Extraterritoriality and the Fourth Restatement of Foreign Relations Law: Opportunities Lost

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EXTRATERRITORIALITY AND THE FOURTH 
RESTATEMENT OF FOREIGN RELATIONS LAW: 
OPPORTUNITIES LOST 

FRANKLIN A. GEVURTZ*

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I. INTRODUCTION

What is the purpose of a "Restatement" of law? While simply 
repeating the holdings from judicial decisions in outline form might 
be useful to students studying for exams, such an exercise hardly 
demands the attention lavished on the production of a Restatement. 
For traditional common law topics encrusted by a multiplicity of 
judicial decisions from numerous jurisdictions, a Restatement can 
serve to clarify the unruly mess. When dealing, however, with 
decisions from a single relevant jurisdiction, whose highest court has 
recently spoken, are the drafters of a Restatement limited simply to 

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repeating holdings, or can they take a more proactive approach?

This was the problem facing the drafters of the Fourth Restatement of Foreign Relations Law when addressing the extraterritorial application of U.S. statutes. Like a fickle fan the Fourth Restatement brings back the presumption against such extraterritoriality, which the Second Restatement contained, but the Third had abandoned. The drafters explain that they are just following the Supreme Court’s off-again, on-again infatuation with the presumption. Yet, even if black-letter adherence to the presumption against extraterritoriality inevitably results from the nature of a Restatement, could the drafters have gone further than they did in addressing the various questions raised by the presumption? After all, what is the point of the exercise if not to suggest answers to the difficult open questions?

This article explores in two parts the Fourth’s Restatement’s effort to address the presumption against extraterritoriality. Part I briefly describes the presumption and sketches the Fourth Restatement’s somewhat two-minded approach to incorporating the presumption within the broader topic of prescriptive jurisdiction. Part II then examines the limited guidance provided by the Fourth Restatement with regard to the issues raised in applying this presumption. We will see that the Fourth Restatement passed on a number of opportunities for a more proactive role in providing useful guidance, the result of which will be to limit the impact of the Fourth Restatement on the topic of prescriptive jurisdiction. This part will also comment on a couple of areas in which the Fourth Restatement took a more proactive approach.

II. THE PRESUMPTION AND THE RESTATEMENT

A. The Supreme Court’s Off-Again, On-Again Affair with the Presumption Against Extraterritoriality

In a simpler time, issues of applying United States law beyond the young nation’s borders arose on ships and involved pirates,  

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4. Id.
murder at sea,\(^6\) and customs duties.\(^7\) By the twentieth century, issues increasingly arose regarding the degree to which modern regulatory statutes enacted by a powerful United States applied to events that occurred in other nations. U.S. courts responded with decisions applying or refusing to apply U.S. antitrust laws,\(^8\) employment laws,\(^9\) securities laws,\(^10\) trademark laws,\(^11\) as well as a variety of other laws,\(^12\) to activities abroad.

In the course of deciding these cases, the Supreme Court often referred to rules of construction or presumptions regarding Congress's intent with respect to applying U.S. laws to events beyond the nation's borders. In its early decisions dealing with murder at sea and enforcing customs duties, the Supreme Court explained that even though a statute used broad, general language regarding its reach, the Court presumed that Congress only intended to legislate within Congress's "authority and jurisdiction."\(^13\) While this probably only referred to the limits imposed by international law on the permissible reach of a nation's statutes,\(^14\) Justice Holmes' opinion in *American Banana Co. v. United Fruit Co.*\(^15\) advanced the broader proposition that the legality of an act nearly universally depends upon the law of the nation in which the act takes place, which, in turn, leads courts to construe statutes to apply solely within the nation's territorial limits.\(^16\) This view eventually came to be known as the presumption against extraterritoriality.

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16. Id. at 359.
The eight decades following *American Banana* saw deceeding invocation of the presumption by the Supreme Court,\(^\text{17}\) including in the very field (antitrust) in which *American Banana* arose.\(^\text{18}\) In 1991 the tide turned again, however, when, in *EEOC v. Arabian American Oil Co. (ARAMCO)*,\(^\text{19}\) the Supreme Court invoked the presumption against extraterritoriality to hold that the Equal Employment Opportunity Act did not apply to the discriminatory firing of an American citizen by an American company when the firing took place in Saudi Arabia. Since *ARAMCO*, the presumption has found increasing favor in the Supreme Court’s eyes.\(^\text{20}\) This includes the pivotal decision in *Morrison v. Australia National Bank*,\(^\text{21}\) in which the Court went beyond the cases in which all of the seemingly relevant events occurred abroad and applied the presumption despite some potentially relevant conduct occurring in the United States.

**B. Fitting the Presumption Against Extraterritoriality into the Restatement’s Approach to Prescriptive Jurisdiction**

The oddly named Second Restatement of Foreign Relations Law—there is no First Restatement on the topic—contained a section (Section 38) setting forth the presumption against extraterritoriality. The Third Restatement dropped explicit reference to the presumption, but the Fourth Restatement, in Section 404, once again includes it among the black-letter rules. The drafters of the Fourth Restatement blame this changing adherence on the Supreme Court’s off-again, on-again invocation of the doctrine.\(^\text{22}\) The difficulty created by the presumption against extraterritoriality for the Restatement runs deeper, however. It also reflects the uncertain scope of the topic of “Foreign Relations Law” and an unacknowledged tension between the

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17. William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 Berkeley J. Int’l L. 85, 91 (1998) (explaining how the Supreme Court did not invoke the presumption against extraterritoriality in the four decades after applying it to the Eight Hour Law in 1949, even though it had opportunities to do so).


Restatement's overall approach to prescriptive jurisdiction and the presumption.

The Restatement of Foreign Relations Law follows a typology, which divides the subject of jurisdiction into jurisdiction to adjudicate (jurisdiction to hear a matter in a nation's courts), jurisdiction to enforce (jurisdiction of a nation to take action against a person or property), and, of present concern, jurisdiction to prescribe (jurisdiction to apply a nation's law). The Restatement then employs a further typology listing various bases upon which a nation might claim prescriptive jurisdiction (in other words apply its law). Several of these bases look to territory, either in which the person or property whose status the law seeks to regulate is found, the conduct that the law seeks to regulate occurred, or the effect of such conduct was felt. A couple of bases look to persons, either the nationality of the person whose conduct or status the law seeks to regulate or the nationality of the victim of the conduct the law seeks to regulate. Another basis looks to threats to a nation's security or other critical interests, while a final basis lies in the view that certain crimes (e.g., piracy) call for any nation to prosecute. While there has been some evolution with respect to one or two of these bases in going from the Second to the Fourth Restatement, the overarching message is that all of these bases for prescriptive jurisdiction are both employed in various U.S. laws and allowable under customary international law.

Having laid out an inclusive approach to the bases under which the U.S. can and does assert prescriptive jurisdiction, another section in the Second and Fourth Restatements sets out a presumption against

23. Id. at § 101.
24. Id. at § 402(1)(a).
25. Id.
26. Id. at § 402(1)(b).
27. Id. at § 402(1)(c).
28. Id. at § 402(1)(d).
29. Id. at § 402(1)(e).
30. Id. at § 402(1)(f).
32. Restatement (Fourth) of the Foreign Relations Law of the United States § 402 Reporters' Notes 5-10.
33. Id. at §§ 407-413.
extraterritorial application of U.S. laws. The result is somewhat inconsistent. What was the point of providing a list of bases beyond territorial connections under which the U.S. can and does apply its law, only to state that courts should presume any given statute only applies based upon a territorial connection? It cannot be international law, since the Restatement asserts that all of the listed bases are consistent with customary international law. Since the Restatement asserts that all of these bases have some use in U.S. statutes (providing examples for each), where is the evidence for a strong presumption that Congress favors territorial connections over the other bases, rather than simply allowing courts to decide which of the listed bases for prescription jurisdiction fits Congress’ intent for any given statute without prejudging the matter? Moreover, even if one assumes that Congress normally thinks in terms of territorial connections, why was it necessary to depart from an expansive application of the list of possible territorial connections (status, conduct, and effects) that the Restatement lays out as permissible bases for prescriptive jurisdiction?

There is also the question of what the presumption against extraterritoriality has to do with Foreign Relations Law. As just stated, according to the Restatement, international law does not compel the presumption. The desire to avoid conflicts resulting from overlapping claims to prescriptive jurisdiction allowed under international law is certainly a legitimate foreign relations concern. Indeed, the Third Restatement’s famous Section 403 sought to limit the exercise of prescriptive jurisdiction in order to avoid such conflicts. The notion that the presumption against extraterritoriality will curb such conflicts, however, flies in the face of experience. Some of the most noted objections by other nations to the application of U.S. laws have arisen out of the application of U.S. law based upon either conduct or effects within the United States. Moreover, Justice Scalia’s opinion in the pivotal Morrison decision justifies the presumption against extraterritoriality based upon Congress being

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34. Indeed, the so-called “F-cubed” (foreign plaintiff, foreign defendant, foreign transaction) cases brought under Section 10(b), which had provoked the objecting foreign government amicus briefs in Morrison, were based upon the presence of some fraudulent conduct in the United States. See, e.g., Hannah L. Buxbaum, Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict, 46 Colum. J. Transnat’l L. 14, 24, 61-64 (2007).

interested primarily in domestic issues rather than upon avoiding conflict with other nations' laws.\textsuperscript{36}

In the end, one suspects that the only reason the Restatement included the presumption against extraterritoriality is because of Supreme Court decisions invoking the presumption and the pragmatic view that it would be confusing to ignore the presumption based upon a technical argument that it does not involve Foreign Relations Law.

III. UNHELPFUL AT THE EDGES: ADDRESSING THE ISSUES RAISED BY THE PRESUMPTION AGAINST EXTRATERRITORIALITY

Having incorporated the Supreme Court's renewed infatuation with the presumption against extraterritoriality, the drafters of the Fourth Restatement faced various questions raised by implementing the presumption.

A. What Is Extraterritorial?

In a world of global interactions in which events potentially triggering U.S. law often straddle national borders, an increasingly critical inquiry in applying the presumption against extraterritoriality is to determine whether a particular application of U.S. law would indeed be extraterritorial.\textsuperscript{37} It is therefore unfortunate that the Fourth Restatement largely missed the opportunity to provide real guidance on the question.

The Fourth Restatement initially addresses the question in Reporters' Note 1 to Section 402. Note 1 points out the different meanings attached to the term "extraterritorial." At the narrow extreme, Note 1 explains how some sources use the term to refer to a situation in which a nation asserts prescriptive jurisdiction based upon something other than a territorial connection (probably because the situation lacks any territorial connection with the nation). At the broad extreme, Note 1 points out how other sources use the term to refer to a situation in which a nation asserts prescriptive jurisdiction based upon a territorial connection, but under circumstances that also touch the territory of another nation. Note 1, however, fails to explore the potential justification for either definition, instead expressing a short-lived intent to stay away from the terminology.


\textsuperscript{37} E.g., Franklin A. Gevurtz, Determining Extraterritoriality, 56 WM. & MARY L. REV. 341 (2014); Aaron D. Simowitz, Extraterritoriality in the Funhouse Mirror, 50 Conn. L. Rev. ___ (forthcoming 2019).
In fact, both of these definitions might be useful depending upon why one is asking whether there is extraterritoriality. The narrow definition is relevant if one assumes that Congress normally thinks in terms of territorial connections—rather than the nationality of the parties or the other non-territorial bases for prescriptive jurisdiction listed by the Restatement—as the predicate for the application of its statutes. The broad definition is relevant if one is concerned about overlapping claims by different nations to prescriptive jurisdiction based upon territoriality.

The Fourth Restatement's intent to stay away from the term "extraterritorial" is, of course, short-lived by the necessity of dealing with the presumption against extraterritoriality. Comment c to Section 404 of the Fourth Restatement ignores both interpretations of "extraterritorial" discussed in Reporters' Note 1 to Section 402. Instead, Comment c states that whether the application of a statute is domestic or extraterritorial depends upon where whatever is the "focus" of the statutory provision at issue occurred. If it occurred inside the United States, the application is domestic and the presumption against extraterritoriality does not apply; if it occurred outside the United States, the application is extraterritorial and the presumption is triggered.

This focus test comes from the Supreme Court's *Morrison* decision. There, the Court confronted a situation in which the plaintiffs argued that, even though they purchased their stock at an inflated price in Australia, the case did not involve extraterritoriality because the fraud inflating the price originated in Florida. In response, the Court held that extraterritoriality depends upon which event constitutes the focus of the statute. The Court then held that the focus of Section 10(b) of the Securities Exchange Act—which, broadly speaking, prohibits fraud in connection with the purchase or sale of a security—is the purchase or sale rather than the fraud, and so the location of the sale, rather than the fraud, dictates extraterritoriality.

Yet, if statutory focus provides the test for determining whether the situation involves extraterritoriality, what is the test for determining the statutory focus? Take the classic example asking whose law against murder should apply when a shooter stands on one

38. *Morrison*, 561 U.S. at 266.
39. *Id*.
41. *Morrison*, 561 U.S. at 266.
side of a nation’s border while the victim stands on the other side. Is the focus of the law against murder the act of pulling the trigger with intent to kill, or is it the fatal impact of the bullet striking the victim? How on earth is a court supposed to figure out the answer to such a question?

Unfortunately, the Supreme Court opinions applying the focus test provide no useful guidance. In *Morrison*, the Court concluded that the focus of Section 10(b) is the sale, not the fraud, based upon five fairly conventional statutory interpretation arguments purporting to show that Congress did not intend to regulate overseas sales of securities. While the five specific arguments the Court made were rather poor, there is a more fundamental problem with this approach: If the court can determine based upon the normal tools of statutory construction that Congress did not intend for a statute to apply to certain overseas events, there is no purpose invoking the presumption against extraterritoriality in order to determine Congress’ intent. In other words, *Morrison* simply engaged in an exercise in circular reasoning under which the court determined that Congress did not intend the statute to apply to overseas sales as a predicate for invoking the presumption against extraterritoriality when dealing with overseas sales.

At the other extreme, the Supreme Court in *RJR Nabisco v. European Community*, concluded that the section providing a private cause of action for persons injured by a violation of RICO only applies if the injury occurs in the United States. Presumably, this reflects an implicit conclusion that the focus of RICO’s private cause of action section is the injury rather than the violation. Yet, the court never bothers to explain why this should be so. True, one purpose of a private cause of action provision is obviously to compensate for injuries. However, Congress did not intend to compensate for any injuries, but only those caused by a violation of RICO’s substantive provisions. Moreover, RICO’s private cause of

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43. *Id*.
44. 136 S. Ct. 2090 (2016).
45. 18 U.S.C. § 1964(c).
47. The Court never actually comes out and says this.
action provision calls for awarding treble damages.\textsuperscript{48} This shows that Congress’ goal for allowing private claims was as much or more to deter violations of RICO’s substantive provisions, as it was to compensate for injuries. Hence, it is not at all self-evident that the injury rather than substantive violation is the focus of Congress’ concern in this section.

Indeed, the Supreme Court’s most recent foray into applying the focus test (\textit{WesternGeco LLC v. ION Geophysical Corp.\textsuperscript{49}}) magically flipped \textit{RJR Nabisco} and decided that when it comes to patent cases the focus of the section allowing parties to recover damages from patent infringement is the infringement rather than the damages. Go figure.

The bottom line from this troika of decisions is that the Supreme Court’s application of its focus test either requires a determination that Congress does not wish the statute to apply unless a particular event occurs inside the United States—in which case the presumption against extraterritoriality is redundant—or else simply becomes an ipsa dixit that decrees one way for one statute and 180 degrees the opposite way for another.

Seen in this light, it is unfortunate that the Fourth Restatement largely punts when it comes to guidance for determining the statutory focus. Comment \textit{c} ignores the question. Instead, the Restatement only attempts some discussion in Reporters’ Notes 8 and 9 to Section 404.

Note 8 contains a general discussion of judicial authority concerning the focus test. One problematic aspect of this Note is its citation to decisions that predate \textit{Morrison}’s adoption of the test. \textit{Morrison} itself only cites the Supreme Court’s earlier decisions dealing with overseas employment (\textit{ARAMCO} and \textit{Foley Bros. v. Folardo}\textsuperscript{50}) as precedent for the test.\textsuperscript{51} Yet, both of these decisions simply assumed the situation before them involved extraterritoriality rather than asking what was, and what was not, the focus of the statute.\textsuperscript{52}

\textsuperscript{48} 18 U.S.C. § 1964(c).
\textsuperscript{49} 138 S. Ct. 2129, 2138 (2018).
\textsuperscript{52} \textit{See, e.g., Gevurtz, supra} note 37, at 371 (discussing the “domestic focus” language in \textit{ARAMCO} and the lack of consideration in that opinion as to whether there was extraterritoriality). \textit{Foley} explored no other territorial connection to the United States of the work performed overseas allegedly in violation of a U.S. statute prohibiting working more than 8 hours per day on contracts with the U.S. government.
In any event, the first and third paragraphs of Note 8 simply repeat the basic approach under which the focus of the statute determines whether the situation involves extraterritoriality. The only effort in these paragraphs to address how courts are to determine a statute’s focus is a quotation from the Supreme Court’s old Bowman decision, which long predates the focus test, and which, as the Reporters’ Notes recognize elsewhere, is probably a case best explained as an application of prescriptive jurisdiction based upon protecting critical government functions rather than territoriality. The middle paragraph of Note 8 helpfully gives examples of various foci statutes might have—conduct, transactions, or injury—but provides no clue as to how the court should figure out which is the focus for a particular statute.

The best the drafters attempt to answer this question comes in the second paragraph of Note 9—the first paragraph of which deals with RJR Nabisco’s piecemeal application of the presumption against extraterritoriality. The second paragraph states that the focus of a statutory provision might be indicated by its text or by looking at the focus of the statute as a whole. Whether intentionally or not, this is just being ironic. The paragraph cites Morrison as looking to the statute as a whole in order to determine its focus. Indeed, among the arguments the Supreme Court makes in Morrison for concluding that Section 10(b) focuses on sales rather than fraud is its placement in a statute the overarching purpose of which is to regulate U.S. stock markets. Of course, this ignores the language in Section 10(b) itself, which speaks specifically of manipulative or deceptive acts or contrivances, rather than anything else, in connection with the purchase or sale of securities. By contrast, Note 9 cites RJR Nabisco as looking to the language of the statutory provision at issue—which establishes a private cause of action for persons injured in their business or property by a RICO violation—as showing a focus on the injury. But this ignores the placement of this private cause of action provision in a broader statute (RICO) whose overarching purpose, as encapsulated in the statute’s title, is to punish those who acquire or engage in an enterprise through a pattern of racketeering activities.

54. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 Reporters’ Note 10 (AM. LAW INST. 2018).
In its recent foray applying the focus test in *WesternGeco*, the Supreme Court pretends to look at both. This case involved an effort to collect lost overseas profits under a section of the Patent Act entitling the holder of an infringed patent to collect "damages adequate to compensate for the infringement." In ruling that the focus of the section is the infringement, rather than the damages, the Court began by stating that it must look at the section in the context of the rest of the statute. This, however, raises the obvious question as to why *RJR Nabisco* did not do the same in dealing with RICO's private cause of action section. The Court's answer does not point to anything in the rest of the Patent Act to explain the difference. Instead, it tries to conjure up a pair of arguments based upon the language of the damages provision itself. One is to draw a difference between damages and injury. For those who thought the two terms largely synonymous, the Court states that RICO's private cause of action provision creates a substantive element requiring the plaintiff to prove it suffered injury. Yet, to collect lost profits under the Patent Act, the patent holder must prove the infringement caused them.

Ultimately, the Reporters' Notes might have been more honest in restating the Supreme Court's approach by saying that the Court will look to whatever it wants about the statute, no matter how inconsistent with the approach in other decisions, in order to get the result the Court sought before it looked at the statute. In a new paper, William Dodge, Reporter for the Fourth Restatement on this

58. 35 U.S.C. § 284. The infringement in the case consisted of making components in the United States for a patented ocean floor surveying system and shipping the components for assembly outside of the United States. To prevent circumvention of the Patent Act, the Act's section defining infringement (id. at § 271) includes manufacturing components in the United States for assembly outside the country into items covered by U.S. patents. The problem in the case came from the nature of the plaintiff's damages. Commonly, the patent holder could claim damages arising in the United States from the loss of export sales that the patent holder would have made to the parties who instead purchased the competing product assembled abroad. *WesternGeco*, however, did not sell its ocean floor survey system but instead used the system to conduct ocean floor surveys. This meant that instead of lost export sales, *WesternGeco* lost contracts for ocean floor surveys outside of the United States, making its damages presumably extraterritorial. See id.
60. Id. at 2138.
topic, tries to turn this lemon into lemonade by applauding the flexibility that the focus test gives the Court. If the competing choice is a mechanical determination of extraterritoriality solely by the location of the defendant’s conduct, then there may be something to be said for such flexibility. However, U.S. courts had long since moved past the view that the only territorial connection justifying application of a statute is the location of the defendant’s conduct, and it not clear that ARAMCO, which never considered the issue of what is extraterritorial, meant to change that. If, however, flexibility means a license for the Supreme Court to reach results-oriented outcomes following a Kabuki dance that obscures the real reasons behind the Court’s decisions, then I am not so sure flexibility is such a good thing.

Maybe the nature of a Restatement precludes setting forth an alternative to the focus test—albeit the Supreme Court itself suggested it might look to something different in its Kiobel decision, where it talked about whether claims “touch and concern” the territory of the United States “with sufficient force” to displace the presumption against extraterritoriality. Even if stuck with the focus test, perhaps the Restatement could have attempted to nudge the Court into using the test in a transparent manner based upon criteria relevant to the goals behind the presumption against extraterritoriality. Specifically, while the circularity of the Morrison decision was maddening, and the Court’s specific statutory construction arguments embarrassingly poor, the Court’s effort to address whether Congress wanted to regulate fraud in connection with overseas sales of securities at least asked the right question. Indeed, in retrospect, Morrison starts to look a lot better when one compares it to the ipse dixit, inconsistent reasoning employed in RJR Nabisco and WesternGeco. Moreover, a sensible approach could include testing various claimed foci by asking if it would advance Congress’s purpose behind the legislation if the statute applies when an asserted

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65. See e.g., Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993); United States v. Sisal Sales Corp., 274 U.S. 268 (1927); United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 443 (2d Cir. 1945) (applying the Sherman Act based upon effects in the United States); Schoenbaum v. Firstbrook, 405 F.2d 200, 204-05 (2d Cir. 1968) (applying Section 10(b) of the Securities Exchange Act based upon effects in the United States).

66. See Gevurtz supra note 37.

focus occurs outside the United States. Beyond such legislative purpose analysis, and even better when viewed from the standpoint of concerns central to foreign relations law, the Restatement could have suggested that courts openly import into the focus test considerations of comity. Of course, we have now reintroduced the better features of the Second Circuit’s pre-Morrison conduct and effects test, but so long as this does not devolve into a case-by-case approach, who is to notice?

B. Rebutting the Presumption

The Fourth Restatement takes a more assertive posture when it comes to rebutting the presumption against extraterritoriality. While bowing to obvious necessity by using the word “clear” when describing the indication of Congressional intent necessary to overcome the presumption, the Fourth Restatement takes pains to state that the presumption is not a clear statement rule and that the Court will look at all evidence to determine Congress’s intent.

Even here, however, the Restatement missed an opportunity for a further clarification. Specifically, the Restatement is rather oblique regarding the relationship between its typography for prescriptive jurisdiction and rebutting the presumption. Conceptually, there are two essential ways in which to rebut the presumption against extraterritoriality. The more obvious is a reference by the statute to events outside the United States. The subtler would be a reference by the statute to one of the non-territorial bases for asserting prescriptive jurisdiction listed by the Restatement (nationality of the person regulated, nationality of a victim, protection of government functioning, or universal). Can a statute’s reference to a possible non-territorial basis for prescriptive jurisdiction rebut the presumption against extraterritoriality in the absence of any language addressing the relevance of territoriality?

Take, for example, a statute that would require U.S. citizens to vote in federal elections. Would this apply to U.S. citizens when outside the country? The answer is easy if the statute specifically states that it will apply even when the U.S. citizen is outside the

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69. RESTATAMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. b (AM. LAW INST. 2018).

70. RESTATAMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES at § 404.
United States (as the case in a number of the examples cited in the Reporters’ Note 7 to Section 402). Suppose, however, the statute does not contain such a geographic reference: How important is it that the statute includes language opening the possibility of a non-territorial basis for prescriptive jurisdiction (nationality of the party regulated)? If such language cannot rebut the presumption on its own, can it at least provide a foot in the door that frees the court to explore a more policy oriented or nuanced analysis of whether the presumption is rebutted? In addition to statutes referring to the nationality of perpetrators or victims, the question also arises with statutes prohibiting conduct commonly subject to universal jurisdiction.

Perhaps this what the drafters meant when referring to “nongeographic provisions” in Reporters’ Note 10 to Section 404. Unfortunately, the terse explanation for this term, its placement well separated from the discussion of rebutting the presumption against extraterritoriality, and its muddy history in the drafting process, render this meaning not entirely clear.

C. **The Chicken or the Egg**

Reporters’ Note 6 to Section 404 points out that the Supreme Court expressed a preference in *RJR Nabisco* for first addressing whether the presumption against extraterritoriality is rebutted and then considering whether the situation involves extraterritoriality under the focus test. The note closes, however, with the reassurance that *RJR Nabisco* does not bar courts from proceeding in the opposite order and, indeed, the Supreme Court in *WesternGeco* reversed the order when considering the Patent Act’s damages provision.

71. *Id.* at Reporters’ Note 10.
72. *Id.* at Reporters’ Note 7.
73. Earlier drafts had referred to provisions that have a “non-geographic” “focus”. *Restatement (Fourth) of the Foreign Relations Law of the United States: Jurisdiction* § 203, Reporters’ Note 10 (Tentative Draft No. 3, 2017). This confuses the question of whether the situation is extraterritorial with rebutting the presumption against extraterritoriality and further confuses the term focus. In fact, few statutes have a geographic focus (except for a statute creating a national park). Section 10(b) of the Securities Exchange Act, according to the Supreme Court in *Morrison*, focuses on the sale of securities. RICO’s private cause of action provision, according to the Supreme Court in *RJR Nabisco*, focuses on injuries. The Patent Act’s damages provision, according to the Supreme Court in *WesternGeco*, focuses on infringement. In other words, statutes normally address (or “focus” on if we must use this term) conduct and consequences rather than places.
Reporters' Note 6 might have gone further to point out that *RJR Nabisco*’s preferred order can actually cause confusion, as illustrated in *RJR Nabisco* itself. The issue of RICO’s extraterritorial application ended up before the Supreme Court due to a split among lower courts over whether the focus of RICO’s prohibition on conducting an enterprise through a pattern of racketeering activities is the enterprise or the racketeering activities. The Court in *RJR Nabisco* believed it mooted this question by finding that Congress intended RICO to apply extraterritorially, at least as to certain racketeering activities. This, however, is wrong, as the Court would have realized had it reversed the order of its inquiries.

The key evidence of Congressional intent regarding extraterritoriality and RICO was that a number of the illegal actions listed as racketeering activities under RICO were prohibited by statutes that showed Congress intended to reach those actions even when they occurred outside the United States. The Supreme Court held that this rebutted the presumption against extraterritoriality for RICO’s substantive prohibition, at least for those actions. This is only true, however, if racketeering activities are RICO’s focus. If, on the other hand, the enterprise conducted through the pattern of racketeering activities is the focus, then this conclusion does not follow, since, in this event, it is the location of the enterprise, rather

76. In other words, repeated actions that violate certain other Federal criminal statutes.
77. *Compare* United States v. Chao Fan Xu, 706 F.3d 965, 977–78 (9th Cir. 2013) (racketeering activities are RICO’s focus), with Sorota v. Sosa, 842 F. Supp. 2d 1345, 1350 (S.D. Fla. 2012) (enterprise is RICO’s focus). The Supreme Court in *RJR Nabisco* pretended otherwise when it suggested that the split was over whether RICO applied extraterritorially. *RJR Nabisco* v. European Cmty., 136 S. Ct. 2090, 2099 (2016). The lower courts, however, were in general agreement that RICO did not apply extraterritorially. E.g., *Chao Fan Xu*, 706 F.3d at 974, 979; *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 32-33 (2d Cir. 2010). True, the Second Circuit in *RJR Nabisco* had created an exception for specific crimes listed as racketeering activities when the statutes prohibiting those crimes evidenced clear intent to apply extraterritorially, but no other circuit said this was wrong.
78. *RJR Nabisco*, 136 S. Ct. at 2103-04. In addition to asserting that it mooted the relevance of the enterprise’s location by finding the presumption against extraterritoriality rebutted, the Court makes two policy arguments against limiting RICO to domestic enterprises: one being the undesirable outcome resulting from saying that RICO cannot apply if a foreign enterprise engages in racketeering in the United States and the other being the difficulty of locating the enterprise in many cases. These sorts of policy arguments, however, run up against Morrison’s rejection of such considerations in applying the presumption against extraterritoriality.
79. *Id.* at 2102 (giving the example of one of the crimes listed as racketeering under RICO, killing a U.S. national while outside the United States, that could only apply to conduct outside the United States).
80. *Id.*
than the location of the racketeering activities, that matters. In other words, if the enterprise is RICO’s focus, then Congress’ inclusion of racketeering activities that might occur abroad says nothing about Congress’ intent regarding extraterritorial application of RICO, since the location of something that is not the statute’s focus is irrelevant in any event.

Of course, given the difficulties inherent in the focus test, it is understandable that the Supreme Court would wish to avoid the test until convinced that the presumption of extraterritoriality applies to the statute. Nevertheless, Congress’s intent to apply the statute to overseas conduct that would not render the statute’s application extraterritorial under the focus test tells us nothing that would rebut the presumption against extraterritoriality. Hence, the need to often identify the statute’s focus first is the inevitable consequence of an approach that renders only certain territorial connections relevant and others irrelevant to determining extraterritoriality.

D. Slicing and Dicing

The Fourth Restatement also addresses in a Reporters’ Note another impact of RJR Nabisco on the presumption against extraterritoriality. This involves whether to evaluate the extraterritorial application of a statute as a whole or for particular pieces and, if looking at individual pieces, how small are the pieces. Reporters’ Note 9 to Section 404 follows RJR Nabisco’s piecemeal approach in stating that a statute might have some provisions that apply extraterritorially and some that do not.81

Once again, however, the Restatement misses an important opportunity: in this instance, to clarify when and where a court should divide up a statute in determining its extraterritorial application. RJR Nabisco illustrates the problem. The plaintiff in RJR Nabisco needed to establish three elements: (1) the defendants engaged in a pattern of racketeering activities;82 (2) the defendants acquired, invested in, or operated an enterprise through this pattern of racketeering activities;83 and (3) the plaintiff was injured in its business or property as a result.84 The Court broke up the first element, holding that the presumption against extraterritoriality was rebutted for some

84. Id. at § 1964(c).
racketeering activities, but not others. The Court then applied the presumption against extraterritoriality separately to last element, both with respect to whether the presumption was rebutted and with respect to the focus of RICO's private cause of action provision. At the same time, the Court did not apply the presumption separately to the enterprise and racketeering elements of RICO and thereby did not throw out the case because the enterprise was located in Europe.

Unfortunately, RJR Nabisco provides no overarching explanation as to when and where the court will divide statutory provisions in applying the presumption against extraterritoriality and when and where it will not. This is not an insignificant concern, since the more the court divides statutory provisions in applying the presumption against extraterritoriality, the narrower the jurisdictional reach of the statute. For example, applying the presumption against extraterritoriality separately to a private cause of action provision and to the substantive statutory violation provision that triggers the private cause of action, as in RJR Nabisco, effectively gives defendants two bites at hiding behind extraterritoriality—one for whether the presumption against extraterritoriality blocks the substantive violation (presumably based upon the focus of the substantive violation provision) and a second based upon the location of the injury. Indeed, such separate treatment of pieces of the same statute could allow the defendant in the cross-border shooting example to literally get away with murder. Seen in this light, it would have been helpful for the Restatement to suggest guidelines for when statutory provisions will be treated separately and when lumped together in applying the presumption against extraterritoriality.

In one instance, the Restatement does provide such a guideline. Reporters' Note 10 to Section 404 cites lower court decisions for the proposition that ancillary crimes (attempt, aiding and abetting, and

86. Id. at 2106-11.
87. Id. at 2103-04.
88. As noted earlier, the Court made a pair policy argument against limiting RICO to domestic enterprises. These arguments, however, fail to provide a principled, as opposed to a results-oriented, basis for determining when and where to separately consider statutory provisions and they do not explain why the Court separately considered the private cause of action provision.
89. If a statute prohibits shooting another person and provides a private cause of action for the victim, and the court separately applies the presumption against extraterritoriality to both the defendant's conduct and the injury, the victim in the cross border shooting can never recover from the shooter because the statute does not prohibit the shooting if the shooter is across the border and only provides recovery when the victim was in the nation when shot.
conspiracy) track the territorial reach (or geographic scope in the Restatement’s preferred terminology) of the underlying crime: In other words, whether the presumption against extraterritoriality is rebutted for the ancillary crime depends on whether it is rebutted for the underlying crime and the focus of the statute prohibiting the ancillary crime is the same as the focus of the statute prohibiting the underlying crime. While this seems sensible, the Reporters’ Note might be more persuasive (should the question ever end up in the Supreme Court) if the Note explained why the treatment of the private cause of action in *RJR Nabisco* followed a different rule.

E. The Impact of Executive Branch Action

A results-oriented explanation for the Supreme Court’s decisions in *Morrison*, *Kiobel* and *RJR Nabisco* is that they reflect hostility toward private claims by foreign parties arising out of events occurring abroad. On a gut level, a number of Supreme Court justices seem determined to prevent Federal courts from turning into a “Shangri La” for entrepreneurial attorneys and foreign parties who are forum shopping for substantive and procedural laws more conducive to private actions than available in their home countries. This suggests there may be different outcomes in applying the presumption against extraterritoriality when dealing with criminal prosecutions or other actions brought or supported by executive branch agencies.

In one of its more proactive portions, the Fourth Restatement pushes back hard against such a distinction. Specifically, Comment d to Section 402 and Reporters’ Notes 4 to Section 402 and 4 to Section 404 generally reject the idea that prescriptive jurisdiction and the presumption against extraterritoriality apply differently to criminal versus civil actions or to public versus private plaintiffs. This might have been more persuasive, however, if the Restatement addressed three things:

First, the Restatement could have more forthrightly addressed Supreme Court decisions that effectively allow public prosecutions to proceed, but throw up an extraterritoriality barrier to private actions. This occurred in both *RJR Nabisco* and the Supreme Court’s earlier

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91. It also explains why the Court was more sympathetic to the plaintiff—a U.S. company that lost overseas business to a party infringing on its U.S. patent—in *WesternGeco LLC*. 
decision in *F. Hoffmann-La Roche v. Empagran S.A.* RJR Nabisco's separate treatment of RICO's private cause of action provision places an extraterritoriality hurdle (that the injury occur in the United States) for claims by private parties, which government prosecutions under RICO do not confront. While *Empagran* did not invoke the presumption against extraterritoriality, the Court interpreted the Foreign Trade Antitrust Improvements Act to block claims by foreign parties who bought vitamins overseas at prices inflated by a worldwide cartel that included U.S. companies. A major reason for doing so was to accommodate other nations' hostility toward private antitrust claims.

Next, Reporters' Notes 4 to Section 402 and 4 to Section 404 mention Congressional legislation that draws a distinction between public and private actions. Specifically, in a hastily added section of the Dodd-Frank Act, Congress sought to reverse *Morrison* when it came to government actions, but directed the SEC to further study what the rule should be for private actions. The Notes do not ask, however, whether this legislation evidences an overall attitude by Congress looking more favorably upon government prosecutions than private actions when it comes to the geographic scope of legislation generally. Of course, such a reading might be seeing more than there is to see in this one provision, but it might have been helpful to explicitly address the temptation of a court to read this Congressional action as more broadly indicative of Congressional attitudes.

Finally, the Restatement fails to address the policy issues raised by the distinction. In fact, some argue that there should be a greater willingness to limit extraterritorial application of statutes when dealing with criminal, as opposed to civil, actions. This reflects the notion that there should be fair notice before prosecuting conduct the defendant might not have realized was illegal—indeed in this instance because the defendant did not realize U.S. law would apply. This is a rationale behind the presumption in favor of lenity when dealing with

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93. Including foreign governments, such as the European Union.
95. *Hoffmann-La Roche*, 542 U.S. at 167-68.
ambiguous criminal statutes.\textsuperscript{98} The persuasiveness of this argument might depend upon how different the U.S. law is from other nations' prohibitions. It might also depend upon whether one is dealing with individual or corporate defendants, since there may be little practical difference between imposing a fine on a corporation and making the corporation liable for monetary damages in a civil action.

By contrast, \textit{Empagran} and \textit{RJR Nabisco} advance policy arguments going in the other direction. As stated above, \textit{Empagran} was concerned with other nations' opposition to a "private attorney general" approach toward enforcing public laws, so that even when there is convergence among nations condemning the conduct at issue, there is divergence with respect to a private remedy. Avoiding such conflicts in law and policy is one rationale sometimes expressed for the presumption against extraterritoriality.\textsuperscript{99} \textit{RJR Nabisco} shares \textit{Empagran}'s concerns,\textsuperscript{100} but also invokes the rationale that private parties will not take into account international relations concerns in deciding whether to bring a lawsuit, as presumably would government prosecutors.\textsuperscript{101} Indeed, this sort of superiority of the Executive rather than the Judicial branch when it comes to legal actions having a potentially negative impact on foreign relations is another rationale sometimes advanced in support of the presumption against extraterritoriality.\textsuperscript{102}

While not specifically involving a distinction between private actions and government prosecutions, the Fourth Restatement itself suggests deference to Executive branch determinations regarding federal statutes and extraterritoriality. Specifically, Comment \textit{e} to Section 404 calls for applying \textit{Chevron} and \textit{Skidmore} deference to agency determinations regarding the geographic scope of federal statutes if such determinations would otherwise be entitled to deference under \textit{Chevron} and \textit{Skidmore}. The arguable policy tension between this position and the Restatement's categorical rejection of a difference between private actions and public prosecutions in evaluating extraterritoriality seems to have escaped the drafters' attention. While decisions to prosecute a given case might not fall within the literal confines of \textit{Chevron} and \textit{Skidmore}, a similar

\textsuperscript{98} E.g., McBoyle v. United States, 283 U.S. 25, 27 (1931).
\textsuperscript{100} RJR Nabisco v. European Cmty., 136 S. Ct. 2090, 2106-07 (2016).
\textsuperscript{101} Id. at 2106, 2108.
deference to the executive branch when considering the foreign policy impact of applying U.S. law might seem to apply at least to some extent in either case.

F. Second Bites at the Apple

Finally, in another more proactive reaction to the presumption against extraterritoriality, the Fourth Restatement leaves open the possibility that courts may further curtail application of U.S. law to events outside the United States even when not blocked by the presumption. Specifically, under the heading “Reasonableness in Interpretation,” Section 405 of the Fourth Restatement announces that courts, as a matter of prescriptive comity, may interpret statutes to include other limitations on their reach. Reinforcing the cumulative nature of this power, Comment c to Section 405 explains that the presumption against extraterritoriality does not preclude courts from also interpreting a statute to contain other limitations based upon comity.

The fundamental problem with this approach is that it creates a one-way ratchet effect in which a hard-edged presumption against extraterritoriality can cut off claims that a more nuanced statutory interpretation based upon reasonableness might have allowed, but, if a plaintiff overcomes the presumption, defendants might still persuade a court to decline application of U.S. law based upon more nuanced considerations of comity. Of course, a cynical view might say that this perfectly captures (or restates) the pro-corporate-defendant view of a majority of the Supreme Court. From a balanced policy perspective, however, the result seems questionable.

While Section 405 traces its linage to famous Section 403 of the Third Restatement, it is important to recognize the critical contextual difference between the two sections resulting from the presumption against extraterritoriality. Section 403 in the Third Restatement exists as the matching piece for Section 402’s broadly permissive enumeration of acceptable bases for prescriptive jurisdiction. The overlapping claims to prescriptive jurisdiction stemming from Section 402’s expansive approach creates the obvious potential for clash. Section 403 addresses this potential through a set of mutually applicable factors for self-restraint, influenced by modern

103. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 405 Reporters’ Note 6 (AM. LAW INST. 2018).
choice of law rules, which both nations should apply in the case of such overlap.

This sort of approach to prescriptive jurisdiction tracked and influenced the pre-Morrison decisions of lower Federal courts applying the so-called "conduct and effects" test to the reach of various Federal statutes, such as Section 10(b) of the Securities Exchange Act. These decisions paired a ready willingness to find a territorial connection based upon any substantial conduct or effect within the United States, with a more particularized determination of whether it would be consistent with Congressional intent and concerns of comity to apply the statute to the situation at hand. The Third Restatement's approach also drew upon the Timberland line of cases, which applied a comity analysis to temper the otherwise broad application of U.S. antitrust laws based upon effects in the United States.

By contrast, Section 405 exists in a very different context resulting from Section 404's restatement the presumption against extraterritoriality. This moves the baseline for applying a statute prior to considerations of comity from the liberality of Section 402 to the hostility of the presumption against extraterritoriality. The drafters of the Fourth Restatement recognize part of the difference when they explain that the presumption against extraterritoriality might render further consideration of comity unnecessary and warn against double counting such considerations. The problem, however, goes deeper. It lies in an unjustified asymmetry when dealing with the advantages and disadvantages of bright line rules versus more nuanced analysis.

Central to Morrison's rejection of the conduct and effects test was the Court's view that the test was too uncertain in its application. Hence, its replacement by the presumption against

107. E.g., Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 614 & note 31 (9th Cir. 1976); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979).
109. Id. at cmt c.
extraterritoriality implemented through a demanding (clear indication) standard for rebuttal and a focus test under which extraterritoriality is determined by the location of one particular thing for the statutory provision. The hoped-for advantage in terms of certainty from the rigid presumption, however, comes at the cost of courts not applying Federal statutes in situations in which a more nuanced evaluation could have shown such application to advance Congressional purposes and not interfered with concerns of comity.

By stating that courts may decline to apply a statute based upon more nuanced considerations of reasonableness, even when not blocked by the presumption against extraterritoriality, the Fourth Restatement reintroduces uncertainty. True, this is not necessarily the extreme case-by-case uncertainty of the former Section 403, but it still opens up the prospects for added considerations whose relevance will only become visible in hindsight. The Second Circuit’s Parkcentral decision—cited in Reporters’ Note 4 to Section 405—illustrates. By holding that Morrison’s location of the sale test provides a necessary, but not a sufficient, predicate for application of Section 10(b), the court in Parkcentral was able to rule that Section 10(b) did not apply to sales of securities (swap contracts) in the United States, when the value of those contracts depended upon the price of stock traded in foreign markets. The result is not only to surprise those who thought that, under Morrison, Section 10(b) protected them when engaging in the purchase or sale of a security in the United States, but also to open up the door for particularized inquiry into the nature of complex securities transactions going beyond simply the question of where the purchase or sale occurred.

At the same time, the offsetting advantage of Section 405 flows in only one direction: allowing a more nuanced evaluation to stop application of the statute in situations in which such an evaluation shows the presumption is insufficient to protect comity. By contrast, situations in which a more nuanced evaluation would show that Congressional objectives for the statute would be achieved without damage to comity by applying the statute, or even that foreign relations concerns counsel in favor of applying the statute, will not

113. If not securities themselves, such contracts constitute a purchase or sale of the underlying securities.
114. E.g., Gevirtz, supra note 37, at 400-04 (discussing instances in which comity
be captured. This sort of asymmetry cannot be justified unless one assumes a parallel asymmetry in the consequences of uncertainty regarding application of a statute or in the consequences of a mistaken over- versus under-application of the statute. Nothing in the Fourth Restatement explains why this is so.

Nor does the bulk of existing judicial authority command this result. Except for Parkcentral, the judicial authorities cited in the Reporters' Notes to Section 405 involve statutes to which the Supreme Court has not applied the presumption against extraterritoriality, and particularly the focus test, in the post-ARAMCO/Morrison era. Hence, these authorities are consistent with complementing expansive approaches to extraterritorial application with more particularized evaluation of comity considerations, as embodied in the Third Restatement, but they do not involve a one-sided piling of additional particularized evaluation on top of Morrison’s effort at a simpler approach.

IV. CONCLUSION

A Secretary of Defense once infamously stated, “You go to war with the army you have.” Similarly, a Restatement restates the law you have, not the law you would like to have. Hence, one sympathizes with the challenge facing the drafters of the Fourth Restatement when dealing with the presumption against extraterritoriality. This leaves it to other forms of scholarship to point out the problems with the law we have, a task to which this article has tried to make a small contribution.

counsels in favor of applying U.S. law to arguably extraterritorial situations).

115. The Reporters’ Notes to § 405 cite judicial decisions dealing with antitrust, trademark and bankruptcy law. As mentioned earlier, see supra note 18, the Supreme Court has taken an expansive approach to the extraterritorial application of the Sherman Antitrust Act. Empagran’s invocation of comity concerns in the antitrust context came in interpreting the Foreign Trade Antitrust Improvement Act, rather than as an attempt to add a layer of comity-based reasonableness limitations on top of the presumption against extraterritoriality. As Reporters’ Note 1 to § 404 points out, the Supreme Court’s decision addressing the extraterritorial reach of the U.S. trademark law (Steele v. Bulova Watch Co., 344 U.S. 280 (1952)) is one of a number of pre-ARAMCO Supreme Court decisions largely ignoring the presumption against extraterritoriality. The Supreme Court has not yet addressed the extraterritorial reach of the Bankruptcy Code and the lower court decisions cited by the Reporters’ Notes are not piling their more nuanced approaches on top of a Morrison-style presumption against extraterritoriality.

116. Wolf Blitzer Reports, Defense Secretary Donald Rumsfeld was in Kuwait to give U.S. troops a prep talk Wednesday, but was peppered with some very pointed questions, CNN, (Dec. 8, 2004, 04:40 PM), http://www.cnn.com/2004/US/12/08/rumsfeld.kuwait/index.html.