferences inside other countries” implicate sensitive foreign policy matters); see also Robert F. Blomquist, The Theoretical Constitutional Shape (and Shaping) of American National Security Law, 30 St. Louis U. Pub. L. Rev. 439, 448–49 (2011) (explaining how differences in constitutional construction, as well as political and cultural differences, make it difficult for foreign laws to “fit” with U.S. national security laws). Even prosecuting matters of extreme violence, such as terrorism, may implicate international matters beyond prima facie concerns. Patrick M. Connorton, Note, Tracking Terrorist Financing Through Swift: When U.S. Subpoenas and Foreign Privacy Law Collide, 76 Fordham L. Rev. 283, 283–85 (2007) (discussing how U.S. interests and initiatives, especially regarding the war on terror, often conflict with those of nations that highly value privacy, such as many European nations). For example, after the September 11th attacks, the United States sought to track terrorist finances by obtaining financial information collected by the Society for Worldwide Interbank Financial Telecommunication (“SWIFT”). Id. at 283–84. However, by granting the United States access to such information, SWIFT violated Belgian and European Union privacy laws. Id. at 284. These nations reprimanded SWIFT, declared their behavior a violation of “fundamental European principles,” and attempted to thwart their continued compliance with the United States. Id. at 284 & n.11 (citing Press Release, European Union Article 29 Working Party, Press Release on the SWIFT Case (Nov. 23, 2006)). The United States’s attempts to pursue its self-interests regularly results in conflicts with other foreign laws, and in describing the United States’s use of extraterritoriality, specifically within the realm of antitrust laws, David J. Gerber notes:

Outside the United States, the extraterritoriality issue has been seen largely in a defensive context—namely, how to respond to excessive jurisdictional claims by the United States. These problems have reached critical dimensions. While American courts and commentators flail about in search of principles to use in grappling with jurisdictional issues, major allies have ceased trying to cooperate with the United States to avoid excessive conflicts of jurisdiction and have turned to so-called blocking legislation to attempt to protect their nationals and enterprises from the reach of United States antitrust laws.


expanding globalism, communications, and technology will inevitably result in multi-jurisdictional conduct, leaving some nations without redress unless they apply their laws extraterritorially.33

In the United States, the extraterritorial capabilities of a federal statute are not controlled by constitutional reach; rather, it is a question of statutory construction.34 Courts have developed general rules to analyze the territorial scope of statutes that are silent on this issue.35 The

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34 DOYLE, supra note 8, at 7. Congress undoubtedly has the ability to enforce its laws beyond the borders of the United States. EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991). To determine whether Congress exercised such authority, courts must look at the statutory construction of the laws. Id.

35 See DOYLE, supra note 8, at 7 (“[A] statute will be construed to have only territorial application unless there is a clear indication of some broader intent.”) (footnote omitted). Several statutes contain explicit language allowing for extraterritoriality. See, e.g., 18 U.S.C. § 175 (2006) (prescribing “extraterritorial Federal jurisdiction” over developing or stockpiling biological weapons); 18 U.S.C. § 1513 (2006) (prescribing “extraterritorial Federal jurisdiction” over acts of retaliation against witnesses); 18 U.S.C. § 1751 (2006) (explicitly prescribing “extraterritorial jurisdiction” to crimes of assassinating, kidnapping, or assaulting the President or presidential staff members); 18 U.S.C. § 2339B (2006) (prescribing “extraterritorial Federal jurisdiction” over the crime of providing material support or resources to terrorist organizations). Such specific language is not always required for a statute to be extraterritorial, and Congress often fashions the extraterritorial reach of a statute meticulously. See, e.g., 18 U.S.C. § 37 (2006) (explicitly conditioning extraterritorial jurisdiction over acts of violence at international airports, such as when the offense took place in the United States, the offender or victim was a national, or when the
first general rule of statutory construction holds that a statute only applies domestically unless a broader intent is clearly indicated. The second rule states that the nature and purpose of a statute may indicate whether Congress intended the statute to apply extraterritorially. Finally, the last general rule holds that a statute may not be interpreted as being inconsistent with international law unless contrary intent is clearly indicated by Congress.

Determining whether a statute is consistent with international law requires further analysis. To ensure that an interpretation is consistent with international law, courts commonly look to customary principles to resolve the issue of extraterritoriality. The United States generally
Extraterritorial Confusion utilizes five principles of international law to address public policy considerations and national interests when determining whether a statute applies extraterritorially. The first national interest is referred to as the “territorial principle,” which allows domestic laws to apply to conduct that occurs within a nation’s geographical boundaries, including its territorial waters. The second interest is the “nationality principle,” which allows for laws to apply extraterritorially to the conduct of its citizens while abroad. The third interest, the “effects principle,” allows


Certain principles of international law allow for extraterritorial application of domestic laws despite a conflict of laws. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(3) (1987) (stating that when there is a conflict of laws, deference is given to the state whose interest is greater). International law stresses that certain international principles are legal obligations. Id. § 102(2). Customary international law is generally fostered by democracies. Jordan J. Paust, Customary International Law and Human Rights Treaties Are Law of the United States, 20 MICH. J. INT’L L. 301, 321 (1999).

41 See DOYLE, supra note 8, at 9 (providing the five principles that the United States uses in addressing these issues). The segmenting of national interests into five specific categories was first discussed in a 1935 Harvard Law School study. Id. While the five principles of international law can be used as interpretative guides to finding extraterritoriality, “[t]hey cannot overcome a clear expression of Congressional intent to the contrary.” CHARLES DOYLE, CONG. RESEARCH SERV., RL 33658, FEDERAL EXTRATERRITORIAL CRIMINAL JURISDICTION: LEGISLATION IN THE 109th CONGRESS 6 (2006) (footnote omitted). The Supreme Court has used the international principles to determine that it is within the national interest of the government to protect itself from conduct that may have harmful effects on the United States. Bowman, 260 U.S. at 98. While these principles are generally recognized as a means to extend jurisdiction, many cases, including Bowman, utilized these principles to interpret the extraterritorial reach of laws. Id. at 98–100; see Chua Han Mow v. United States, 730 F.2d 1308, 1312 (9th Cir. 1984) (“Extraterritorial application of penal laws may be justified under any one of the five principles of extraterritorial authority.” (citing United States v. King, 552 F.2d 833, 851 (9th Cir. 1977))).

42 DOYLE, supra note 8, at 9–10 (discussing the territorial principle of international law, which allows for extraterritorial application of federal laws to crimes that may have an effect within the United States); see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (recognizing a nation’s right to prescribe jurisdiction over conduct within or that affects the territory of a nation); see also United States v. Neil, 312 F.3d 419, 421–22 (9th Cir. 2002) (finding that molestation of a child within non-territorial waters had detrimental effects within the United States and thus fell under the territorial principle of jurisdiction). The territorial principle is flexible and applies to, among other things, acts within geographical borders or territorial waters and conduct that has an impact within the territory. DOYLE, supra note 8, at 10.

43 DOYLE, supra note 8, at 9, 11–12; see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (recognizing a nation’s right to prescribe jurisdiction over conduct committed by or
for extraterritorial application of a nation’s laws when conduct occurring abroad has an effect within the nation.\textsuperscript{44} The fourth interest is the “protective principle,” which allows for extraterritorial application of laws if conduct threatens national security or has adverse consequences within a country.\textsuperscript{45} The final interest is referred to as the “universal principle,” which allows for universal jurisdiction over acts that are especially heinous and recognized as an international concern.\textsuperscript{46}


\textsuperscript{44} Clopton, \textit{supra} note 14, at 144 (defining the effects principle as “the notion that a state should be able to regulate conduct outside its borders that has effects inside its borders”) (footnote omitted); see \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW} § 402 (recognizing a nation’s right to prescribe jurisdiction over conduct committed by or against nationals outside of its territory). The effects principle, often referred to as the passive personality or objective territorial principle, has regularly been used over the last century to govern extraterritorial conduct. Clopton, \textit{supra} note 14, at 144.

\textsuperscript{45} DOYLE, \textit{supra} note 8, at 9, 11–12; see \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW} § 402 (recognizing a nation’s right to prescribe jurisdiction over conduct outside of its territory that threatens security or some national interests). Under international law, the protective principle allows nations to assert jurisdiction over conduct outside of a state “that threatens its security as a state or the operation of its governmental functions.” United States v. Vilches-Navarrete, 523 F.3d 1, 21–22 (1st Cir. 2008) (citation omitted); \textit{RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW} § 33 (1965). “The protective principle does not require that there be proof of an actual or intended effect inside the United States.” United States v. Gonzalez, 776 F.2d 931, 939 (11th Cir. 1985). The protective principle is one that is evolving, and over time courts have expanded the types of cases that fall under the protective principle. See, e.g., United States v. Delgado-Garcia, 374 F.3d 1337, 1347–48 (D.C. Cir. 2004) (holding that encouraging illegal immigration into the United States has an effect on the United States and federal laws prohibiting such conduct apply extraterritorially); United States v. Yousef, 327 F.3d 56, 96–97 (2d Cir. 2003) (holding that attacks intended to alter foreign policy have an effect on the United States and may be prosecuted extraterritorially under the protective principle); United States v. Vasquez-Velasco, 15 F.3d 833, 841 (9th Cir. 1994) (holding that the overseas murder or attempted murder of federal employees falls under the protective principle); United States v. Ayesh, 762 F. Supp. 2d 832, 841 (E.D. Va. 2011) (holding that the conversion of government money abroad by a non-national threatens the national interest); United States v. Layton, 509 F. Supp. 212, 217–18 (N.D. Cal. 1981) (holding that the protective principle can be used to apply statutes criminalizing assaults on U.S. Congressmen extraterritorially).

\textsuperscript{46} DOYLE, \textit{supra} note 8, at 11, 14, 16; see \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW} §§ 404, 423 (1987) (explaining that universal jurisdiction may be had for crimes that universally concern the international community, including crimes of slavery, piracy, genocide, war crimes, and some acts of terrorism). The Supreme Court acknowledged the
Universal jurisdiction allows any state to prosecute conduct that is deemed to be an egregious violation of international norms and obligations, such as crimes against humanity and genocide, regardless of territorial or national nexus. Universal jurisdiction has been praised as principle of universal jurisdiction early within its history. See United States v. Furlong, 18 U.S. (5 Wheat.) 184, 196–97 (1820) (recognizing universal jurisdiction over piracy). Universal jurisdiction most commonly applies to crimes such as piracy, genocide, slavery, war crimes, and crimes against humanity. Restatement (Third) of Foreign Relations Law §§ 404, 423. However, these categories are not limiting; the flexible nature of international law, along with newly emerging global problems, has resulted in the expansion of categories of universal violations. Id. § 404 & cmt. a; see id. at cmt. b (stating that universal jurisdiction is not limited to criminal law and may possibly be applicable in cases such as tort remedies); Colangelo, supra note 32, at 151 (noting that the expansion of categories of universal crimes may soon include sex, drugs, and nuclear arms trafficking). For example, it has been recognized that universal jurisdiction may perhaps be applicable to "certain acts of terrorism." United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991). But see Yousef, 327 F.3d at 106–08 & 107 n.42 (refusing to recognize terrorism as a universal crime because of a lack of consensus regarding an internationally accepted definition). 47 Colangelo, supra note 32, at 150–51. Some nations, including the United States, grant themselves universal jurisdiction by prescribing language within legislation directing universal applicability. See, e.g., 18 U.S.C. § 32 (2006) (prescribing universal jurisdiction over the destruction of aircraft); 18 U.S.C. § 37 (2006) (prescribing universal jurisdiction over violent acts occurring at international airports); 18 U.S.C. § 546 (2006) (prescribing universal jurisdiction over the smuggling of goods into a foreign country from an American vessel); 18 U.S.C. § 831 (2006) (prescribing universal jurisdiction over threats, theft, or unlawful possession of nuclear material); 18 U.S.C. § 844(f)(1) (2006) (prescribing universal jurisdiction over actions causing malicious damage to or destruction of any building, vehicle, or other personal or real property owned, possessed, or leased by the United States by means of fire or explosive); 18 U.S.C. § 2332a (2006) (prescribing universal jurisdiction over the unlawful use of weapons of mass destruction against the United States or its nationals); 18 U.S.C. § 2332b (2006) (prescribing universal jurisdiction over acts of terrorism that target, affect, or intend to affect the United States, its officials, and its property). Such statutory construction can be found within the laws of other nations. See, e.g., Anthony J. Colangelo, Universal Jurisdiction as an International "False Conflict" of Laws, 30 Mich. J. Int'l L. 881, 896 (2009) (discussing how Spanish law prescribes universal jurisdiction over the crime of torture); Steven R. Ratner, Belgium's War Crimes Statute: A Postmortem, 97 Am. J. Int'l L. 888, 888–89 (2003) (discussing the rise and fall of the Belgian law of universal jurisdiction over “human rights atrocities”). While states have the ability to prescribe universal jurisdiction, international law may forbid such application if it is determined to be unreasonable. Restatement (Third) of Foreign Relations § 403(1). In determining reasonableness, a number of factors must be considered:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states
a means of bringing warlords and international criminals to justice, but its unpredictable use and expansion into new grounds raises questions of abuse.48

Before further exploring the United States’s approach to extraterritoriality, it must be understood that other nations’ treatment of extraterritoriality varies.49 Germany’s criminal code, for example, explicitly states that criminal laws only apply to acts committed within...
German territory, except for certain specifically stated provisions.\textsuperscript{50} Generally, European laws apply extraterritorially “so long as there is some meaningful connection with the asserting state.”\textsuperscript{51} However, many nations are hesitant to give significant weight to the “effects principle” of international law to allow extraterritoriality.\textsuperscript{52} Nevertheless, many nations have recently begun to recognize extraterritoriality and regularly use it to obtain jurisdiction over conduct committed abroad.\textsuperscript{53} With that in mind, this Note now discusses the history of the United States’s treatment of extraterritoriality.\textsuperscript{54}

\textsuperscript{50} STRAFGESETZBUCH [STGB] [PENAL CODE], May 15, 1871, REICHSGESETZBLATT [RGBL.] 3322, as amended, §§ 3, 6–7 (Ger.). The German Criminal Code provides extraterritoriality to acts against internationally protected legal interests, such as human trafficking, drug dealing, certain types of pornography, offenses involving nuclear energy, and treaty provisions. \textit{Id.} § 6. In addition, German criminal laws may apply extraterritorially if the offense was committed by a German and if the act is a criminal offense in the location of its commission or if that location is not subject to any criminal jurisdiction. \textit{Id.} § 7. However, in 2001, the High Court in Germany allowed extraterritorial jurisdiction over criminal acts having an effect within Germany. See John R. Schmertz, Jr. & Mike Meier, \textit{German High Court Decides Novel Issue in Holding that German Law May Impose Criminal Liability on Foreign Owners of Internet Websites Who Design Their Sites to Stir Up Racial Hatred Within German Society}, INT’L L. UPDATE, Jan. 2001, at 6, 7 (discussing how crimes inciting hatred and “capable of disturbing the peace in Germany” may be applied extraterritorially and holding that extraterritorial criminal liability may be found if the “success necessary to constitute a crime” took place in Germany).

\textsuperscript{51} Christopher L. Blakesley & Otto Lagodny, \textit{Finding Harmony Amidst Disagreement over Extradition, Jurisdiction, the Role of Human Rights, and Issues of Extraterritoriality Under International Criminal Law}, 24 VAND. J. TRANSNAT’L L. 1, 9–10 (1991) (footnote omitted). European nations place a stronger emphasis on the nationality principle of international law if the conduct was punishable in the place where it was committed. \textit{Id.} at 25. In addition, “European nations generally do not extradite their own nationals” for crimes. \textit{Id.} (footnote omitted).

\textsuperscript{52} See \textit{id.} at 24 (discussing how international recognition of the passive personality principle (that is, the effects principle) is in disrepute, especially with regard to international terrorism, and that other international principles of law may be necessary for jurisdiction, based on this principle, to be recognized). \textit{But see} Parrish, \textit{supra} note 32, at 1458 & n.13 (explaining how some European nations have begun to use the effects principle to obtain extraterritorial jurisdiction, especially with regard to acts with economic effects). Nations recognize different definitions of the effects principle. Ulrich Immenga, \textit{Export Cartels and Voluntary Export Restraints Between Trade and Competition Policy}, 4 PAC. RIM L. & POL’Y J. 93, 143 (1995). Since “customary international law is founded upon the consent of nations,” it is questionable as to whether the United States’s traditionally “low standard of proof of effects” is in fact “legal under international law.” Erika Nijenhuis, \textit{Comment, Antitrust Suits Involving Foreign Commerce: Suggestions for Procedural Reform}, 135 U. PA. L. REV. 1003, 1036 (1987).

\textsuperscript{53} See Parrish, \textit{supra} note 31, at 854–56 (stating that other nations have begun to apply their domestic laws extraterritorially, especially in regards to cyber-crimes, criminal conduct, human rights violations, and anti-competition laws).

\textsuperscript{54} See \textit{infra} Part II.B (discussing the history and development of the treatment of extraterritoriality within U.S. courts).
B. The History and Development of the Extraterritorial Treatment of Federal Laws

The U.S. courts recognize a presumption against extraterritorial application of federal laws. This presumption against extraterritoriality is not a restriction on “Congress’s power to legislate,” but rather a means of interpreting federal laws. While federal laws must not be construed by courts to conflict with international laws, Congress has the ability to prescribe extraterritorial conduct without regard for international law. Despite these common principles, the territorial scope of geoambiguous federal laws has been construed inconsistently. To better understand extraterritoriality, it is necessary to discuss its history and evolution within the courts. Exceptional focus will be placed on the seminal case United States v. Bowman, the subsequent cases interpreting Bowman, and the Supreme Court’s decision in Morrison v. National Australia Bank Ltd.

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57 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 (1987) (stating that federal laws and other acts of Congress can supersede international laws or agreements if intended for that purpose). U.S. federal laws are “not subordinate to customary international law[s]” and may conflict with it, if so necessary. United States v. Yousef, 327 F.3d 56, 91 (2d Cir. 2003); see Al-Bihani v. Obama, 590 F.3d 866, 871 (D.C. Cir. 2010) (holding that international law is not controlling over U.S. law and cannot be used to limit the President’s war powers).

58 Compare Bowman, 260 U.S. at 98–99 (allowing for a loosened application of the presumption against extraterritoriality), with Aramco, 499 U.S. at 248 (applying a strict presumption against extraterritoriality).

59 See infra Part II.B.1 (describing the early development and evolution of extraterritoriality in U.S. law).

60 See infra Part II.B.2 (discussing how courts’ treatment of extraterritoriality has developed into its modern state).
1. Early History of Extraterritoriality Leading to *United States v. Bowman*

One of the original sources of extraterritoriality is found within the Constitution itself, which authorizes Congress “[t]o define and punish . . . Offences against the Law of Nations.”\(^{61}\) The Constitution also expressly permits universal jurisdiction over acts of piracy.\(^{62}\) However, the Supreme Court was quick to place limitations upon statutory interpretation, and in 1804 stated, “[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”\(^{63}\) This doctrine, which became known as the *Charming Betsy* canon, states that federal statutes must not be interpreted in a way that violates international laws unless there is no other possible way of construing them.\(^{64}\)

The presumption against extraterritoriality appears early in the United States’s history as a means to avoid international conflicts.\(^{65}\)

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\(^{61}\) U.S. CONST. art. I, § 8, cl. 10. Congress shall have the power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” *Id.* This clause, known as the Offences Clause, allows the United States to prescribe laws regulating conduct that is considered to be a violation of all nations. *Colangelo, supra* note 26, at 137. Today, the “law of nations” is analogous with international customary law. *The Offences Clause After Sosa v. Alvarez-Machain, supra* note 40, at 2381. The constitutional drafters did not take a fixed view of international law and designed the clause to allow for flexibility to allow proper management as international law evolves. *Id.* By constructing the Constitution in this manner, the United States drew its authority to legislate from several nations. *Id.*


\(^{63}\) *Murray v. Schooner Charming Betsy (Charming Betsy), 6 U.S. (2 Cranch) 64, 118 (1804);* *see McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963)* (explaining that the National Labor Relations Act is directly at odds with the Honduran Labor Code and unreasonably interferes with a nation’s sovereign authority, and thus is inapplicable).

\(^{64}\) *Meyer, supra* note 8, at 143. Under the *Charming Betsy* canon, geoambiguous laws must be interpreted to conform to customary international law in order to avoid interference with other nations. *Id.* The reason for this doctrine, arguably, is that the United States’s foreign affairs power comes from international law, and, thus, the United States is obligated to obey international law. *Colangelo, supra* note 26, at 156. However, despite this doctrine, the United States is not subordinate to customary international law or treaties. *United States v. Yousef*, 327 F.3d 56, 91 (2d Cir. 2003).

\(^{65}\) *See, e.g., The Paquete Habana, 175 U.S. 677, 708, 714 (1900)* (finding that U.S. courts govern with respect to the law of nations and are thus obliged to recognize and give effect to international law); *The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824)* (“The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. . . . [T]he phrases used in our municipal laws. . . . must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction.”); *see also Knox, supra* note 13, at 371 (stating that the *Charming Betsy* canon is construed as an older, weaker presumption against extraterritoriality). The earliest cases
1909, the Supreme Court reiterated this stance in *American Banana v. United Fruit Co.* In *American Banana,* the Supreme Court found that the Sherman Antitrust Act did not apply extraterritorially and held that all statutes are “prima facie territorial” and that, as a general rule, “the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.” However, as communication and transportation began to improve and offenses began to “exhibit an inter-jurisdictional flavor,” the Court began to question the strict application of the presumption against extraterritoriality. These factors, along with increasing threats to national security, culminated in the Supreme Court case *United States v. Bowman.*

In *Bowman,* the Court found that a criminal statute prohibiting fraud against the United States applied extraterritorially. The Court recognized that criminal statutes can be interpreted to apply in such a way if they are “not logically dependent on their locality for the government’s jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens.” In addition, the Court in *Bowman* declared that crimes against individuals, their involving extraterritoriality “often involved offenses committed aboard American ships or by or against Americans.”


67 *Id.* at 356–57 (citations and quotations omitted). In *American Banana,* the American Banana Company, located in what is now Panama, was acquired by an Alabama corporation. *Id.* at 354. After purchasing the company, United Fruit Company intended to control and monopolize the banana trade in parts of Central and South America. *Id.* With this intent in mind, United Fruit Company convinced government and military officials to prevent American Banana from doing business in the area. *Id.* at 354-55.

68 Colangelo, *supra* note 26, at 128.

69 260 U.S. 94 (1922).

70 *Id.* at 98–100. In *Bowman,* three Americans were charged with conspiring to defraud the U.S. Shipping Board Emergency Fleet Corporation, a company of which the United States was the sole stockholder. *Id.* at 95–96. The conspiracy was concocted in Brazil, and the context of the federal statute being used against them was silent on its territorial scope. *Id.* at 96–97.

71 *Id.* at 98. *Bowman* explicitly allowed some criminal laws to apply extraterritorially to U.S. citizens; however, the Court declined to rule whether extraterritorial application applied to non-citizens acting abroad. *See id.* at 102-03 (declining to predict whether the statute could apply extraterritorially to a non-national). Several years following the *Bowman* decision, federal courts began to allow laws to apply extraterritorially to foreign nationals as well. *See,* e.g., United States v. Benitez, 741 F.2d 1312, 1317 (11th Cir. 1984) (finding that theft of personal property of the United States applied extraterritorially to foreign nationals); United States v. Bin Laden, 92 F. Supp. 2d 189, 194–95 (S.D.N.Y. 2000) (finding that extraterritorial laws can be applied to the conduct of foreign nationals); United States v. Zehe, 601 F. Supp. 196, 200 (D. Mass. 1985) (applying the Espionage Act extraterritorially to a foreign national).
property, and the community cannot be applied extraterritorially without prescription. Here, the Court found that the security of the U.S. government took precedent over the security of its individual citizens.

Bowman is a pivotal point in guiding America’s handling of extraterritoriality and international law. However, Bowman still left many questions—for example, it was undetermined if criminal statutes could be applied extraterritorially to non-citizens. As a result, courts began to interpret the territorial scope of federal statutes inconsistently, providing no clear guidance to lower courts or litigants.

Bowman, 260 U.S. at 98. Circuit courts have expanded on this ruling, and many allow some crimes against individuals and the community to apply extraterritorially. See, e.g., United States v. Frank, 599 F.3d 1221, 1230 (11th Cir. 2010) (finding that a statute criminalizing sexual misconduct against minors applied extraterritorially); United States v. Vasquez-Velasco, 15 F.3d 833, 841 (9th Cir. 1994) (finding that violent crimes against Americans in furtherance of a racketeering operation applied extraterritorially); United States v. Erdos, 474 F.2d 157, 159 (4th Cir. 1973) (finding that a federal manslaughter statute can be applied extraterritorially).

Bowman can be construed to say that there is no presumption against extraterritoriality for violations of federal criminal law that are “not logically dependent on their locality.” See id.; see Curtis A. Bradley, Universal Jurisdiction and U.S. Law, 2001 U. CHI. LEGAL F. 323, 333 (2001) (construing Bowman to mean that there is no presumption against extraterritoriality when crimes focus on an extraterritorial matter).

One of the biggest questions left unanswered, which was explicitly left unaddressed in Bowman, was whether laws can be interpreted to apply extraterritorially to non-citizens of the United States. See Bowman, 260 U.S. at 102-03 (questioning the applicability of jurisdiction over the unapprehended defendant, who was a citizen of Great Britain). Bowman confirmed that the nationality, protective, and effects principles may be used to apply domestic laws extraterritorially. See id. at 100–02 (allowing extraterritorial application of federal laws to conduct committed by nationals that had effects within the territory of the United States and induced the government to protect itself). Soon after Bowman, the Supreme Court confirmed that the nationality principle can apply extraterritorially to govern conduct committed by its citizens abroad. See United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) (stating that the Constitution and federal laws have no force in foreign nations unless applied to U.S. nationals). However, lower courts have determined that extraterritorial jurisdiction may also apply to non-citizens acting abroad as well. See United States v. Delgado-Garcia, 374 F.3d 1337, 1345–46 (D.C. Cir. 2004) (stating that, under Bowman, citizenship is irrelevant, and laws can be applied extraterritorially to both citizens and non-citizens); United States v. Ayesh, 762 F. Supp. 2d 832, 840 (E.D. Va. 2011) (finding that federal laws may apply extraterritorially to non-citizens); see also supra note 71 (exploring cases in which federal laws were applied extraterritorially to non-citizens).

The guidelines handed down by courts to overcome the presumption have varied widely, ranging from statements that a clear expression of
2. Extraterritoriality post-Bowman and Morrison

Following the ruling in Bowman, lower courts began to gradually give extraterritorial effect to some federal laws, including civil statutes.77 However, the Supreme Court reaffirmed the presumption against extraterritoriality in 1949 with Foley Brothers, Inc. v. Filardo.78 Over forty years later, the Supreme Court again revived the presumption in EEOC v. Arabian American Oil Co. (Aramco), which promoted a “clear statement” rule requiring express language within a statute indicating extraterritoriality.79 Nevertheless, courts continued to apply laws extraterritorially during this time, and circuit courts seemed to develop their own means of evaluating the territorial scope of statutes.80 The congressional intent is necessary, to indications that the structure, legislative history, and agency interpretations of the statute are relevant, to decisions that some circumstances justify extending law extraterritorially without any direct evidence of legislative intent at all.” Id. (footnotes omitted).

77 See, e.g., Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795–96 (1993) (finding that civil provisions of the Sherman Act apply extraterritorially when foreign conduct produces a substantial effect in the United States); United States v. Aluminum Co. of Am., 148 F.2d 416, 443-44 (2d Cir. 1945) (citing Bowman, 260 U.S. at 98) (determining that the Sherman Act applies extraterritorially); see also Clopton, supra note 14, at 167 (discussing how Bowman is “routinely reconstruct[ed]” to overcome the presumption against extraterritoriality and apply criminal laws extraterritorially). However, after Bowman, a general presumption against extraterritoriality still continued to exist. See infra note 78 (discussing Foley Brothers, Inc. v. Filardo).

78 See 336 U.S. 281, 285 (1949) (“The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained . . . .” (citing Blackmer v. United States, 284 U.S. 421, 437 (1932))). In Foley Brothers, the Supreme Court determined that the Eight Hour Law did not apply extraterritorially to a U.S. citizen employed abroad. Id. at 289-90.

79 EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 258 (1991). In Aramco, the Supreme Court found that Title VII of the Civil Rights Act of 1964 does not regulate employment practices of U.S. employers employing U.S. citizens abroad. Id. at 248–49. Aramco further enhanced the presumption against extraterritoriality by requiring express language (or a “clear statement”) to overcome the presumption. See id. at 248 (requiring an “affirmative intention” of Congress to be “clearly expressed” for the presumption to be defeated). The dissent in Aramco argued that a clear statement rule was too stringent and believed that congressional intent could be ascertained to overcome the presumption. Id. at 261 (Marshall, J., dissenting).

80 Knox, supra note 13, at 393. While the Bowman case discussed territorial effects, its legitimate reasoning utilized the protective principle. Id. Generally, this is the Second Circuit’s approach to extraterritoriality. Id. However, the Third, Fifth, and Eleventh Circuits appear to utilize an effects test in evaluating extraterritoriality. Id. The Eleventh Circuit has gone so far as to state that, after Bowman, many circuits “inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm.” United States v. Plummer, 221 F.3d 1298, 1304-05 (11th Cir. 2000) (citations omitted). The D.C. and Ninth Circuit have an even broader evaluation of extraterritoriality. Knox, supra note 13, at 393. Under these two circuits, there is no
development of technology and foreign relations eventually led to more complicated issues regarding extraterritoriality.81

The war on terrorism has also had a particularly profound effect on the presumption.82 After September 11, 2001, courts began interpreting several statutes to apply extraterritorially in an effort to fight terrorists conducting operations abroad.83 It appeared that the standard had perhaps been lowered; however, the Supreme Court soon reinvigorated the approach of a firm presumption against extraterritoriality.84

In 2010, the Supreme Court heard Morrison v. National Australia Bank Ltd. – a securities case in which Australian investors sued a bank in Australia for fraudulently reporting the numbers and documents of a presumption against extraterritoriality when the concern of the statute is not limited to domestic affairs. Id.; see Delgado-Garcia, 374 F.3d at 1345 (finding that federal law prohibiting encouragement of illegal immigration into the United States applied extraterritorially because it was “fundamentally international, not simply domestic, in focus and effect”).

81 See supra note 17 and accompanying text (discussing how recent social and technological advancements, the increase in international business, and terrorism may call for an increased need in extraterritoriality).

82 Adler, supra note 17, at 183. For example, historically, the United States had no reason to apply its immigration laws extraterritorially. Id. However, after September 11, there was a sudden interest in preserving our borders so as to prevent the entry of would-be terrorists. Id. Suddenly, there was an interest in applying immigration laws extraterritorially. Id.; see Delgado-Garcia, 374 F.3d at 1347–48 (holding that encouraging illegal immigration into the United States has an effect on the United States and federal laws prohibiting such conduct apply extraterritorially).

83 See, e.g., United States v. Yousef, 327 F.3d 56, 91 (2d Cir. 2003) (finding that federal laws can apply extraterritorially to non-citizens conspiring to commit some terrorist acts); United States v. Reumayr, 530 F. Supp. 2d 1210, 1221 (D. N.M. 2008) (holding that federal law applied extraterritorially to a Canadian citizen for a terrorism plot to blow up the Alaskan Pipeline); United States v. Bin Laden, 92 F. Supp. 2d 189, 222 (S.D.N.Y. 2000) (suggesting that there might be universal jurisdiction over some acts of terrorism). Cases applying extraterritoriality to acts of terrorism still attempt to appease international law, especially with regard to extraterritorial jurisdiction and due process. See Reumayr, 530 F. Supp. 2d at 1221–22 (stating that international law allows for extraterritorial application of federal terrorism laws under the protective principle); Bin Laden, 92 F. Supp. 2d at 196 (finding that the protective principle established in Bowman is consistent with international law); see also DOYLE, supra note 8, at 11 (discussing how the protective principle is often used to combat terrorism); Knox, supra note 13, at 357 (discussing international principles that could be used to fight terrorism abroad). This is odd considering some of these cases deny the controlling authority of international law. See Yousef, 327 F.3d at 91 (holding that the United States is not subordinate to international law); Bin Laden, 92 F. Supp. 2d at 214 (finding that Congress has the power to override international law (citing Cook v. United States, 288 U.S. 102, 119–20 (1933))).

84 Colangelo, supra note 9, at 1043 (“On the other hand, the Court’s recent reinvigoration of the presumption against extraterritoriality in Morrison appears strongly to support a separation of powers model that preferences foreign territorial sovereignty as a default rule.”).
Florida-based mortgage company owned by the bank. In Morrison, the Court explicitly stated that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.” The Court confirmed that the presumption against extraterritoriality applies in all cases, and a possible extraterritorial interpretation of a statute does not override the presumption against such application. Furthermore, the Court stated that a statute only has extraterritorial effect if Congress clearly expresses such an intention within the context of the statute. But, after finding that the law in question did not apply extraterritorially, the Court assessed whether the domestic conduct within the case was sufficient to establish a domestic connection. The Court stressed the focus of

85 Morrison v. Nat’l Austl. Bank Ltd., 130 S. Ct. 2869, 2875–76 (2010). Before Morrison, circuits varied in their method of assessment of extraterritorial application of securities laws, and the two most common means utilized by lower courts to establish extraterritoriality were the “effects test” and the “conduct test.” Id. at 2879. The effects test was used to determine whether the conduct had a “substantial effect” on the United States or its citizens. Id.; see Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968), abrogated by Morrison, 130 S. Ct. at 2887–88 (finding that securities laws can apply extraterritorially when conduct affects American securities). The conduct test sought to determine where the illegal conduct actually took place. Morrison, 130 S. Ct. at 2879. See SEC v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977), abrogated by Morrison, 130 S. Ct. 2869 (holding that securities laws may only apply extraterritorially when at least a part of the conduct “designed to further a fraudulent scheme occurs within this country”). Both of these tests, in some way, attempted to conform to the territorial principle of international law. See Colangelo, supra note 9, at 1080 (explaining that the effects test demonstrated the objective territorial principle of international law, and the conduct test demonstrated the subjective territorial principle of international law).

86 Morrison, 130 S. Ct. at 2878. Before Morrison, federal courts had been applying extraterritoriality to securities laws for over forty years. Colangelo, supra note 9, at 1080; see Morrison, 130 S. Ct. at 2878 (noting that courts had been giving extraterritorial effect to securities and exchange acts for decades).

87 See Morrison, 130 S. Ct. at 2881 (finding that the presumption against extraterritoriality had become unpredictable and holding, “Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects”) (footnote omitted).

88 Id. at 2883. In renewing the presumption against extraterritoriality, the Court stated that a statute’s context may be consulted in determining whether it can apply extraterritorially. Id. While there must be a clear indication of extraterritoriality, a statute is not required to say “this law applies abroad” to have extraterritorial effect. Id. This ruling bolstered a strong presumption against extraterritoriality, but it did not require, as the Court did in Aranco, express language or a “clear statement rule” to overcome extraterritoriality. Compare id. (explaining that the presumption against extraterritoriality is not a “clear statement rule”), with EEOC v. Arabian Am. Oil Co. (Aranco), 499 U.S. 244, 258 (1991) (requiring the existence of a clear statement rule to overcome the presumption against extraterritoriality). In regards to the statute in question in Morrison, the Court stated that it gave “no clear indication” of an extraterritorial application. Morrison, 130 S. Ct. at 2883.

89 Morrison, 130 S. Ct. at 2883–84. The petitioners in Morrison attempted to avoid the issue of extraterritoriality altogether by asserting that the conduct committed within the
congressional concern when evaluating statutes and found that the existence of some domestic activity was not enough to overcome the presumption.90

Morrison does not explicitly overrule Bowman; however, it definitely questions its applicability.91 While Bowman permits a broader interpretation of statutes that allow for an assumption of Congress’s intent, Morrison requires Congress’s affirmative intent to be clearly expressed.92 The Court in Morrison found that the context of a statute may be helpful in determining its extraterritorial reach, but it promoted a
form of the “clear statement” rule by which extraterritoriality cannot apply unless such statutory language is explicitly found.  

C. The Current State of Extraterritoriality

The current state of extraterritoriality is difficult to thoroughly define, but it can be stated with certainty that the presumption against extraterritoriality is more easily overcome within the context of criminal offenses. Cases immediately following Morrison indicate that lower courts generally favor Bowman over Morrison, particularly in criminal cases. The presumption is even lower when criminal conduct

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93 See Morrison, 130 S. Ct. at 2891–92 (Stevens, J., concurring) (discussing how the majority’s insistence on a “clear indication” from Congress to apply a statute extraterritorially appears to re-establish the “clear statement” rule laid out by the Court in Aramco).

94 See Kollias v. D & G Marine Maint., 29 F.3d 67, 71 (2d Cir. 1994) (interpreting Bowman to not apply to all cases and stating that, under Bowman, “only criminal statutes, and perhaps only those relating to the government’s power to prosecute wrongs committed against it, are exempt from the presumption”). Bowman specifically refers to the extraterritorial application of criminal statutes, explicitly stating that crimes against individuals and their property, including “assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds,” do not apply extraterritorially without statutory prescription. Bowman, 260 U.S. at 98; see Leija-Sanchez, 602 F.3d at 798–99 (stating that Bowman explicitly treats criminal statutes differently from civil statutes). Some courts have expanded Bowman to allow for some crimes against individuals, specifically children, to apply extraterritorially. See United States v. Frank, 599 F.3d 1221, 1230 (11th Cir. 2010) (finding that, under Bowman, federal statutes prohibiting sexual exploitation of minors apply extraterritorially); United States v. Harvey, 2 F.3d 1318, 1327 (3d Cir. 1993) (determining that child pornography statutes applied extraterritorially (citing Bowman, 260 U.S. at 98)). In Bowman, the Court determined that there is no presumption against extraterritoriality for criminal acts not logically dependent on their locality for the government’s jurisdiction, “but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated.” Bowman, 260 U.S. at 98.  

95 The language of Morrison is sweeping. See Morrison, 130 S. Ct. at 2878 (“When a statute gives no clear indication of extraterritorial application, it has none.”). However, since the Court decided Morrison, lower courts have ignored the decision with regard to criminal statutes and rely more heavily on Bowman. Compare NewMarket Corp. v. Innospec, Inc., No. 3:10CV503 HEH, 2011 WL 1988073, at *3–4 (E.D. Va. May 20, 2011) (holding that civil federal price discrimination laws have no extraterritorial application under Morrison), with United States v. Belfast, 611 F.3d 785, 811, 813–14 (11th Cir. 2010) (finding that a criminal law prohibiting conspiracy to commit torture applies extraterritorially), Campbell, 798 F. Supp. 2d at 304–05 (finding that criminal bribery statutes may apply extraterritorially when the United States is a victim), United States v. Ayesh, 762 F. Supp. 2d 832, 840 (E.D. Va. 2010) (finding that bribery statutes can be applied extraterritorially when the U.S. government is a victim), United States v. Hasan, 747 F. Supp. 2d 642, 686 (E.D. Va. 2010) (finding that use of a firearm to commit a violent crime against a member of the uniformed services applies extraterritorially without discussion of Morrison), and Fisch, 2010 WL 3958176, at *3–4 (finding that criminal bribery and money laundering statutes apply extraterritorially and holding that Morrison does not overrule Bowman). But see Sarei v. Rio Tinto, PLC, 671 F.3d 736, 744–747 (9th Cir. 2011) (finding that
somehow affects the United States. For example, the United States often applies federal laws extraterritorially when an individual attempts to defraud or terrorize the U.S. government.

Because Morrison is still young in its jurisprudence, its ultimate effect on Bowman is unclear. It is acceptable to believe that the broad Morrison does not prevent the Alien Tort Statute from applying extraterritorially, especially when the basis of the claim includes criminal violations of international law; United States v. Jack, No. 2:07-cr-00266 FCD DAD, 2010 WL 4718613, at *12 (E.D. Cal. Nov. 12, 2010) (holding that criminal law regarding transferring or possessing a machine gun does not apply extraterritorially without discussion of Morrison).

See Bowman, 260 U.S. at 98 (holding that there is no presumption against extraterritoriality for “criminal statutes which are, as a class, not logically dependent on their locality for the government’s jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated”). Courts often cite the protective principle under international law to justify extraterritorial application of federal laws when it is a party to a case. Colangelo, supra note 9, at 1078; see United States v. MacAllister, 160 F.3d 1304, 1308 n.8 (11th Cir. 1998) (“On authority of Bowman, courts have routinely inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm.”) (citations omitted).

See, e.g., Bowman, 260 U.S. at 99-100 (holding that the United States may apply its laws extraterritorially to protect itself from fraud); United States v. Yousef, 327 F.3d 56, 87 (2d Cir. 2003) (explaining that federal laws can apply extraterritorially to terrorist acts aboard civilian aircraft); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (finding that certain federal laws addressing terrorism may apply extraterritorially); Campbell, 798 F. Supp. 2d at 306 (determining that bribery statutes can apply extraterritorially when the United States is a victim); Ayesh, 762 F. Supp. 2d at 840 (providing that bribery statutes can be applied extraterritorially when the U.S. government is a victim); United States v. Bin Laden, 92 F. Supp. 2d 189, 201-02 (S.D.N.Y. 2000) (finding that statutes pertaining to murders committed during the course of an attack on a U.S. facility apply extraterritorially).

Some lower courts have read the ruling of Morrison literally, and the Second Circuit, as well as some district courts, has relied on Morrison to deny civil extraterritorial application to the RICO Act. See Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29, 32-33 (2d Cir. 2010) (finding that, in light of Morrison, the RICO Act cannot be applied extraterritorially, even with the inclusion of broad, general language); Sorota v. Sosa, 842 F. Supp. 2d 1345, 1348–51 (S.D. Fla. 2012) (holding that the RICO Act does not apply extraterritorially and finding that Morrison abrogates the Eleventh Circuit’s traditional approach that RICO does have extraterritorial reach); United States v. Philip Morris USA, Inc., 783 F. Supp. 2d 23, 27–29 (D.D.C. 2011) (finding that there is a presumption against applying the civil provisions of the RICO Act extraterritorially). The fact that the RICO Act has both criminal and civil provisions further complicates matters, and it is unclear if Morrison would be interpreted as applying to criminal RICO provisions as well. See Clopton, supra note 14, at 188–89 & n.206 (noting that some statutes, such as the Sherman Antitrust Act and RICO, contain both civil and criminal provisions and that “[a]ny preference for flexibility in criminal cases would have to be weighed against the desire to give a consistent meaning to the same statutory text”) (footnote omitted). Some cases have continued to loosely apply extraterritoriality and look to Bowman rather than to Morrison. See, e.g., Rio Tinto, 671 F.3d at 744–47 (finding that Morrison does not prevent the Alien Tort Statute from applying extraterritorially, especially when the basis of the claim includes violations of international law); United States v. Weingarten, 632 F.3d 60, 65–67 (2d Cir.
language in *Morrison* will begin to affect criminal law.99 Thus far, it is too soon to determine *Morrison*’s long-term effect on the presumption, especially in regards to criminal statutes.100 Nevertheless, the Supreme Court has demonstrated a continued trend of establishing a strict presumption against extraterritoriality.101

III. ANALYSIS

A clear indication of extraterritoriality is required to overcome the presumption, but there are no specific guidelines defining what “a clear indication” entails.102 Courts, in practice, sometimes apply laws

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99 See Clopton, *supra* note 14, at 181 (“A court looking at an ambiguous criminal statute may treat *Morrison* as the straw that broke *Bowman*’s back, requiring a stringent presumption [against extraterritoriality] in criminal as well as civil cases.”).

100 See *supra* note 91 (discussing criminal cases exploring the early relationship between *Morrison* and *Bowman*). The Court in *Morrison* determined that the presumption against extraterritoriality applied “in all cases.” *Morrison*, 130 S. Ct. at 2881. However, it is possible that *Bowman* simply remains to be an “exception” to the presumption. Meyer, *supra* note 8, at 135. Additionally, many courts have expressed the belief “that *Bowman* and the civil law precedents live in harmony.” Clopton, *supra* note 14, at 166 (footnote omitted). For example, in *United States v. Leija-Sanchez*, which was decided just months prior to *Morrison*, the Seventh Circuit held that civil decisions “cannot implicitly overrule a decision holding that criminal statutes are applied differently.” 602 F.3d 797, 798 (7th Cir. 2010).

101 See *Morrison*, 130 S. Ct. at 2878 (discussing the “longstanding principle” of the presumption against extraterritoriality and holding that the presumption applies “in all cases”); EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991) (promoting a strong presumption against extraterritoriality); Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) (endorsing a presumption against extraterritoriality); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (“All legislation is prima facie territorial.” (quoting *Ex parte Blain*, L. R. 12 Ch. Div. 522, 528; State v. Carter, 27 N. J. L. 499 (1859); People v. Merrill, 2 Park. Crim. Rep. 590, 596)). But see William S. Dodge, *Morrison’s Effects Test, 40 SW. L. REV. 687, 688* (2011) (discussing the Supreme Court’s inconsistent treatment of extraterritoriality). Despite these cases, many lower courts have continued to interpret geoambiguous statutes to apply extraterritorially. See *supra* notes 91, 95 (listing cases citing *Bowman* to find extraterritoriality after the *Morrison* decision).

102 See *Morrison*, 130 S. Ct. at 2878 (“When a statute gives no clear indication of an extraterritorial application, it has none.”); Meyer, *supra* note 8, at 148 (“[I]t is far from clear what must exist for the presumption against extraterritoriality to be overcome.”); see also Clopton, *supra* note 14, at 167 (“[C]ourts routinely reconstruct *Bowman* to overcome the presumption and apply a U.S. criminal law abroad.”) (footnote omitted).
extraterritorially without any clearly stated indication. It is not uncommon for courts to rely on principles of international law to justify the extraterritorial application of domestic law. However, these principles can easily be manipulated to liberally interpret the territorial scope of statutes. While extraterritorial interpretation may abuse the intended confines of a statute, strictly applying the presumption can have a severely limiting effect and may result in excessive restraint.

U.S. courts often juxtapose the presumption with international principles, particularly the effects and protective principles, when evaluating extraterritoriality, and a court’s use of one of these principles over another appears to involve an intricate “balancing” test. In Part


104 See Meyer, supra note 8, at 143–45 (discussing the use of international law to justify applying laws extraterritorially); see also United States v. Davis, 905 F.2d 245, 249 n.2 (9th Cir. 1990) (stating that the principles of international law may also be used to establish a nexus and fulfill due process requirements).

105 See Knox, supra note 12, at 650 (discussing how international law can provide a jurisdictional basis to apply statutes extraterritorially without evidence indicating such intent by Congress). The international principles of law lack a guiding criterion with regard to their application. Meyer, supra note 8, at 150. They are inherently difficult to ascertain and can easily be manipulated. Id. at 150–51. Determining extraterritoriality based exclusively on these principles could very well allow the United States to apply almost any federal law globally. Id. In addition, applying the principles of international law does not avoid the fact that they may conflict with the laws of other foreign nations. Knox, supra note 13, at 384–85.

106 See Meyer, supra note 8, at 150 (noting that the presumption against extraterritoriality may be overly broad and may restrict application of domestic law, even when there is no conflict with international law); see also United States v. Clark, 435 F.3d 1100, 1108 (9th Cir. 2006) (finding that the PROTECT Act would be “severely” limited if it was prohibited from applying extraterritorially). A strong presumption against extraterritoriality may actually result in discord with foreign nations if it prevents the United States from fulfilling international obligations. Colangelo, supra note 9, at 1023–24.

107 See Meyer, supra note 8, at 146 (discussing how the principles of international law allow courts to balance interests and circumvent “traditional territorial” restrictions of laws). Section 403 of the Restatement (Third) of Foreign Relations Law suggests the use of a balancing test in determining whether extraterritorial jurisdiction is appropriate. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403(2) (1987). But section 403 has gone beyond jurisdiction and has been used to determine the appropriateness of applying statutes extraterritorially as well. See United States v. Vasquez-Velasco, 15 F.3d 833, 839–41 (9th Cir. 1994) (discussing section 403’s role in determining that the extraterritorial
III.A, this Note examines problems associated with a strict presumption against an extraterritoriality approach by courts. It focuses particularly on the analysis found within the *Morrison* case. Additionally, this Note examines why the current state of affairs renders this approach archaic if applied absolutely. Next, Part III.B evaluates *Bowman* and discusses the dangers of conservatively applying the presumption. It also analyzes the intermingling of international principles with federal laws and techniques that courts use to obtain extraterritoriality.

A. The Impracticality of a Strict Presumption Against Extraterritoriality

Although a strong presumption against extraterritoriality prevents U.S. laws from conflicting or interfering with foreign law, it may also impede the United States from exercising its sovereign power to protect itself and its citizens. While the presumption has been a cornerstone of U.S. law and policy, the emphasis of the presumption has fluctuated between a focus on the content and context of laws to an evaluation emphasizing the interests of the United States. In *Morrison*, the Court avoided supplemental considerations that stretch the extraterritorial application of a statute punishing violent crimes committed in aid of a racketeering enterprise to violent crimes associated with drug trafficking is reasonable under international law principles. While section 403’s balancing test is useful in guiding extraterritoriality, in practice, “balancing interests” would likely be biased in favor of application and may result in foreign affair gaffes. See *Knox*, supra note 13, at 380; see also *Meyer*, supra note 8, at 160 (discussing the dangers of using section 403 to determine extraterritorial application).

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108 See infra Part III.A (discussing the presumption against extraterritoriality, the Court’s reasoning in *Morrison*, and the consequences of the presumption).
109 See infra notes 128–45 and accompanying text (analyzing *Morrison*).
110 See infra notes 139–45 and accompanying text (explaining how a strict application of the presumption against extraterritoriality fails to adequately promote the modern legal interests of the United States).
111 See infra Part III.B (analyzing *Bowman* and explaining how over-applying federal laws extraterritorially violates sovereignty and promotes judicial activism).
112 See infra notes 161–84 and accompanying text (analyzing the courts’ use of international principles and vague statutory construction to achieve extraterritoriality).
113 See *Colangelo*, supra note 9, at 1037 (discussing how the purpose of the presumption against extraterritoriality is to prevent discord with foreign laws); see also United States v. *Bowman*, 260 U.S. 94, 98–99 (1922) (discussing how the presumption against extraterritoriality may prevent the United States from adequately defending itself in some cases). Although one of the main functions of the presumption against extraterritoriality is to avoid conflicts with foreign laws, it applies even when no conflict exists. *Morrison* v. Nat’l Austl. Bank Ltd., 130 S. Ct. 2869, 2877–78 (2010).
114 Compare *Morrison*, 130 S. Ct. at 2884 (stress[ing] the focus of a statute when analyzing its geographic reach), with *Bowman*, 260 U.S. at 98–99 (discussing the overriding interest of protecting the government when evaluating extraterritoriality).
capabilities of statutes and instead reemphasized the focus of the statute itself.\textsuperscript{115} While strictly applying the presumption fosters uniformity and prevents over-applying laws to reach extraterritorial conduct, it is also an inefficient means of handling contemporary legal issues.\textsuperscript{116} For example, applying the presumption to a territorially silent federal law that simply criminalizes conspiracies to kill U.S. employees complies with the United States’s methodology, sets precedent, and respects international boundaries; however, the government sometimes requires its employees to travel internationally, and applying the presumption in these cases hinders the effectiveness of the law.\textsuperscript{117}

Such a hindrance demonstrates the restrictive nature of a strict interpretation of the presumption against extraterritoriality.\textsuperscript{118} The presumption restrains the United States from effectively battling new, illegal conduct absent explicit statutory provisions.\textsuperscript{119} In a sense, when a domestic law does not explicitly prescribe extraterritoriality, the United

\begin{itemize}
  \item \textsuperscript{115} \textit{Morrison}, 130 S. Ct. at 2884. The Court noted that such an approach also encourages Congress to legislate and construct laws more precisely. \textit{Id}, at 2881. The previous approach to the presumption against extraterritoriality appeared to be more dynamic—especially with regard to achieving national interests. \textit{Meyer}, \textit{supra} note 8, at 147–48.
  \item \textsuperscript{116} \textit{See Meyer, supra} note 8, at 113–14 (noting how the presumption approach may not adequately handle new-age crimes).
  \item \textsuperscript{117} \textit{See}, e.g., \textit{United States v. Al Kassar}, 660 F.3d 108, 118 (2d Cir. 2011) (finding that a law prohibiting conspiracy to kill U.S. officers or employees applies extraterritorially despite the absence of an explicit extraterritorial provision, because “a significant number of those employees perform their duties outside U.S. territory”); \textit{United States v. Benitez}, 741 F.2d 1312, 1317 (11th Cir. 1984) (applying a law prohibiting the attempted murder of DEA agents extraterritorially, because it “is exactly the type of crime that Congress must have intended to apply extraterritorially”).
  \item \textsuperscript{118} \textit{See Meyer, supra} note 8, at 150 (explaining that one of the shortcomings of the presumption against extraterritoriality is its restrictiveness). While sometimes the courts find that the presumption can be overcome if an extraterritorial act produces effects within the United States, this is not a hard-line rule. \textit{See Knox, supra} note 13, at 351. However, the fact that an act committed abroad produces effects within the United States does not necessarily mean that a law must be construed to apply extraterritorially to reach such conduct. \textit{See Morrison}, 130 S. Ct. at 2883–84 (evaluating the effects of a security fraud committed abroad and localizing the effects instead of relying on extraterritoriality). In \textit{Morrison}, the Court did not even attempt to address or reconcile previous judicial decisions that did not take a strict approach against extraterritoriality. \textit{Knox, supra} note 12, at 647.
  \item \textsuperscript{119} \textit{See Meyer, supra} note 8, at 113–14 (discussing how the presumption can be an ineffective approach to handling “new-age scenarios”). In \textit{Morrison}, the Court noted that, in making a determination on extraterritoriality, “context [of the statute] can be consulted as well” as the text itself. \textit{Morrison}, 130 S. Ct. at 2883. However, the definition of “context” is unclear, thus leaving lower courts with a confusing standard. \textit{Colangelo, supra} note 9, at 1043. Courts sometimes conservatively apply the presumption against extraterritoriality to battle new and evolving illegal conduct. \textit{See Bowman}, 260 U.S. at 98, 102 (recognizing that improvements in communication and travel make it likely that crimes will occur outside U.S. territory); \textit{United States v. Ivanov}, 175 F. Supp. 2d 367, 374 (D. Conn. 2001) (applying laws extraterritorially to computer hacking committed abroad).
\end{itemize}
States’s customary approach is akin to legal isolationism—essentially, unless otherwise indicated, U.S. laws do not extend to actions outside of its territory and are not flexible enough to do so. But the presumption against extraterritoriality is simply a judicially created standard, and “there is no evidence” indicating that Congress prefers this approach. It is conceivable that exceptions to this standard, such as the one created in *Bowman*, are an appropriate and alternative means of handling heinous, unpredictable offenses that demand immediate justice.

The purpose of the presumption may be a separation of powers issue. Viewed within this context, the presumption restrains courts from acting as legislatures and unilaterally amending the geographic scope of laws. The fact that Congress often explicitly prescribes extraterritoriality with respect to some laws demonstrates that Congress understands the importance of self-restraint when legislating.

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120 See Smith v. United States, 507 U.S. 197, 204 n.5 (1993) (stating that Congress legislates domestic matters, not foreign ones). Laws that are silent on the issue of extraterritoriality do not apply extraterritorially. *Morrison*, 130 S. Ct. at 2878. Unilateral application of laws is unwise and may leave the United States susceptible to foreign law as well. *Parrish*, supra note 32, at 1491. However, the approach of strictly applying the presumption might prevent the United States from fulfilling international obligations. *Colangelo*, supra note 9, at 1034.

121 *Knox*, supra note 12, at 647. The presumption is purely a judicial creation and there is no code instructing such an approach. *Id.* Courts sometimes appear to be more concerned with avoiding extraterritoriality than Congress. *Id.*

122 See *United States v. Frank*, 599 F.3d 1221, 1230 (11th Cir. 2010) (discussing how the *Bowman* exception allows extraterritoriality to “be inferred from the nature of the offense[] and Congress’ other legislative efforts to eliminate” similar types of crimes (quoting *United States v. Baker*, 609 F.2d 134, 136 (5th Cir. 1980); *United States v. MacAllister*, 160 F.3d 1304, 1307–08 (11th Cir. 1998))); *Clopton*, supra note 14, 166–71 (discussing how *Bowman* can be considered an exception to the presumption and is often utilized to immediately address certain types of criminal offenses).

123 *Knox*, supra note 13, at 386 (explaining that the separation of powers concerns express “a general reluctance for the judicial branch to insert itself into questions of foreign policy, which should be left to Congress and the executive”).

124 *Id.* Questions of international relations may be better left to Congress than to courts. *Id.* But the presumption against extraterritoriality is possibly an overly aggressive approach to the separation of powers. *See id.* (explaining that the separation of powers informs courts that they are not in a proper position to determine foreign affairs, now that they must narrowly interpret laws).

125 *Id.* at 396. “Congress normally expects its statutes to be construed to avoid inadvertent conflicts with other countries, to address domestic concerns, and to respect the separation of powers in the U.S. government.” *Id.* For example, in *United States v. Azem*, the Second Circuit stated, “In general, congressional consideration of an issue in one context, but not another, in the same or similar statutes implies that Congress intends to include that issue only where it has so indicated.” 946 F.2d 13, 17 (2d Cir. 1991) (emphasis added) (citing United States v. Diaz, 712 F.2d 36, 39 (2nd Cir. 1983)). However, this was explicitly ignored in *United States v. Bin Laden*, which found that, even though two similar statutes differed only in their territorial prescription, courts are not forced to presume that
Similarly, the Court’s language in *Morrison* conceivably promotes judicial-restraint. Nevertheless, it is arguable that Congress tacitly approves of a court’s interpretation of a statute’s territorial reach unless it amends the statute post-decision.

In *Morrison*, the Court articulated its insistence on a strong presumption against extraterritoriality. Curiously enough, however, in making its ultimate determination, the majority in *Morrison* circumvented extraterritoriality. Instead, the Court “localized” the law—that is, they treated the case as a purely domestic issue that did not call for extraterritoriality. The Court’s approach in *Morrison* modifies the one silent on territorial scope does not apply extraterritorially. 92 F. Supp. 2d 189, 200 (S.D.N.Y. 2000).

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126 See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877–78 (2010) (discussing the Court’s duty to respect the meaning of the statute as provided by Congress and recognizing Congress’s ability to prescribe laws extraterritorially when such language is provided).

127 See *Meyer*, supra note 8, at 148 (discussing the frequency of extraterritoriality interpretation and postulating that Congress may leave such interpretation to the courts). It might be presumed that a court’s interpretation of the territorial reach of a statute is valid unless Congress actively amends the reach of the statute in question following a judgment. See, e.g., *Dodd–Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, 124 Stat. 1376, 1864-65, 1871 (June 25, 2010) (extending extraterritoriality to some provisions of the U.S. Securities Act following the court’s ruling in *Morrison*); *Frank*, 599 F.3d at 1232 (“Congress has . . . amended its laws to allow for extraterritorial application when it has discovered loopholes in its statutory scheme.” (citing *Baker*, 609 F.2d at 137–38)); Clopton, supra note 14, 153 n.74 (discussing how Title VII was amended to apply extraterritorially after the Supreme Court’s decision in *Aramco*).

128 *Morrison*, 130 S. Ct. at 2877–78. A strict presumption against extraterritoriality was by no means a new development for the Court. See supra note 101 (discussing the Supreme Court’s continued endorsement of a presumption against extraterritoriality). The Court in *Morrison* attempted to avoid creating a “clear statement” rule and stated that a law need not say “this law applies abroad” in order to apply extraterritorially. *Morrison*, 130 S. Ct. at 2883. In interpreting the territorial reach of a law, “context can be consulted as well.” *Id*. Justice Stevens, in his concurring opinion, strongly disagreed with the majority’s holding that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none,” going so far as to refer to it as “dictum.” *Id.* at 2892 (Stevens, J., concurring). Stevens stated that, in interpreting whether a law applies extraterritorially, “evidence legitimately encompasses more than the enacted text.” *Id*. Even though the majority disputed Stevens’s claim, it failed to elaborate on how instructive context actually is. Colangelo, supra note 9, at 1043. In order to provide full clarity, the inclusion of language such as “this law applies abroad” may actually be much more constructive to interpreting extraterritoriality. *Morrison*, 130 S. Ct. at 2883. It is not uncommon to find such language located within the text of some statutes. See, e.g., 18 U.S.C. § 2332b (2006) (prescribing extraterritorial jurisdiction to terrorist acts transcending national boundaries).

129 See *Dodge*, supra note 101, at 695 (explaining how *Morrison* refocused “the presumption against extraterritoriality on the location of the effects”).

130 *Id.* at 691. In his article, Dodge notes that, since Congress is concerned primarily with domestic conditions, focusing a statute domestically makes logical sense. *Id.* This
the focus of the act from one that emphasizes its extraterritorial nature to one that emphasizes domestic repercussions.\footnote{131} In evaluating domestic repercussions, the Court utilized an effects test.\footnote{132} By relying on domestic effects to avoid extraterritoriality, the Court resurrected “an outdated private international law approach,” which has been “largely abandoned for its reliance on the formalist fiction that multi-jurisdictional claims can be ‘localized’ to a single territory.”\footnote{133} This approach allows federal laws to apply extraterritorially without reliance on any extraterritorial indication, so long as courts focus on the domestic effects of the act.\footnote{134} 

\footnote{131} Dodge, supra note 101, at 690. Despite the presence of foreign activity within this case, the Court took a strictly domestic approach. Brilmayer, supra note 89, at 685.\footnote{132} See Dodge, supra note 101, at 692 (“\textit{Morrison} substituted a narrower effects test that turns solely on the location of the specific transaction affected by the fraud.”) (footnote omitted). In \textit{Morrison}, the Court criticized the Second Circuit for utilizing an effects test to find extraterritoriality; however, in its analysis, the Court also used an effects test to determine whether the law could apply domestically. See \textit{Morrison}, 130 S. Ct. at 2878–81 (criticizing lower courts for attempting to discern Congressional intent of extraterritoriality by using the effects test without “put[ting] forward a textual or even extratextual basis for these tests”). To comprehend the Court’s reasoning, it must be understood that the effects test used by the Second Circuit was, according to the majority in \textit{Morrison}, vague and unpredictable and forced courts to combine effects and then weigh them against the United States’s interests. Dodge, supra note 101, 691–92.\footnote{133} Colangelo, supra note 9, at 1040. Instead of applying the presumption against extraterritoriality, the Court simply localized the effects. \textit{Morrison}, 130 S. Ct. at 2881–84. Such localization is “reminiscent of the traditional approach to conflict of laws”; however, there was no conflict of laws issue in \textit{Morrison}. Colangelo, supra note 9, at 1080 (footnote omitted); see also Brilmayer, supra note 89, at 685 & n.152 (discussing how this particular approach of localization is an archaic means of avoiding conflict of laws by focusing solely on the domestic aspect of the case and relying on this focus to exclude other pertinent factors). It should be recognized that past multijurisdictional cases that have utilized the effects test at least recognized that the statute in question was in fact being used in an extraterritorial manner. See, e.g., Hartford Fire Ins. v. California, 509 U.S. 764, 796 (1993) (finding that civil provisions of the Sherman Act apply extraterritorially when an act has substantial effects within the United States); Smith v. United States, 507 U.S. 197, 203–04 (1993) (finding that a federal tort law did not apply extraterritorially because it had no domestic effect); United States v. Bowman, 260 U.S. 94, 97–100 (1922) (finding that a statute prohibiting conspiracies to defraud the United States applies extraterritorially to foreign conduct that has an effect within the United States).\footnote{134} Colangelo, supra note 9, at 1045. \textit{Morrison} communicates that Courts can avoid conflicts of law and the presumption of extraterritoriality by simply focusing on the local effects of the crime. Brilmayer, supra note 89, at 685. This approach now allows domestic laws to regulate international conduct and allows extraterritoriality without expressly stating so. Colangelo, supra note 9, at 1045–46. In essence, this approach promotes the practice of ignoring extraterritoriality as long as the effects principle applies. Dodge, supra note 101, at 690–92. In her assessment of the Court’s emphasis on the focus of statutes in \textit{Morrison}, Lea Brilmayer notes:
On its face, localization allows courts to avoid the issue of extraterritoriality altogether; however, in practice, this approach is not an adequate means of handling legitimate international conflicts of law and discord among nations. To put it bluntly, if a law is being used to prosecute effects or conduct that occurs abroad, it is being used extraterritorially, regardless of its domestic effects. Instead of promoting predictability and uniformity, Morrison promotes the use of judicial loopholes and creativity to avoid extraterritoriality. Under Morrison, courts can now determine whether a law applies extraterritorially and consider whether the conduct in question has any effect within the United States, thus giving courts “two bites at the apple.”

Rather than undertaking a thankless (and probably fruitless) search for indications about what Congress wanted, a court need only decide that the presumption against extraterritoriality is inapplicable because the “focus” of the substantive law in question is something that took place in the United States. The irony is that the evidentiary standard needed to invoke the loophole [to avoid the presumption against extraterritoriality]—which no one pretends has been authorized by Congress—is considerably lower than the evidentiary standard needed to satisfy the presumption—a presumption that supposedly reflects what Congress wanted.

Brilmayer, supra note 89, at 663–64.

135 Colangelo, supra note 9, at 1045–46. Regardless of localization, if there is more than one jurisdiction involved, there is inevitably possible interference with a nation’s sovereignty or conflict of law. Id. Applying a law extraterritorially and utilizing principles of international law to achieve such application may be preferable because this approach directly conforms to international law. See Murray v. Schooner Charming Betsy (Charming Betsy), 6 U.S. (2 Cranch) 64, 118 (1804) (holding that laws should be construed in a manner that is compatible with and does not violate international law). But see supra note 39 (discussing how the United States is neither constrained nor subordinate to international law).

136 See Meyer, supra note 8, at 123 (“[A] law is extraterritorial if it governs acts that occur outside the nation-state’s borders, even if committed by the nation’s own citizens.”) (footnote omitted). Simply localizing a crime does not suspend the reality that a law is being used extraterritorially. Colangelo, supra note 9, at 1040; see also Brilmayer, supra note 89, at 685 & n.152 (discussing how localization is an archaic means of attempting to avoid conflict of laws).

137 Colangelo, supra note 9, at 1045–46; see Brilmayer, supra note 89, at 667–68 (explaining that the effects test gives rise to “judicial creativity” because it allows courts to shift their analysis onto the “focus” of the law).

138 Brilmayer, supra note 89, at 663. Morrison appears to make it easier for courts to base their interpretation of the geographic scope of a statute on judicially created concepts rather than on the intentions of Congress. Id. at 663–64; see Colangelo, supra note 9, at 1045 (discussing how the creativity of the Court in Morrison gives lower courts multiple means of applying laws extraterritorially without explicitly stating so).
Nevertheless, *Morrison*, read narrowly, reasserts domestic borders to territorially ambiguous laws.139 But the pressing necessity of such a reassertion is suspect—especially when, before *Morrison*, courts were applying § 10(b) of the Securities Exchange Act (the statute in question in *Morrison*) extraterritorially for forty years.140 Surely forty years of such an application qualifies as tacit consent from Congress.141 In fact, following the Supreme Court’s decision in *Morrison*, Congress amended the U.S. Securities Act to expressly allow extraterritorial application of some sections.142 The blanket approach of a presumption against extraterritoriality significantly curbs the application of laws and prevents the United States from taking part in the international legal community.143 More importantly, the presumption often fails to effectively promote modern legal concerns of the United States, such as terrorism, economic crimes, and cyber crimes.144 A loosened approach to the presumption against extraterritoriality would more adequately bring such acts to justice.145

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139 Colangelo, *supra* note 9, at 1026.
141 *See* *Morrison*, 130 S. Ct. at 2890–91 (Stevens, J., concurring) (discussing how Congress’s failure to reject courts’ extraterritorial interpretation of securities laws amounted to tacit approval); Knox, *supra* note 13, at 385 (discussing how, if courts interpret a statute in a manner inconsistent with Congress’s intent, Congress would assuredly overrule courts by amending the statute).
143 *See* Colangelo, *supra* note 9, at 1036–37 (discussing how the blanket approach to the presumption does not help achieve U.S. interests). One of the most damaging effects of *Morrison* is that it declares that the blanket presumption against extraterritoriality exists “regardless of whether there is a risk of” conflict of laws. *Morrison*, 130 S. Ct. at 2877–78. Now, the only existing justification for the presumption is that Congress normally legislates with regard to domestic issues. Dodge, *supra* note 101, at 688–89.
144 *See* Meyer, *supra* note 8, at 113–14 (noting how the presumption approach may not adequately handle new-age crimes).
145 *See*, e.g., United States v. Yousef, 327 F.3d 56, 87 (2d Cir. 2003) (relying on the exception to a presumption against extraterritoriality in *Bowman* to apply a statute criminalizing conspiracies to attack commercial aircraft extraterritorially); United States v. Ivanov, 175 F. Supp. 2d 367, 374–75 (D. Conn. 2001) (applying a statute criminalizing cyber fraud extraterritorially); United States v. Bin Laden, 92 F. Supp. 2d 189, 218 (S.D.N.Y. 2000) (relying on *Bowman* to apply a statute prohibiting the use of weapons of mass destruction extraterritorially regardless of the actor’s nationality).
B. Manipulating Statutory Construction to Create Extraterritoriality

Extraterritoriality can be just as problematic as the presumption against it. In exercising extraterritoriality, courts generally examine the construction and nature of the statute, public policy implications, and the principles of international law. This practice began with Bowman, and following this decision the floodgates began to slowly open and other courts began to find extraterritorial language within statutory construction. Subsequent cases expanded Bowman, and criminal statutes were generally more likely to be granted extraterritorial reach.

In Bowman, the Court recognized that a strict adherence to a presumption against extraterritoriality is inadequate in handling emerging world issues. Bowman’s use of international principles and focus on the evolution of technology to justify extraterritoriality attempts

146 Podgor & Filler, supra note 10, at 592 (discussing how liberally applying laws extraterritorially is problematic within the current global environment in which many nations seek to enforce respective interests).

147 United States v. Bowman, 260 U.S. 94, 97-98 (1922); see supra notes 34–38 and accompanying text (discussing the approaches to interpreting the territorial scope of federal statutes that are geoambiguous). These principles are utilized in an attempt to comport with the Charming Betsy canon and to avoid conflicts of law. Meyer, supra note 8, at 143.

148 See Clopton, supra note 14, at 139 (noting that Bowman’s use of the protective principle of international law to establish extraterritorial jurisdiction over acts of fraud against the U.S. government opened the door to extraterritorial application of other federal criminal laws). The Supreme Court has also allowed states to apply their statutes extraterritorially to their citizens if the state has a legitimate interest and it does not violate an act of Congress. See, e.g., Skiriotes v. Florida, 313 U.S. 69, 77 (1941) (allowing Florida to apply its laws extraterritorially).

149 See Kollias v. D & G Marine Maint., 29 F.3d 67, 71 (2d Cir. 1994) (interpreting Bowman to not apply to all cases and stating that, under Bowman, “only criminal statutes, and perhaps only those relating to the government’s power to prosecute wrongs committed against it, are exempt from the presumption [against extraterritoriality]” (citing Bowman, 260 U.S. at 98; United States v. Larsen, 952 F.2d 1099, 100-01 (9th Cir. 1991))). However, after Bowman, courts have interpreted some civil laws to apply extraterritorially as well. See, e.g., Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) (finding that civil provisions of the Sherman Act apply extraterritorially when foreign conduct produces a “substantial effect in the United States”); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 744–747 (9th Cir. 2011) (finding that Morrison and the presumption against extraterritoriality do not prevent the Alien Tort Statute from applying extraterritorially). There is a legitimate possibility that courts may begin regularly interpreting Morrison to apply to criminal statutes as well. See Clopton, supra note 14, at 181 (“A court looking at an ambiguous criminal statute may treat Morrison as the straw that broke Bowman’s back, requiring a stringent presumption in criminal as well as civil cases.”).

150 See Meyer, supra note 8, at 136–37 (discussing the Court’s departure from strictly territorial jurisdiction and “emerging international law” at the time of the Bowman decision).
to harmonize international law and constitutional requirements.\textsuperscript{151} The Court in \textit{Bowman} limited such an interpretation of laws to criminal offenses committed against the government.\textsuperscript{152} Yet, modern courts often allow for extraterritoriality when the government is not the victim.\textsuperscript{153} \textit{Bowman} did not excuse courts from making an ultimate determination regarding a statute’s ability to apply extraterritorially.\textsuperscript{154} Nevertheless, extraterritoriality is sometimes determined on a case-by-case basis regardless of the territorial scope of the law in question, such as when the statute is an ancillary one dependent on another statute.\textsuperscript{155}

\textsuperscript{151} See \textit{Bowman}, 260 U.S. at 98–100 (citing to “the right of the government to defend itself,” that is, the protective principle of international law, to justify extraterritorial jurisdiction and application). “[A]lthough principles of international law might not determine conclusively the constitutionality of Congress’s extraterritorial legislative reach, they nonetheless inform the analysis.” Colangelo, supra note 26, at 169 (footnote omitted). Giving statutes extraterritorial effect simply because an international principle of law could be applicable would not alleviate international discord. Knox, supra note 13, at 382–83.

\textsuperscript{152} \textit{Bowman}, 260 U.S. at 98. The Court in \textit{Bowman} declined to extend such a reading to crimes committed against individuals, stating:

\begin{quote}
Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds, which affect the peace and good order of the community must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.
\end{quote}

\textit{Id.}

\textsuperscript{153} See United States v. Vasquez-Velasco, 15 F.3d 833, 839 n.4 (9th Cir. 1994) (finding that a statute prohibiting violent crimes in aid of racketeering activity applied extraterritorially, even though the United States was not a victim of the crime, because not doing so would undermine the scope and effectiveness of the law); see also supra note 72 (discussing cases in which the government was not the victim and extraterritoriality was found). Unfortunately, it does not appear that extraterritoriality will apply when aquatic mammals are the victims. See United States v. Mitchell, 553 F.2d 996, 1002–05 (5th Cir. 1977) (finding that the Marine Mammal Protection Act of 1972 does not apply extraterritorially, because such an application would attempt to regulate the resource development and sovereign territory of another state).

\textsuperscript{154} See \textit{Bowman}, 260 U.S. at 97, 102 (noting that extraterritoriality is a question of statutory construction and finding that legislative intent must be fairly construed in determining whether a law applies extraterritorially).

\textsuperscript{155} See, e.g., United States v. Baker, 609 F.2d 134, 136 (5th Cir. 1980) (reading \textit{Bowman} as allowing courts to infer congressional intent for extraterritoriality based on the “the nature of the offenses and Congress’ other legislative efforts to eliminate the type of crime involved”); see also Meyer, supra note 8, at 148–49 (“Although insisting on a need for a clear showing of congressional intent to apply its law abroad, the courts in practice sometimes follow the judicial unilateralist approach to allow extraterritorial application of U.S. law without explicit support in the text of the statute or legislative history.”) (footnote omitted). Ancillary statutes are dependent on another crime and often do not contain extraterritorial
When determining the nature and purpose of the statute, courts sometimes make reflexive presumptions that extraterritoriality is implied. It is common for criminal laws to apply extraterritorially if a court believes that the situation involves imperative public policy and an international principle of law can be used to reach such conduct.

However, questions of public policy are better left for Congress as opposed to courts, and courts walk a fine line in violating a separation of language; however, courts usually interpret such statutes to apply extraterritorially. See, e.g., United States v. Belfast, 611 F.3d 783, 812–13 (11th Cir. 2010) (holding that a conspiracy to commit a crime may apply extraterritorially when the underlying act itself applies extraterritorially); United States v. Mardirossian, 818 F. Supp. 2d 775, 777 (S.D.N.Y. 2011) (finding that a statute criminalizing the use of a firearm to commit a violent crime applied extraterritorially when the underlying crime applies extraterritorially).

Courts have claimed that extraterritoriality can be inferred from some statutes based on the nature of the crime. See, e.g., United States v. Delgado-Garcia, 374 F.3d 1337, 1345 (D.C. Cir. 2004) (finding that a federal law prohibiting encouragement of illegal immigration into the United States applied extraterritorially because it was “fundamentally international”); Vasquez-Velasco, 15 F.3d at 839 n.4 (finding that crimes furthering drug-trafficking enterprises apply extraterritorially, because drug-trafficking by its “very nature” is international); Baker, 609 F.2d at 136 (stating that extraterritoriality can be inferred based on the nature of the offense and similar “legislative efforts to eliminate the type of crime involved”); Brulay v. United States, 383 F.2d 345, 350 (9th Cir. 1967) (finding that federal smuggling statutes applied extraterritorially, because “smuggling by its very nature involves foreign countries”).

Courts no longer limit themselves to the holding in Bowman and often “consider policy justifications,” as well as “comprehensive statutory scheme[s],” when interpreting extraterritoriality. Clopton, supra note 14, at 170–71; see, e.g., Frank, 599 F.3d at 1231 (finding that a statute prohibiting the buying and selling of children applies extraterritorially, because it “is part of a comprehensive scheme created by Congress to eradicate the sexual exploitation of children and eliminate child pornography, and therefore warrants a broad sweep”) (footnotes omitted); Baker, 609 F.2d at 136–37 (holding that statutes combating drug-trafficking applied extraterritorially, because they were “part of a comprehensive legislative scheme designed to halt drug abuse in the United States”).
powers issue when they take such considerations head-on.\textsuperscript{158} The fact that Congress explicitly constructs some laws to apply extraterritorially and regularly amends the territorial reach of statutes demonstrates that it is aware that the absence of extraterritorial language means that it will only be construed to apply domestically.\textsuperscript{159} However, all of this may be legal fiction—the possibility exists that inaction after a statute is granted or denied extraterritorial reach demonstrates congressional approval because an unsatisfactory determination would result in intervention.\textsuperscript{160}

Courts must look to the purpose and nature of a statute to determine territorial scope, but extraterritoriality is essentially a matter of “national interests” implicating international law.\textsuperscript{161} The United States typically uses the international principles of law to establish jurisdiction and

\textsuperscript{158} See supra notes 123–25 and accompanying text (discussing how the separation of powers prevents courts from unilaterally amending or over-extending the territorial scope of federal laws). “Primarily it is for the lawmakers to determine the public policy of the state.” Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 357 (1931) (citations omitted); see United States v. Funez-Pineda, No. 5:11-cr-14, 2011 WL 5024364, at *9 n.7 (D. Vt. Oct. 20, 2011) (“It is the legislatures, not the courts, which are tasked with making the public policy determination of whether certain conduct constitutes a crime.”) (citations omitted); see also Blomquist, supra note 31, at 452–53 (discussing how courts often face problems of “knowledge,” “conduct,” and “governance” when reviewing national security laws and policy making).

\textsuperscript{159} See supra note 127 (discussing amendments expanding the territorial scope of some statutes). The Supreme Court presumes that Congress is aware of the Court’s decisions. Cannon v. Univ. of Chi., 441 U.S. 677, 696–99 (1979) (“[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.”). But see William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 YALE L.J. 331, 337 n.12 (1991) (stating that the same cannot be said of lower court decisions and noting that Congress is usually unaware of many of them). If this is true, then Congress should be aware of the Supreme Court’s consistent preservation of a presumption against extraterritoriality and therefore legislate with this in mind. See supra note 101 (listing Supreme Court cases over the last 100 years that consistently refer to the presumption against extraterritoriality). Congress’s insistence on including extraterritorial language in some statutes, but not others, is further indication that Congress understands how courts will interpret the scope of statutes. See United States v. Azeem, 946 F.2d 13, 17 (2d Cir. 1991) (“In general, congressional consideration of an issue in one context, but not another, in the same or similar statutes implies that Congress intends to include that issue only where it has so indicated.”) (emphasis added) (citations omitted).

\textsuperscript{160} See supra notes 125–26 and accompanying text (discussing the possibility that congressional inaction after judicial interpretation of a statute results in acceptance or agreement of such an interpretation).

\textsuperscript{161} See DOYLE, supra note 8, at 11 (explaining that extraterritorial application is a question of national interest); see also Blomquist, supra note 31, at 457 (discussing how “constantly shifting” public policies and national values shape the United States’s national security interests). Under Bowman, protecting national interests was determined to outweigh the presumption against extraterritoriality. See Clopton, supra note 14, at 169 (explaining that the Court in Bowman came to its decision by relying on the interests of the government).
accommodate international norms. But one has to wonder whether the consistent appearance of the international principles when evaluating jurisdiction has less to do with due process and more to do with justifying territorial expansion of federal laws to the international community. Incorporating international law via due process may, in practice, guide the extraterritorial application of federal laws. But

See Porto, supra note 65, § 2 (discussing the international principles and how they relate to extraterritorial jurisdiction). When seeking extraterritorial jurisdiction over crimes, courts consider whether exercising such jurisdiction is consistent with international law. *Id.* Even in cases where the courts rejected the authority of international law, many still applied the principles of international law in finding extraterritorial jurisdiction. See United States v. Yousef, 327 F.3d 56, 91, 110 (2d Cir. 2003) (finding that, although U.S. laws are not subordinate to international customary laws, the crime at hand met the requirements of the protective principle under international law); United States v. Bin Laden, 92 F. Supp. 2d 189, 214, 220 (S.D.N.Y. 2000) (finding that international law could be overridden by Congress, but holding that the protective principle allowed for the law at issue to apply extraterritorially). Some suggest that the use of international principles should be the nexus norm for establishing extraterritorial jurisdiction. See Colangelo, supra note 26, at 166 (stating that, absent a nexus connecting a defendant to the United States, international principles are an efficient means of “ensur[ing]” that extraterritorial application is not arbitrary or unfair). The purpose of a nexus is to put the actor on notice that he may be subject to the laws of the United States. *Id.* at 162–63. However, some circuits have gone so far as to hold that no nexus needs to exist to establish extraterritorial jurisdiction over some acts. See United States v. Suerte, 291 F.3d 366, 376 (5th Cir. 2002) (holding that no nexus between the defendant and the United States is required to apply the Maritime Drug Enforcement Act extraterritorially); United States v. Perez-Oviedo, 281 F.3d 400, 403 (3d Cir. 2002) (stating that the Maritime Drug Enforcement Act can be applied extraterritorially without a jurisdictional nexus); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993) (“Inasmuch as the trafficking of narcotics is condemned universally by law-abiding nations, we see no reason to conclude that it is ‘fundamentally unfair’ for Congress to provide for the punishment of persons apprehended with narcotics on the high seas.”).

See Colangelo, supra note 26, at 162–63 (examining extraterritoriality with respect to due process). In this sense, the international principles have a dual use: they help to establish extraterritoriality *and* fulfill constitutional requirements. *Id.* Extraterritorial jurisdiction is essentially stretched according to national interests, and national interests often serve as the basis for extraterritorial application. *Id.* at 164. While American notions of territoriality have been drawn from international law, these eventually evolved “to reflect American national interests.” KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 7 (2009). As a result, territory is not static, and it “has been stretched and pulled over time in an effort to achieve national ends within the existing international order.” *Id.*

See Colangelo, supra note 26, at 167 (explaining that international law will help determine whether a certain application of international law comports with due process). Such an incorporation of international law “both expands the United States’ ability to extend its laws to conduct outside U.S. territory, and effectively addresses a major objection to the imposition of due process limits on federal extraterritorial legislation.” *Id.* But this approach can cause courts to “lose sight of the ultimate question: would application of the statute to the defendant be arbitrary or fundamentally unfair?” United States v. Davis, 905 F.2d 245, 249 n.2 (9th Cir. 1990). Once again, the issue of extraterritorial application ties in
using the international principles of law to establish extraterritorial application is problematic and still involves a violation of foreign sovereignty. Additionally, these principles, even though they comport with international law, are so overbroad that they “are readily susceptible to misapplication” and may be used in a manner that is unfair or arbitrary. Relying on these principles to obtain extraterritoriality is a double edged sword: while the five principles of international law provide protection to the United States and its citizens, they also subject these same classes to foreign laws. This puts the United States and its citizens in special danger when a nation is determined to pursue its self-interests. Furthermore, such use allows judges to act as lawmakers and amend statutes by applying them extraterritorially, once again raising a separation of powers issue.

the underlying issue of constitutional constraints, which this Note will not fully delve into; but it should be recognized that some courts have used the principles of international law to find extraterritoriality, while others have used them as a nexus to due process. See Colangelo, supra note 26, at 167–70 (discussing the use of international legal principles in establishing a nexus between conduct and the United States). See Colangelo, supra note 9, at 1084–86 (describing how using the international principles of law to obtain extraterritoriality disrespects the sovereignty of foreign states).

Meyer, supra note 8, at 150; see also Colangelo, supra note 26, at 168–69 (explaining that if the international principles can be used to apply domestic laws abroad, due process would be the only true constraint on extraterritoriality); supra note 105 (discussing how the international principles of law lack guiding criteria and can be easily manipulated to stretch federal laws universally).

See Meyer, supra note 8, at 150–51 (stating that using these principles encourages harmonization with international laws and norms but also jeopardizes the nation and its citizens); Parrish, supra note 32, at 1505 (discussing how unilateral application of laws leaves the United States vulnerable to foreign law).

See, e.g., Ratner, supra note 47, at 888–91 (discussing international complications caused by the Belgian War Crimes Statute). A good example of an abuse and overuse of international norms and principles is the Belgian War Crimes Statute, which was repealed in 2003. Id. at 891. Under this law, Belgium granted universal jurisdiction over war crime claims. Id. at 889. Soon, the Belgian courts became flooded with claims. Id. In many cases, it appeared that the claims were strictly political. Id. at 891. Many nations were unsatisfied with the law and believed that it disrespected sovereignty. Id. Belgium finally repealed the law after the threat of sanctions from several nations. Id. This statute demonstrates an abusive use of unilateral laws that are given extraterritorial effect based on international law. Id. at 888.

See Colangelo, supra note 9, at 1039 (explaining that by construing geographically silent statutes extraterritorially, courts are able to use modern international rules of jurisdiction to amend statutes in a way that could interfere with the rights of other sovereigns). It may be possible for courts to use international rules to amend geoambiguous statutes to force them to apply extraterritorially, thus encroaching on the sovereign rights of other nations. Id. The principles of international law may be better suited as a means to establish extraterritorial jurisdiction and due process as opposed to an extraterritorial gauge. See Davis, 905 F.2d at 249 n.2 (finding that the principles of international law may be used to establish a nexus and fulfill due process requirements).
The effects and protective principles of international law seem to evaluate policy concerns and are the most commonly cited principles regarding conduct that threatens the government, such as piracy, terrorism, and cyber attacks. The two principles often intermingle, and, when applying the protective principle, courts consider the effects or intended effects within the United States. Nevertheless, the exact interpretation of the protective principle has been questioned over the years, given that these principles can be used regardless as to whether an act has an effect on the United States. This alternative use of the protective principle demonstrates how easily it can be manipulated and abused. Additionally, the United States traditionally uses a lower standard of proof for the effects test, and such a deviation from the norms practiced by the international community calls into question the international legality of the United States’s approach. If such treatment of the effects test is, in fact, illegal under international law,
then the United States would risk violating the *Charming Betsy* canon every time the principle was summoned.  

While the United States would like to apply the international principle of universal jurisdiction over some conduct, such as terrorism, such an application would be ill-advised. Definitions of particular crimes vary by country, and such a difference in definition is critical enough to deter unilateral declaration of universal law. However, it is possible for the United States to influence international recognition of universal laws through the enactment of treaties. Through actively prescribing universal reach over particular conduct, the United States might assist in creating a norm that may eventually become globally accepted.

But eliminating the use of the international principles would not altogether stop courts from applying geoambiguous laws extraterritorially—some lower courts utilize broad, boilerplate language within statutes to interpret extraterritoriality. For example, when

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175 See *Murray v. Schooner Charming Betsy* (*Charming Betsy*), 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .”).

176 See *Yousef*, 327 F.3d at 106–08 & 107 n.42 (explaining that there is a lack of an international consensus on what type of misconduct qualifies as terrorism, and applying terrorism laws universally may cause discord among nations). For this reason, the Second District Court of Appeals held that terrorism is not subject to universal jurisdiction because international law has failed to produce a uniform definition. *Id.* at 97, 103. *But see* Colangelo, *supra* note 9, at 1094–95 (discussing how widespread acceptance of treaties acknowledging terrorist acts as crimes create an international norm by which acts of terrorism fall under universal jurisdiction). Furthermore, terrorism is a complicated issue in and of itself, especially considering that “one man’s terrorist is another man’s freedom fighter.” *United States v. Afshari*, 426 F.3d 1150, 1155 (9th Cir. 2005).

177 *See supra* notes 47–48 and accompanying text (discussing how the definition of particular crimes may vary from nation to nation, and applying a generally unrecognized definition of a particular crime universally is fundamentally unfair).


179 *Colangelo, supra* note 47, at 907 (discussing how increased use of universal jurisdiction will help define and create acceptable norms).

180 *See, e.g.*, *United States v. Weingarten*, 632 F.3d 60, 65–66 (2d Cir. 2011) (finding that the term “foreign commerce” was not considered boilerplate in regards to a statute criminalizing sexual misconduct with minors and thus could be used to interpret extraterritoriality, despite discussing *Morrison*’s disapproval of the use of terms such as “foreign commerce” and other boilerplate language to interpret extraterritorial application); *United States v. Clark*, 435 F.3d 1100, 1106–07 (9th Cir. 2006) (finding that the phrase “foreign commerce” could be used to indicate that the PROTECT Act applies extraterritorially); *United States v. Hasan*, 747 F. Supp. 2d 642, 653–84 (E.D. Va. 2010) (finding that broad terms, such as “any person” and “any crime” in an ancillary statute, could be used to interpret extraterritoriality); *see also* *United States v. Erdos*, 474 F.2d 157, 160 (4th Cir. 1973) (stating that, with regard to extraterritoriality, “[w]here the power of the
analyzing the nature and purpose of laws, some courts have given statutes extraterritorial application based solely on broad language and phrases, such as “foreign commerce,” even though the Supreme Court has discouraged such practices.\textsuperscript{181} Even when such language is absent, courts have “interpreted” extraterritorial intent solely on the treatment of laws concerning similar crimes, even when their statutory construction differs.\textsuperscript{182} These types of practices have been discouraged as well,\textsuperscript{183} and

\begin{quote}
Congress is clear, and the language of exercise is broad . . . [there is] no duty to construe a [criminal] statute narrowly”).
\end{quote}

\textsuperscript{181} See supra note 180 (discussing cases using statutory language, such as “foreign commerce,” to interpret extraterritorial application); see also Morrison v. Nat’l Austl. Bank Ltd., 130 S. Ct. 2869, 2882–83 (2010) (holding that statutes that contain broad terms, such as “foreign commerce,” do not apply extraterritorially without any further “affirmative indication” of such application); EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 251–53 (1991) (holding that boilerplate phrases, such as “foreign commerce,” cannot be used to interpret congressional intent regarding extraterritorial application). \textit{But see} United States v. Frank, 599 F.3d 1221, 1230–31 (11th Cir. 2010) (holding that broad statutory language, such as “interstate or foreign commerce,” indicates that Congress intended for crimes of selling or buying children to apply extraterritorially).

\textsuperscript{182} See, e.g., United States v. Baker, 609 F.2d 134, 136 (5th Cir. 1980) (finding that extraterritoriality “may be inferred from the nature of the offenses and Congress’ other legislative efforts to eliminate the type of crime involved”). Some statutes are given extraterritorial effect because they are part of a “comprehensive statutory scheme” to combat particular conduct, even if extraterritorial language is not indicated within the statutes. Clopton, \textit{supra} note 14, at 170–71. There appears to be two types of crimes that are particularly susceptible to such an analysis; the first are child pornography laws. \textit{See Frank}, 599 F.3d at 1231 (finding that statutes combating child pornography are part of a “comprehensive scheme” created by Congress to “eliminate child pornography” and thus apply extraterritorially); United States v. Harvey, 2 F.3d 1318, 1327 (3d Cir. 1993) (holding that Congress created a “comprehensive scheme” to combat child pornography that required extraterritorial application); United States v. Martens, 59 M.J. 501, 504 (C.A.A.F. 2003) (finding that a geoambiguous statute criminalizing the distributing or receiving of child pornography was part of a “comprehensive statutory scheme to eradicate sexual exploitation of children” and was intended to apply extraterritorially (quoting United States v. Thomas, 893 F.2d 1066, 1068 (9th Cir. 1990))). The second are drug distribution laws. \textit{See Baker}, 609 F.2d at 137 (holding that the Comprehensive Drug Abuse Prevention and Control Act was a “comprehensive legislative scheme” created to eradicate and control drug abuse within the United States and thus applied extraterritorially). However, judicial decisions interpreting these “comprehensive statutory schemes” are not uniform. \textit{See, e.g.}, United States v. Lopez-Vanegas, 493 F.3d 1305, 1312–13 (11th Cir. 2007) (finding that a statute criminalizing the intent to distribute a controlled substance did not apply extraterritorially despite similar efforts to combat such conduct); United States v. Martinelli, 62 M.J. 52, 59–61 (C.A.A.F. 2005) (finding that the Child Porn Protection Act does not contain any language indicating extraterritorial applicability and thus only applies domestically).

\textsuperscript{183} \textit{See, e.g.}, United States v. Azeem, 946 F.2d 13, 17 (2d Cir. 1991) (“[C]ongressional consideration of an issue in one context, but not another, in the same or similar statutes, implies that Congress intends to include that issue only where it has so indicated.”) (emphasis added) (citation omitted); United States v. Diaz, 712 F.2d 36, 39 (2d Cir. 1983) (holding that statutory language will not be implied when one statute is silent in regards to
serve as a manifestation of aggressive judicial activism. As discussed earlier, courts seem to have no reservations with applying a law extraterritorially, so long as they consider the crime at hand to be one that carries public policy implications and national interests.

With Morrison, one would imagine that lower courts’ liberal use of extraterritoriality would diminish; however, subsequent cases indicate that courts have only been slightly deterred in extraterritorially applying federal laws. Morrison is often eschewed, and the international principles, as well as judicial activism and loose interpretations of the purpose and nature of statutes, continue to be used to obtain extraterritoriality. The current trend appears to be a loose reading of a particular issue but similar statutes address the exclusion). At least one district court has held that statutory ambiguity does not prevent a finding of extraterritoriality if it is found that the statute was perhaps poorly authored. See United States v. Layton, 509 F. Supp. 212, 223–24 (N.D. Cal. 1981) (interpreting a statute criminalizing the murder of an “internationally protected person” to apply extraterritoriality even without clear statutory language, because it was legislated to meet treaty obligations that were not explicitly found within the statute).


See Nanda & Pansius, supra note 157, § 8:9 (explaining that the “‘importance’ of enforcing [a] criminal law” is a determining factor for extraterritorial application and that the presumption against extraterritoriality is often ignored when it “substantially frustrates” a statute’s effectiveness); supra note 157 and accompanying text (discussing the influence of public policy and national interests in applying laws extraterritorially).

See supra notes 95, 98 (listing cases discussing the treatment of extraterritoriality post-Morrison). Generally, it appears that courts prefer to rely on Bowman in criminal cases, despite the clear language that Morrison applies in all cases. Id. While it initially appeared that Morrison controlled all civil statutes, the Ninth Circuit has determined that Morrison does not prevent the Alien Tort Statute from applying extraterritorially. Sarei v. Rio Tinto, PLC, 671 F.3d 736, 744–47 (9th Cir. 2011).

See supra notes 95, 98 (discussing how courts have consistently interpreted extraterritoriality after Morrison); see also sources cited, supra note 184 (discussing the dangers of judicial activism). The Second Circuit appears to follow Bowman in criminal cases and Morrison in civil cases. Compare Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29, 33 (2d Cir. 2010) (discussing Morrison and holding that civil RICO provisions do not apply extraterritorially), with United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011) (ignoring Morrison and citing Bowman in determining that the presumption against extraterritoriality does not apply to criminal statutes); United States v. Weingarten, 632 F.3d 60, 65–66 (2d Cir. 2011) (acknowledging Morrison, but recognizing Bowman as controlling over criminal statutes, and using the term “foreign commerce” to establish extraterritorial application over a statute criminalizing sexual misconduct with a minor,
the presumption against extraterritoriality, and the presumption’s limits post- _Morrison_ are unknown. Therefore, a new approach must be created that upholds the traditional presumption against extraterritoriality but allows laws to apply extraterritorially to especially heinous international acts that victimize the United States and its citizens.

**IV. CONTRIBUTION**

The presumption against extraterritoriality serves as an obvious safeguard to prevent unauthorized extraterritorial application of federal laws without Congress’s consent; however, the international principles of law, particularly the effects and protective principles, are, in reality, the governing factors in obtaining extraterritoriality even when courts abstain from citing to them directly. While strict adherence to the presumption against extraterritoriality has traditionally been useful in preventing judicial activism, national security concerns and the development of technology has made such an approach obsolete when handling criminal matters where prompt, immediate response takes priority over equivocal congressional provisions. To properly balance these two concerns, it is imperative for courts to take a new, uniform approach in determining the extraterritorial effect of federal statutes.

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188 See Parrish, supra note 32, at 1470–71 (discussing how the unrestrained definition of the effects test “marked the beginning of the end for meaningful territorial limits on legislative jurisdiction”). Zachary D. Clopton, in his article _Bowman Lives_, posits that _Morrison_ and _Bowman_ adequately co-exist. Clopton, supra note 14, at 184. He notes that both cases relied on the presumption against extraterritoriality and the focus of the statute, as well as the _Charming Betsy_ canon. _Id_. at 184–85. When analyzed in this manner, the application of the presumption against extraterritoriality is guided by the statute’s focus. _Id_.

189 See infra Part IV (discussing a new approach to extraterritoriality that holds true to the presumption against extraterritoriality while allowing for a specific exception to combat criminal conduct that threatens national security).

190 See, e.g., Chua Han Mow v. United States, 730 F.2d 1308, 1312 (9th Cir. 1984) (“Extraterritorial application of penal laws may be justified under any one of the five principles of extraterritorial authority.” (citing United States v. King, 552 F.2d 833, 851 (9th Cir. 1976))). As we have seen, the same can be said for extraterritorial jurisdiction as well. See United States v. Davis, 905 F.2d 245, 249 n.2 (9th Cir. 1990) (stating that the principles of international law may be used to establish a nexus and fulfill due process requirements).

191 See supra note 18 and accompanying text (discussing how globalization and the development of technology calls for the government to increase its governing authority over conduct abroad).
Under this new approach, which can be referred to as the Modified-Exception Test, courts will first evaluate the statute based on a strict reading of the presumption against extraterritoriality. Next, courts will evaluate the statute based on selected principles overtly discussed by the Supreme Court in Bowman. Finally, courts will look to the status of the accused and the nature of the alleged act. This test focuses specifically on the intended victim of the extraterritorial conduct, and inherently violent acts are weighed more heavily than non-violent acts. This ideal test is one that would take into account both the Supreme Court’s decisions in Morrison and Bowman, as well as contemporary national security concerns, and attempt to balance them in a complimentary manner, rather than a conflicting one. Such an approach would consider the simplified, bare-language of these cases in a three-step analysis in determining extraterritoriality.

Under the first step, courts will evaluate a statute based on a strict reading of Aramco and Morrison. Using these two cases to start this analysis works directly to ensure a presumption against extraterritoriality. As the Supreme Court instructed in Morrison, “When a statute gives no clear indication of extraterritorial application, it has none.” This holding would be combined with the “clear statement” rule in Aramco, and only the specific, non-boilerplate language will be used in determining the extraterritorial application of a statute. This approach abandons evaluating the context, legislative history, or similar federal laws in determining the extraterritorial effect.
Extraterritorial Confusion

of a statute because such considerations are easily manipulated. In addition, the localization approach taken by the Supreme Court in *Morrison* will be discarded, because localization gives courts excessive influence over the territorial aspects of an act, thus leaving statutes open to over-interpretation.

If, after the *Morrison* and *Aramco* evaluation, a statute is found to have no specific language indicating extraterritoriality, courts would proceed with evaluating the statute based on selected principles in *Bowman*. Under the *Bowman* evaluation, the courts will consider two issues: first, whether the statute in question is criminal in nature; and, second, whether the conduct poses a direct threat to national security. To successfully pass this analysis, the conduct in question must be criminal and not civil. The act must also be an actual threat to national security. Such an analysis closely conforms to the protective principle of international law in that it allows the United States to properly protect itself from perceived threats. In order to qualify as a threat to national security, the act must specifically target either the U.S. government or its citizens because of their status or perceived status as U.S. citizens. In interpreting the threat, no consideration or reliance should be given to the secondary effects of the conduct. Admittedly, determining an actual threat to national security is a broad guideline. Therefore, a sliding scale interpretation must be followed where violent actions are weighed more heavily than non-violent actions and conspiracies to commit crimes. Thus, a particularly destructive crime, such as a

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201 See supra notes 180–84 and accompanying text (discussing manipulative means of interpreting statutory language to find extraterritoriality).

202 See supra note 130 and accompanying text (discussing how the Court in *Morrison* promoted localizing statutes as a way to avoid extraterritoriality and combat conduct committed abroad).

203 See supra notes 135–37 and accompanying text (discussing how localization is manipulative and promotes judicial creativity).


205 See id. at 98 (expressly allowing some criminal statutes to apply extraterritorially).

206 See id. (allowing statutes that are “enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated” to apply extraterritorially).

207 See id. (extending extraterritoriality to only some criminal statutes).

208 See supra note 45 (discussing the protective principle of international law).

209 For example, under the Modified-Exception Test, an individual could be held criminally liable if he or she violently attacked a Liberian Embassy after confusing its flag for that of the United States.

210 That is, the primary purpose of the act could only be perceived as one committed to cause injury to the United States or its citizens because of their status as U.S. citizens.

211 Under this sliding scale, violent acts are granted more deference because of their immediate and often permanent effects, which are more easily measurable.
terrorist bombing, is more apt to be considered vulnerable to extraterritoriality.212 If, based on the Bowman evaluation, the conduct regulated by the statute in question is considered more violent than non-violent, then there is an exception to the presumption against extraterritoriality in the specific case.

However, if, based on the Bowman evaluation, the conduct regulated by the statute in question is considered more non-violent than violent, a third and final step should be applied. This final step extends extraterritorial effect to fraud and cyber attacks against the U.S. government or its citizens.213 In addition, under this approach, conspiracies to commit fraud, cyber attacks, or violent acts could only apply extraterritorially if the conspirator was a national of the United States, which directly follows the Court’s opinion in Bowman.214 If the conduct in question falls under one of these categories, then there is an exception to the presumption against extraterritoriality in the specific case.

Therefore, to put the Modified-Exception Test in a simplified manner, the presumption against extraterritoriality applies strictly unless the primary purpose of the crime specifically targets the U.S. government or its citizens because of their status or perceived status as U.S. citizens. If the act is inherently violent, then the statute may apply extraterritorially in the specific case. If an act is not inherently violent, but falls under the category of fraud or a cyber attack, then the statute may also apply extraterritorially in the specific case. Finally, conspiracies to commit any one of the previously mentioned acts may apply extraterritorially if committed by a national of the United States.

Under this new extraterritorial test, criminal statutes may not always appear static. In fact, it is entirely possible that several criminal statutes may be applied extraterritorially; nevertheless, overly abusive extraterritorial application is curbed by the specificity of the analysis. Additionally, this test does not presume statutes to be territorially flexible; rather, it adheres to the presumption against extraterritoriality while allowing for a specific exception. This test, by placing a stronger

212 This approach, however, attempts to prevent extending universal jurisdiction over all terrorist attacks. See supra note 176 and accompanying text (discussing the dangers of granting universal jurisdiction over terrorism).

213 Under this step, fraud and cyber crimes targeting corporations and organizations would be exempt from the exception unless they were committed because of the fact that the company had national ties to the United States.

214 See United States v. Bowman, 260 U.S. 94, 98 (1922) (allowing some crimes against the United States to apply extraterritorially, “especially if committed by its own citizens, officers, or agents”).
emphasis on the violent nature of an act, also allows for more immediate justice when an act has resulted in irreversible damage.

The Modified-Exception Test, while referring to *Bowman*, is different in two important ways. First, it does not force courts to painstakingly determine the territorial locus of a statute. It instead focuses on the action and the purpose of the action, not the location. Second, the Test does not grant a statute extraterritorial effect. Instead, it evaluates crimes on a case-by-case basis and only allows extraterritoriality when the circumstances around the conduct adequately meet the requirements of the Modified-Exception Test.

An argument could be made that such a test is unnecessary because courts’ current approach to interpreting criminal statutes is adequate, and if extraterritorial application is wrongly interpreted, then Congress will provide for clarification. While this may be true, the Modified-Exception Test fills in perceived holes of the current approach. First, the current approach assumes that Congress is properly informed of every instance in which a court allows a statute to apply extraterritorially. This is a large assumption and can result in damaging determinations by lower courts when their precedent influences future treatment of the statute. Second, the modern approach of loosely applying extraterritoriality while relying on Congress to alleviate any confusion after a decision promotes judicial activism rather than the presumption against extraterritoriality. This is exactly what the Supreme Court was

215 See *id* at 97–98 (holding that to determine whether a statute applies extraterritorially, courts must examine the “locus” of the crime).

216 See *supra* note 154 and accompanying text (discussing how extraterritoriality is dependent upon statutory construction and is not a case-by-case decision).

217 Such an approach is beneficial because it allows the United States to adequately protect its national security interests without being overly restrained by statutory construction. At the same time, it also prevents courts from aggressively applying federal laws extraterritorially when national security concerns or congressionally determined public policy implications are not triggered.

218 See *supra* note 126 (discussing how Congress’s unwillingness to amend statutes after they have been territorially interpreted by the courts demonstrates Congress’s tacit approval of such interpretation).

219 See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696–98 (1979) (stating that the Supreme Court presumes that Congress is aware of its decisions). But see *Eskridge*, *supra* note 159, at 337 n.12 (stating that Congress is usually unaware of lower court decisions).

220 See, e.g., *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011) (relying on previous precedent in determining the extraterritorial reach of 18 U.S.C. §§ 1114 and 1117, despite the absence of any “explicit extraterritorial provision” within the statutes).

221 See *supra* notes 135–37 (explaining how tactics, such as localization, promote judicial activism and creativity); see also *supra* note 184 (discussing the dangers of judicial activism). Judicial activism is regularly used to obtain extraterritoriality, even though such activism is often considered dangerous when decisions implicate foreign nations. See *supra* notes 183–84 and accompanying text. Courts may face the “overarching philosophical problems” of
attempting to curb in *Morrison*.222 The Modified-Exception Test follows the “clear statement” rule regarding the presumption against extraterritoriality,223 while providing a loophole for circumstances where national security is actually threatened without relying on malleable statutory interpretation or the international principles of law.224 By evaluating the presumption against extraterritoriality with a vigorous “clear statement” rule, courts give Congress increased notice regarding the structural limitations of statutes.225 Finally, the Modified-Exception Test grants deference to the national security of the United States and its citizens and promotes the goals of the nation when it is at its most vulnerable.

V. CONCLUSION

Courts’ extraterritorial treatment of geographically silent federal statutes has become increasingly liberal over the last several years to the extent that the presumption against extraterritoriality is sometimes merely a mirage—especially within the context of criminal statutes. While this could be seen as increased vigilance, it, in actuality, is over-application, and courts have begun to take it upon themselves to frame public policy and foreign relations.226 Facially, the *Morrison* decision attempts to curb liberal territorial readings of statutes that are silent in their territorial scope by reaffirming the controlling nature of the presumption; however, lower courts have been sluggish in following the principle literally and it is often lost in criminal cases. While justice may sometimes be served, it comes at the cost of judicial activism and the normalization of manipulative statutory interpretation.

A strict, specific exception to the presumption is imperative to adequately respond to emergency situations involving breaches of national security. The growth in technology, transport, and telecommunications has led to new and innovative ways for criminals to place the United States and its citizens at risk. While globalism often

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224 *See* United States v. Bowman, 260 U.S. 94, 98 (1922) (using extraterritoriality to allow the government to protect itself).
225 Unlike the Court in *Morrison*, the Modified-Exception Test would advocate the use of statutory content, such as “this law applies abroad.” *Morrison*, 130 S. Ct. at 2883.
226 *See* supra notes 157–58 and accompanying text (discussing how courts attempt to frame public policy concerns when they apply geoambiguous laws extraterritorially).
Extraterritorial Confusion

requires extraterritoriality to effectively combat international issues, generously applying federal laws in such a way may violate international laws, as well as personal and national sovereignty. Thus, it has become increasingly difficult for courts to juxtapose the insurance of national security with the presumption against extraterritoriality. A new approach must be adopted that simultaneously preserves the presumption and adequately addresses extraterritorial activity causing immediate harm to the nation and its citizens. Rather than the current all-or-nothing approach to statutory interpretation, courts should follow the Modified-Exception Test, which endorses a clear statement rule regarding the presumption against extraterritoriality while providing a loophole for unforeseeable or destructive conduct that specifically targets the United States and its citizens. Such an approach preserves the legal tradition of the presumption against extraterritoriality and ensures that justice will be served when an actor harms national security and attempts to hide behind territorially ambiguous federal laws.

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