The Extraterritoriality Formalisms

Aaron D. Simowitz

Follow this and additional works at: https://opencommons.uconn.edu/law_review

Recommended Citation
The extraterritorial application of U.S. law was a settled issue for a long time. For about sixty years, U.S. law would apply abroad if conduct occurred or effects were felt within U.S. borders. This potentially broad sweep of U.S. law was limited in several ways—most importantly by the doctrine of “reasonableness” grounded in international law and explicated in the Restatement (Third) of Foreign Relations Law of the United States.

This approach had its detractors. In 2010, the U.S. Supreme Court joined the ranks of the critics in dramatic fashion. The Court cast aside the previous sixty years of jurisprudence—dismissing it as uninhibited “judicial lawmaking”—and created a new test. This new approach proceeded in two parts. A court should ask whether the “presumption against extraterritoriality”—a sometimes cited, but oft ignored concept—was rebutted by a “clear indication” in the text or “context” of the statute. If not, a court should then inquire whether the particular case presents a “domestic application” of the statute. But merely “some domestic activity” would not constitute a domestic application of the statute. Rather, the court must define the “objects of the statute’s solicitude” and then determine whether that “focus” is within U.S. borders.

The Court presented this revolution as more predictable, less complex, and more deferential to the legislature. In reality, the Court traded the venerable uncertainties of the conduct-and-effects test for the new, poorly understood, and unanticipated uncertainties of the “Morrison two-step.” Many commentators have attempted to make sense of Morrison’s first step—the reinvigorated presumption against extraterritoriality. But relatively few have examined Morrison’s second step—the question of what it means for a statute to apply domestically in the context of a transnational dispute. In fact, this second question—which the Morrison opinion treats practically as a throw-away line—has caused far more divergence and confusion among the lower courts. It has become a distorted reflection of the extraterritoriality inquiry: the same consequences, but with irrelevant facts or formalisms looming large in the picture. This article attempts to lay out both the current myths and mistakes of the so-called “focus test” and to chart a sensible path forward.
ARTICLE CONTENTS

INTRODUCTION .................................................................................................................. 377

I. EXTRATERRITORIALITY AND DOMESTIC APPLICATION ....... 382
   A. THE OLD REGIME – THE CONDUCT AND EFFECTS TEST ............... 382
   B. THE NEW OLD EXTRATERRITORIALITY – THE PRESUMPTION ...... 384
   C. EXTRATERRITORIALITY’S DISTORTED REFLECTION – THE FOCUS TEST ................................................................. 388

II. DOMESTIC APPLICATION DISHARMONY ............................................. 389
   A. THE DOMESTIC OFF-EXCHANGE TRANSACTION .................. 389
   B. THE DOMESTIC RACKETEERING ENTERPRISE ..................... 391
   C. THE DOMESTIC FRAUDULENT CONVEYANCE ....................... 392
   D. THE DOMESTIC RIGHT TO PRIVACY ........................................ 394

III. THE FOCUS FORMALISMS ................................................................. 396
   A. THE ATOMIZED FOCUS ............................................................. 397
   B. THE SINGLE FOCUS .................................................................. 397
   C. THE SUFFICIENT FOCUS .......................................................... 399
   D. THE LOCALIZABLE FOCUS ......................................................... 402

IV. A NEW FOCUS ......................................................................................... 404
   A. APPLY PRESCRIPTIVE COMITY ............................................. 405
   B. RECOGNIZE MULTIPLE FOkses ............................................. 409
   C. VINDICATE STATUTORY PURPOSE ........................................ 410

CONCLUSION ................................................................................................................. 411
INTRODUCTION

In *Morrison v. National Australia Bank*, the U.S. Supreme Court discarded sixty years of jurisprudence governing whether U.S. law would apply beyond U.S. borders. The Court did so in the name of predictability and consistency. The actual results have largely been confusion and divergence. However, the source of the greatest discord has largely been overlooked, both by the Court and by commentators.

The *Morrison* Court spent the vast majority of its opinion on a single project: reinvigorating the “presumption against extraterritoriality.” For sixty years before *Morrison*, U.S. laws had applied abroad when either conduct occurred or effects were felt in the United States. Potential overreach was policed by several doctrines, most notably the application of “reasonableness,” rooted in international law and delineated in the Restatement (Third) of the Foreign Relations Law of the United States.

The *Morrison* Court attacked this approach, declaring it to be uninhibited “judicial lawmaking,” with results “complex in formulation and unpredictable in application.” The Court replaced this structure with the presumption against extraterritoriality, which can be rebutted only when the text or “context” of the statute contain a “clear indication” of extraterritorial application. The presumption did not prove to be simple or predictable. In

---

1 561 U.S. 247, 255 (2010) (“This disregard of the presumption against extraterritoriality did not originate with the Court of Appeals panel in this case. It has been repeated over many decades by various courts of appeals in determining the application of the Exchange Act, and § 10(b) in particular, to fraudulent schemes that involve conduct and effects abroad.”).

2 See id. at 255 (describing the presumption against extraterritoriality as “long and often recited in our opinions”).


4 *Morrison*, 561 U.S. at 261 (“The concurrence urges us to cast aside our inhibitions and join in the judicial lawmaking.”).

5 Id. at 248.

6 See id. at 265.
successive cases, the Court either failed to lay out a clear, consensus approach to the analysis or made significant alterations to it.\(^8\)

Even so, the main source of confusion has been left largely unaddressed. *Morrison* set out a two-part test.\(^9\) The Court held that no clear indication existed to rebut the presumption, and so inquired whether the present case constituted a “domestic application” of the statute.\(^10\) The *Morrison* Court expressly acknowledged the necessity of this inquiry, noting that when the “presumption here (as often) is not self-evidently dispositive . . . its application requires further analysis.”\(^11\) However, the Court cautioned that “it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States,” and that “the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case.”\(^12\)

Rejecting this “timid sentinel,”\(^13\) the Court held that lower courts must first determine “the objects of the statute’s solicitude,”\(^14\) and then find whether that “focus of congressional concern” is “domestic.”\(^15\) The new test—although the Court did nothing to acknowledge its novelty—came to be known as “the focus test.”\(^16\) The Court presented the focus test as simple. Perhaps it seemed so in context of the *Morrison* case itself. The *Morrison* case was a classic “f-cubed” case—an action for securities fraud under the

---

7 See Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013) (“And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”).

8 See RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2102 (2016) (“We agree with the Second Circuit that Congress’s incorporation of these (and other) extraterritorial predicates into RICO gives a clear, affirmative indication that § 1962 applies to foreign racketeering activity—but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially.”).

9 See id. at 2101 (“Morrison and Kiobel reflect a two-step framework for analyzing extraterritoriality issues.”).

10 See *Morrison*, 561 U.S. at 266 (“Petitioners argue that the conclusion that § 10(b) does not apply extraterritorially does not resolve this case. They contend that they seek no more than domestic application anyway, since Florida is where HomeSide and its senior executives engaged in the deceptive conduct of manipulating HomeSide’s financial models . . .”).

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 267.

15 *Id.* at 266 (“In Aramco, for example, the Title VII plaintiff had been hired in Houston, and was an American citizen. The Court concluded, however, that neither that territorial event nor that relationship was the ‘focus’ of congressional concern, but rather domestic employment.” (quoting EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 255 (1991))).

16 See William S. Dodge, *The Presumption Against Extraterritoriality in Two Steps*, 110 AM. J. INT’L L. UNBOUND 45, 45–46 (2016) (detailing and analyzing the two-step test presented in *RJR Nabisco*, where the second step of the test involves looking into the statute’s focus); Franklin A. Gevurtz, *Determining Extraterritoriality*, 56 Wm. & MARY L. REV. 341, 342 (2014) (“[I]f the focus of the statute determines extraterritoriality, what is the test for determining the focus of the statute?”).
Securities Exchange Act of 1934 (the “Act”) that sought redress for a foreign plaintiff against a foreign defendant, based on public trading on a foreign exchange. 17 The focus test has proved to be truly “complex in formulation and unpredictable in application” 18 in other areas of law—and even in securities law, the heartland of the Morrison opinion.

The focus test introduces two types of uncertainty. First, the focus test creates statutory uncertainty. The Morrison test requires courts to identify the statute’s focus—“the objects of the statute’s solicitude.” 19 Perhaps this was a simple question in the context of the Securities Exchange Act of 1934. The Court seemed to have little trouble concluding that the focus of the Act was the exchange itself. 20 But this inquiry has become far more complicated as the Court has expanded the Morrison test to other statutes—apparently, to every other statute. 21 For example, appellate courts split over the Congress’s regulatory focus in the Racketeering Influenced and Corrupt Organizations Act (“RICO”), unable to decide whether this multifaceted statute “focused” on corrupt enterprises or patterns of criminal conduct—as the United States itself suggested—both. 22 In the RJR Nabisco v. European Community case, the Court declined to answer the question, but rather emphasized the additional complication that each statutory subsection must have its own individual focus. 23

The second source of uncertainty is descriptive. Even once a court has identified “the objects of a statute’s solicitude”—for example, the securities transaction in Morrison—it may be quite difficult to say whether a particular object is inside or outside the United States. 24 Again, the Morrison Court did not seem to foresee this complication.

The Morrison case concerned securities traded on a public exchange. It

17 Morrison, 561 U.S. at 283 n.11.
18 Id. at 248.
19 Id. at 267.
20 See id. (“The primacy of the domestic exchange is suggested by the very prologue of the Exchange Act . . . .”).
21 See RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016) (“Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application . . . . We therefore apply the presumption across the board . . . .”).
22 See Brief for the United States as Amicus Curiae Supporting Vacatur, RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016) (No. 15-138), 2015 WL 9268185, at *9 (“Contrary to petitioners’ claim, RICO contains no domestic-enterprise requirement. RICO’s ‘focus’ is on the ‘pattern’ as well as the enterprise. Accordingly, if a pattern of domestic racketeering activity occurs, RICO may be violated whether the enterprise is foreign or domestic.” (quoting Morrison, 561 U.S. at 266)).
23 RJR Nabisco, 136 S. Ct. at 2106 (“The same logic requires that we separately apply the presumption against extraterritoriality to RICO's cause of action despite our conclusion that the presumption has been overcome with respect to RICO’s substantive prohibitions.”).
24 See Jennifer Daskal, The Un-Territoriality of Data, 125 YALE L.J. 326, 326 (2015) (“Territoriality, after all, depends on the ability to define the relevant ‘here’ and ‘there,’ and it presumes that the ‘here’ and ‘there’ have normative significance. The ease and speed with which data travels across borders . . . test[s] these foundational premises.”).
is not difficult for a U.S. court to conclude that the New York Stock Exchange is “domestic” and that the London Exchange is not. However, the Court devoted a half-sentence to the entire subject to so-called off-exchange transactions—securities transactions that do not take place on a public exchange. From 2008 to 2014, the percentage of all U.S. stock traded conducted off-exchange increased from sixteen to about forty percent. The actual percentage of off-exchange transactions is likely much higher once all non-equity securities transactions are included. In this much larger category of securities transactions, the Court caused complete confusion. Some have tied the application of U.S. securities law to empty territorial proxies—such as the place of closing, the applicable law, or the identity of the parties. The United States Court of Appeals for the Second Circuit—the federal appellate court most responsible for securities cases—rejected these approaches and chose to tie U.S. regulation to “the place where irrevocable liability is incurred.” This test quickly proved both unpredictable and, in that court’s own admission, over-inclusive.

Some cases have combined both statutory and descriptive uncertainty. A panel of the United States Court of Appeals for the Second Circuit held that the Stored Communication Act’s regulatory focus was “the right to privacy,” rejecting the litigants’ arguments that the focus was either the place of production of the data, or the server with which the data was

---


26 See, e.g., SEC v. Compania Internacional Financiera S.A., No. 11 CIV 4904 DLC, 2011 WL 3251813, at *6 (S.D.N.Y. July 29, 2011) (applying Morrison and concluding that extraterritorial application was warranted where foreign parties were conducting off-exchange trading of contracts for difference on stock of an exchange-traded company because the underlying securities were associated with a national exchange).

27 Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 67 (2d Cir. 2012).

28 The U.S. Supreme Court’s quest for uncertainty has confounded not only courts, but also regulators. The Commodities Futures Trading Commission (CFTC) is charged with promulgating rules to govern the U.S. regulation of swap contracts. These are the very “swaps” that Warren Buffett described as the “financial weapons of mass destruction” that turned the sub-prime mortgage crisis into a global financial crisis. Lucinda Shen, Warren Buffett Just Unloaded $195 Million Worth of These ‘Weapons of Mass Destruction,’ FORTUNE (Aug. 8, 2016), http://fortune.com/2016/08/08/mass-destruction-buffett-derivatives/. The landmark Dodd-Frank financial reform statute charged the CFTC with “exclusive jurisdiction . . . with respect to accounts, agreements . . . and transactions involving swaps or contracts of sale of a commodity for future delivery.” 7 U.S.C. § 2 (2012). After Morrison, the CFTC went through multiple gyrations attempts to set out rule-based approaches to Dodd-Frank’s registration requirements. Michael L. Spafford & Daren F. Stanaway, The Extraterritorial Reach of the Commodity Exchange Act in the Wake of Morrison and Dodd-Frank, 37 J. ON L. INV. & RISK MGMT. PRODUCTS, July 2017, at 10 (“Although Congress declined to expand the extraterritorial reach of the CEA in the same manner in which it amended the securities laws in Dodd-Frank, it did not leave the CFTC without recourse to pursue foreign entities.”).
principally associated. Other members of that court described this as “not marginally more useful than thinking of Santa Claus as a denizen of the North Pole,” and a severe restriction on “an essential investigative tool used thousands of times a year [in] important criminal investigations around the country.” To the relief of many, the legislature stepped in to resolve the issue by statute after the U.S. Supreme Court granted certiorari.

This article seeks to address the statutory uncertainty created by Morrison. The lower courts have committed a variety of errors in attempting to wrestle with this new inquiry thrust on them by the U.S. Supreme Court. These errors must be identified and addressed. The lower courts have also so far failed to articulate a coherent or consistent approach to the question of what constitutes “domestic application” of U.S. law in a transnational dispute. This article seeks to do both, while recognizing that the fundamentally transnational context in which the “domestic application” inquiry arise.

Unless the “focus test” is remediated or discarded, the second step of Morrison will be a warped and puzzling reflection of the extraterritoriality inquiry. If a court concludes that a statute has been applied “domestically,” that decision will have the exact same consequences for a dispute as the conclusion that the law applies extraterritorially. But the “domestic application” inquiry focuses on irrelevant facts and formalisms—like where data is localized—while ignoring the weightier and more important question of which sovereign is best situated to regulate the conduct at issue.

This article proceeds in four parts. First, the article will identify the ways in which the development of the Morrison test led to the current discord. Second, the article will examine the various and disparate bodies of law in which the “focus test” has caused confusion and identify the particular mistakes and myths that are common to each body of law. Third, the Article identifies the unnecessary formalisms that have encrusted and distorted the

30 Matter of Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp., 855 F.3d 53, 62 (2d Cir. 2017) (Jacobs, J., dissenting) (“Localizing the data in Ireland is not marginally more useful than thinking of Santa Claus as a denizen of the North Pole. Problems arise if one over-thinks the problem, reifying the notional: Where in the world is a Bitcoin? Where in my DVR are the images and voices? Where are the snows of yesteryear?”).
31 Id. at 63 (Cabranes, J., dissenting) (“To top this off, the panel majority’s decision does not serve any serious, legitimate, or substantial privacy interest.”).
33 Each of these uncertainties—statutory and descriptive—merit their own paper. I plan to address the descriptive uncertainty—where there is an off-exchange security transaction, a right to privacy, a pattern of criminal conduct, or a fraudulent transaction—in future work.
focus test. Fourth, the article lays out a new vision for how best to execute the Supreme Court’s exhortation to determine the “domestic application” of U.S. law in transnational disputes.

I. EXTRATERRITORIALITY AND DOMESTIC APPLICATION

The era of the conduct and effects test does not deserve to be romanticized. The conduct and effects test attracted plenty of calls for reform or demolition. However, after eighty years or so, its uncertainties were more or less known. It is possible that, after another eighty years or so, the Morrison version of the presumption will be regarded as an improvement over the old regime. The Morrison presumption certainly shows no signs of fading. Rather, the Supreme Court has expanded the scope of the presumption in successive cases, even as its formulation has shifted significantly with each iteration.

A. The Old Regime – The Conduct and Effects Test

For several decades, the U.S. doctrine of extraterritoriality proceeded in a more or less straight line. U.S. courts consistently held that they could apply U.S. substantive law when either the relevant conduct took place in

34 See Austen L. Parrish, The Effects Test: Extraterritoriality's Fifth Business, 61 VAND. L. REV. 1455, 1460–61 (2008) (“Condemned as incoherent and convoluted, a patchwork of incompatible rules presently governs legislative jurisdiction. Some scholars go so far as to describe the Court's extraterritoriality decisions as patently inconsistent, if not hopelessly confused.”); William S. Dodge, Understanding the Presumption Against Extraterritoriality, 16 BERKELEY J. INT’L L. 85, 90 (1998) (“[O]nly the notion that Congress generally legislates with domestic concerns in mind is a legitimate basis for the presumption against extraterritoriality . . . . [A]cts of Congress should presumptively apply only to conduct that causes effects within the United States regardless of where that conduct occurs.” (emphasis omitted)).

35 See, e.g., Austen L. Parrish, Evading Legislative Jurisdiction, 87 NOTRE DAME L. REV. 1673, 1674 (2012) (“To be sure, significant and vigorous debate existed at the margins over the extent to which constitutional provisions constrained congressional action and over how courts should interpret a statute's geographic reach in the face of congressional silence. But while those debates played out at the periphery, the core doctrine remained untouched.”); Marco Ventoruzzo, Like Moths to A Flame? International Securities Litigation After Morrison: Correcting the Supreme Court's “Transactional Test,” 52 VA. J. INT’L L. 405, 422 (2012) (“[N]otwithstanding the undeniable problems accompanying the conduct-effects test, [it did not pose] a significant threat in terms of excessive extension of American jurisprudence that was in conflict with the sovereignty of other jurisdictions . . . [and was not] a strain on American courts that were called on to resolve primarily foreign disputes.”).

36 See Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013) (applying the Morrison presumption to the Alien Tort Statute, even though that statute is “strictly jurisdictional,” and “does not directly regulate conduct or afford relief” (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 713 (2004)); id. at 124–25 (“And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”); RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016) (noting that the Court applies the Morrison presumption “across the board”); id. at 2103 (“This unique structure makes RICO the rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality.”).
the U.S. or the effects were felt here.

The notion of a presumption against extraterritoriality did not originate with the *Morrison* Court. But *Morrison* revived the old concept and transformed it into something new and distinct from its previous incarnations. The presumption against extraterritoriality as a concept in American law dates back at least to 1824 when Justice Story applied it to limit the reach of U.S. customs laws. Justice Holmes delivered perhaps “the most famous modern statement of the presumption against extraterritoriality” in *American Banana v. United Fruit*, in which he noted “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done,” requiring “a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.”

“However, the influence of the presumption soon began to wane.” Although the U.S. Supreme Court occasionally cited the principle in labor law cases, it all but ignored it in antitrust cases. Judge Learned Hand gave the most famous formulation of the “effects” test in *United States v. Alcoa*, where he wrote that “any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.” Judge Henry Friendly gave the most famous formulation of the “conduct” test in *Leasco Data v. Maxwell*, where he wrote that when “there has been significant conduct within the territory, a statute cannot properly be held inapplicable simply on the ground that, absent the clearest language, Congress will not be assumed to have meant to go beyond the limits recognized by foreign relations law.”

The Restatement (Third) of Foreign Relations Law sought to sum up the U.S. approach: A state had a reasonable basis to apply its own law to “conduct that, wholly or in substantial part, takes place within its territory.”

---

37 See 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. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction.”).


41 United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945).


43 *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(1)(a)* (AM. LAW INST. 1987).
or “conduct outside its territory that has or is intended to have substantial effect within its territory.”

However, this principle had limits. The Restatement provided that, even if a state had a reasonable basis to apply its law, “a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable” and laid out non-exhaustive factors for evaluating unreasonableness.

The Restatement concluded that “[w]hen it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state’s interest in exercising jurisdiction,” and that “a state should defer to the other state if that state’s interest is clearly greater.”

B. The New Old Extraterritoriality – The Presumption

In 1991, the U.S. Supreme Court seemed poised to significantly alter the reach of U.S. law. In EEOC v. Arabian American Oil Co. (Aramco), the Court held that federal anti-discrimination law did not apply to a claim made by a U.S. national against a U.S. corporation because the discriminatory conduct had occurred in the Kingdom of Saudi Arabia. The Court invoked the “presumption against extraterritoriality,” which it defined as the principle that a U.S. statue must be presumed to be “primarily concerned with domestic conditions”, unless Congress has “clearly expressed” its “affirmative intention” that the law should apply extraterritorially.

Justice Marshall, joined by Justices Stevens and Blackmun, dissented, arguing that the majority “converts the presumption against extraterritoriality into a clear-statement rule in part through selective quotation,” and “also overstates the strength of the presumption by drawing on language from cases involving a wholly independent rule of construction,” the so-called Charming Betsy canon, that “an act of congress ought never to be construed to violate the law of nations if any other possible construction remains.”

46 Id. § 402(1)(c). In addition to these bases for prescriptive jurisdiction, the Restatement also provided for so-called “passive personality” and “special . . . interests” jurisdiction. Id. § 402 cmt. g (introducing the “passive personality principle”); id. § 402 cmt. a (applying the “special . . . interests” jurisdiction to subsection (c)). See also id. § 402(2)–(3) (“[A] state has jurisdiction to prescribe law with respect to . . . (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.”).

47 Id. § 403(1)–(2).

48 Id. § 403(3).

49 EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 244, 248 (1991) (holding that Congress did not “intend[] the protections of Title VII to apply to United States citizens employed by American employers outside of the United States”).

50 Id. at 248 (internal citations and quotation marks omitted).

The Aramco decision landed with a profound thud. Congress overturned the result with amendments to the relevant antidiscrimination law.\(^{52}\) The U.S. Supreme Court cited to the principle in a few subsequent cases.\(^{53}\) Two years later, in *Hartford Fire Insurance v. California*, the Court applied the conduct-and-effects test to the U.S. antitrust law, proceeding almost as if Aramco had never been decided.\(^{54}\) The majority declined even to cite to *Aramco*. But although the presumption against extraterritoriality seemed dead, it “did but slumber.”\(^{55}\)

In 2010, the U.S. Supreme Court took up the presumption again in *Morrison v. National Australia Bank*. The Court decided a legal issue of profound transnational significance in the context of particularly skewed facts (and not for the last time).\(^{56}\) Justice Scalia, writing for the majority, described the conduct-and-effects test as “judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court.”\(^{57}\) and the results as “unpredictable and inconsistent.”\(^{58}\) He revived the presumption, stating that, “[r]ather 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.”\(^{59}\)

Justices Stevens dissented, joined by Justice Ginsburg.\(^{60}\) In the face of these critiques, Justice Scalia sought to qualify the presumption, stating that it was not a “clear statement rule”, but rather required only a “clear

---


\(^{54}\) Hartfort Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) (“[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”).

\(^{55}\) WILLIAM SHAKESPEARE, HENRY V, act 2, sc. 6.

\(^{56}\) See Pamela K. Bookman, Litigation Isolationism, 67 STAN. L. REV. 1081, 1098 (2015) (“In two recent cases involving foreign plaintiffs, foreign defendants, and foreign conduct (known as ‘foreign-cubed’ cases), however, the Court solidified its retreat to territoriality.” (footnote omitted)).


\(^{58}\) Id. at 260–61.

\(^{59}\) Id. at 261.

\(^{60}\) Id. at 274.
indication of extraterritoriality." The Court declined to give examples of such indications or to make clear how such an indication would differ from a clear statement, except to state that “[a]ssuredly context can be consulted.”

*Morrison* left open a great many questions, including whether the presumption against extraterritoriality applied to all statutes—a particular puzzle given that Court’s failure in *Morrison* to address its prior decision *Hartford Fire*. In *Kiobel v. Royal Dutch Petroleum*, the Court seemed to answer that question with a resounding yes. In *Kiobel*, the Court held that the *Morrison* presumption applied to the Alien Tort Statute (“ATS”). The ATS is a transnational law mystery. The U.S. Congress enacted it in 1789, stating in full: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Debates continue as to what this was originally designed to address and as to what work it can do today.

Nonetheless, the ATS is clearly different from the securities law at issue in *Morrison*. The ATS addresses transnational issues—it allows U.S. courts to entertain causes of action only for “an alien” and only for a tort “in violation of the law of nations or a treaty of the United States.”

The Court did not see *Morrison* and *Kiobel* as different, simply extending the “principles underlying the presumption against extraterritoriality.”

---

61 See id. at 265 (“But we do not say, as the concurrence seems to think, that the presumption against extraterritoriality is a ‘clear statement rule’ . . . .”).

62 Id.

63 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013) (“[W]e think the principles underlying the [presumption against extraterritoriality] similarly constrain courts considering causes of action that may be brought under the ATS.”).

64 Id. at 116.


66 See, e.g., Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 836 (2006) (“The statute was not enacted to redress piracy or infringements of ambassadorial rights. Safe conducts have been almost entirely neglected in the literature . . . .”).

67 See, e.g., Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After Kiobel*, 64 DUKE L.J. 1023, 1051 (2015) (stating that federal courts, under the ATS, have jurisdiction over cases regarding genocide, war crimes, and torture); Roger P. Alford, *The Future of Human Rights Litigation After Kiobel*, 89 NOTRE DAME L. REV. 1749, 1751–52 (2014) (arguing that “foreign tort laws will apply to the typical human rights claims that were pursued under the ATS” and that relief under ATS will likely not apply to “foreign human rights victims”).


69 See Pamela K. Bookman, *Agora: Reflections on RJR Nabisco v. European Community Doubling Down on Litigation Isolationism*, 110 AM. J. INT’L L. UNBOUND 57, 58 (2016) (noting that, prior to the Court’s *RJR Nabisco* decision, “Kiobel might have been an outlier because the purely jurisdictional statute at issue was the extraordinary Alien Tort Statute, and the Court made this extension in large part because the Court had previously held that the Alien Tort Statute permitted the courts to create a cause of action” (footnote omitted)).
extraterritoriality” to constrain “courts exercising their power under the ATS.”70 However, the Court failed to articulate a clear rule for the application of the Morrison presumption to the ATS. The Court affirmed that the ATS was not wholly an empty “shelf”71—but that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”72 The Court declined to give any guidance as to what sorts of claims would meet this test, except to say that mere “corporate presence” of a defendant was not enough.73 The Court also declined to explain how Morrison’s pure “canon of statutory interpretation”74 could be “displaced” by a particular constellation of facts.75

In RJR Nabisco v. European Community, the Court’s next decision on the presumption, the Court held that a statute may contain “a clear, affirmative indication” that it applies extraterritorially, and yet apply extraterritorially “only to the extent that the predicates alleged in a particular case themselves apply extraterritorially.”76 In RJR Nabisco, the European Community prevailed on the issue that had consumed the lower courts’ attention—whether the Morrison presumption cabined RICO’s application.77 But it still lost. The manner of its defeat illustrates an important point about Morrison and its application. The presumption against extraterritoriality—the main issue in Morrison and the preoccupation of scholars and lower courts attempting to interpret Morrison—did not decide the case. Rather, it was the so-called “focus test” that scuttled the European Community’s suit.78

71 See Sosa v. Alvarez-Machain, 542 U.S. 692, 719 (2004) (“[T]he First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action . . . .”).
72 Kiobel, 569 U.S. at 124–25.
73 See id. at 125 (“Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.”).
74 Id. at 115.
75 Id. at 131.
77 Id. at 2093.
78 Id. at 2111 (“Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries.”). The Court’s most recent extraterritoriality decision, WesternGeco v. ION Geophysical, also places the focus test front-and-center. 138 S. Ct. 2129 (2018). The Court in RJR Nabisco noted in dicta that, some instances, in might be appropriate for a court to analyze the “focus test” before considering whether the presumption against extraterritoriality had been rebutted. See 136 S.Ct., at 2101, n. 5. The Court in WesternGeco did exactly that, noting that “addressing step one would require resolving ‘difficult questions’ that do not change ‘the outcome of the case,’ but could have far-reaching effects in future cases. WesternGeco, 138 S. Ct. 2129 at 2136 (quoting RJR Nabisco, 555 U.S. at 236–237)). The Court declined to consider whether the “presumption against extraterritoriality should never apply to statutes . . . that merely provide a general damages remedy for conduct that Congress has declared unlawful. WesternGeco, 138 S. Ct. 2129, 2136. Rather, the Court proceeded directly to consider the focus of the remedial portion of the Patent Act. The
C. Extraterritoriality’s Distorted Reflection – The Focus Test

_Morrison_ resurrected the presumption against extraterritoriality—sometimes called “_Morrison Step-One._”\(^{79}\) But _Morrison_ also introduced a new “Step-Two.” The _Morrison_ Court instructed lower courts to, first, determine whether a “clear, affirmative indication” rebutted the presumption against extraterritoriality, and if not, to determine whether the particular facts of the case presented a “domestic application” of the statute.\(^{80}\)

To answer the question of what constituted a “domestic application,” the Court adopted the “rather simplistic ‘focus’ test.”\(^{81}\) Justice Scalia directed the lower courts to look to the “object of the statute’s solicitude.”\(^{82}\) It would not be sufficient that the case merely “had some domestic contact”—for the _Morrison_ presumption “would be a craven watchdog indeed if it retreated into its kennel” at the threat of merely some domestic connections.\(^{83}\)

Therefore, the second step of _Morrison_ would actually require two analytical steps. First, a court would be required to assess the “objects of the statute’s solicitude”—to state what precisely a statute is about.\(^{84}\) Second, the court would make a factual determination as to whether the particular “objects” in the instant case were within the territorial boundaries on the United States or not. The _Morrison_ Court introduced this test with little explanation, most likely under the impression that these were simple questions. In fact, _Morrison_’s focus test has introduced two types of uncertainty, statutory uncertainty and descriptive uncertainty. Because of the particular context of _Morrison_, the Court viewed both inquiries as simple. Neither has proved to be.

The _Morrison_ case concerned publicly traded securities—equities bought and sold on public, regulated exchanges. The Court held that “it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies.”\(^{85}\) In other words, the Court held that the “focus” of the Securities Exchanges Act of 1934, section 10(b) was the regulation of the proper functioning of the

---

majority and dissent disagreed, without evident irony, about what “focus” was dictated by the “plain text” of the statute.

\(^{79}\) _See_ RJR Nabisco, 136 S. Ct. at 2101 (“_Morrison_ and _Kiobel_ reflect a two-step framework for analyzing extraterritoriality issues. At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially.”).

\(^{80}\) _See_ id. (“If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute’s ‘focus.’”).


\(^{82}\) _Morrison_, 561 U.S. at 267.

\(^{83}\) _Id._ at 266.

\(^{84}\) _Id._ at 267.

\(^{85}\) _Id._
exchange itself.\textsuperscript{86} This was not necessarily an obvious conclusion—plaintiffs argued that the injuries to defrauded parties should at least also be a “focus”\textsuperscript{87}—but it was not especially difficult either. The Court prominently cited the work of Linda Silberman and Stephen Choi arguing that the exchange was the right object of “the statute’s solicitude” for purposes of both conflicts of law and deterring securities fraud.\textsuperscript{88}

Because the Court viewed this as a readily apparent conclusion, it gave little assistance to lower courts in this new search for the “objects of the statute’s solicitude.” The Court said only the mere presence of some domestic contacts could not suffice, though that was in the context of justifying the invention of the focus test itself.\textsuperscript{89} Lower courts interpreted Justice Scalia’s pungent dicta to require that they avoid any application of the focus test that would recapitulate the “conduct and effects” test—in other words, holding that the focuses of a statutes were both the relevant conduct and the resulting effects.\textsuperscript{90} But the Court did not lay down any interpretive guideposts, neglecting to say whether this inquiry should be particularly transnational nature. In short, it seemed pretty easy to the Court: Just say what the statute is about.

\section*{II. Domestic Application Disharmony}

The Court’s “rather simplistic”\textsuperscript{91} formulation of the focus test led immediately to confusion in and among the lower courts. Even in securities law—the subject of the \textit{Morrison} opinion itself—the focus test has divided and perplexed the courts.

A. The Domestic Off-exchange Transaction

Post-\textit{Morrison} securities cases demonstrate that, even where the U.S. Supreme Court has specified the statutory focus, significant problems remain. In \textit{Morrison}, the Court held that, when the alleged fraud concerns exchange-traded securities, the object of U.S. regulatory law is the exchange

\begin{itemize}
  \item \textsuperscript{86} Id. at 266–67.
  \item \textsuperscript{87} See id. at 266 (articulating plaintiff’s argument that just because “§10(b) does not apply extraterritorially does not resolve the case.”).
  \item \textsuperscript{88} Id. at 260 (citing Stephen J. Choi & Linda J. Silberman, \textit{Transnational Litigation and Global Securities Class-Action Lawsuits}, 2009 Wis. L. Rev. 465, 468 (2009)).
  \item \textsuperscript{89} See \textit{Morrison}, 561 U.S. at 266 (“But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case.”).
  \item \textsuperscript{90} See Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 70 (2d Cir. 2012) (noting that the conduct and effects test is defunct and applying a “transactional test” from \textit{Morrison} that does not involve conduct nor effects).
  \item \textsuperscript{91} Matter of Warrant to Search a Certain E–Mail Account Controlled & Maintained by Microsoft Corp., 829 F.3d 197, 229 (2d Cir. 2016) (Lynch, J., concurring), \textit{vacated as moot sub nom.} U.S. v. Microsoft Corp., 138 S. Ct. 1186 (2018).
\end{itemize}
However, the significant majority of all securities transactions do not occur on public exchanges—but are rather so-called “off-exchange transactions,” including all transactions in privately held entities. The Court consigned this entire category of transactions to a six word aside: “And it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies.”

The lower courts immediately splintered on the question of how to determine whether these “off-exchange” transactions were “domestic.” Modern securities transactions very rarely take place in person—the “place of closing” is an anachronism—but are rather negotiated, drafted, and signed over e-mail and by PDF. Litigants looked to numerous territorial proxies in their attempts to localize these transactions, including the place of the broker-dealer, the closing, the parties, or the issuer. The United States Court of Appeals for the Second Circuit held that an off-exchange transaction is located where “irrevocable liability was incurred or title was transferred,” and emphasized that the “transactional test announced in Morrison does not require” conduct in the United States.

Two years later, the court retreated from this conclusion, holding that “while a domestic transaction or listing is necessary to state a claim under § 10(b), a finding that these transactions were domestic would not suffice to compel the conclusion that the plaintiffs’ invocation of § 10(b) was appropriately domestic.” The court’s test had not been a model of clarity before and now the one clear element of its holding—that conduct was irrelevant—was withdrawn. These off-exchange transaction cases illustrate

---

92 See Morrison, 561 U.S. at 266 (indicating that the focus of the Exchange Act is the “purchase and sales of securities in the United States”).
93 Id. at 267 (emphasis added).
94 Chris Brummer, Territoriality As A Regulatory Technique: Notes from the Financial Crisis, 79 U. Cin. L. Rev. 499, 502 (2010) (“Defining geographic borders for regulatory purposes is not always a straightforward matter. Instead, jurisdiction over financial matters often arises through what can be described as territorial proxies.”)
95 See Absolute Activist, 677 F.3d at 68 (rejecting plaintiffs’ suggestion that “the location of the broker-dealer should be used to locate securities transactions [because] [w]hile we agree that the location of the broker could be relevant to the extent that the broker carries out tasks that irrevocably bind the parties to buy or sell securities, the location of the broker alone does not necessarily demonstrate where a contract was executed.”). The court also rejected plaintiffs’ assertion that “the identity of the securities should be used to determine whether a securities transaction is domestic and that where, as in this case, the securities are issued by United States companies and are registered with the SEC, the transactions are domestic within the meaning of Morrison.” Id. The court concluded that the plaintiffs’ argument was “belied by the wording of the test announced in Morrison” which emphasized “domestic transactions in other securities” and not other transactions in domestic securities. Id. at 68–69 (citation omitted).
96 Id. at 69 (“Accordingly, rather than looking to the identity of the parties, the type of security at issue, or whether each individual defendant engaged in conduct within the United States, we hold that a securities transaction is domestic when the parties incur irrevocable liability to carry out the transaction within the United States or when title is passed within the United States.”).
97 Id.
that a “regulatory focus” may appear workable in one application—but impossibly complex in others.

B. The Domestic Racketeering Enterprise

The RICO litigation in European Community illustrates both the statutory and descriptive uncertainty introduced by Morrison. RICO requires a “pattern of racketeering activity” by a criminal “enterprise” as elements of the independent cause of action created by the statute. The lower courts remain split on whether the “regulatory focus” of the statute is the pattern or the enterprise. The answer, of course, is both. The United States government argued as much in its amicus brief to the U.S. Supreme Court in the European Community case. However, the Court’s holding did not require it to reach the issue, as it held that RICO’s substantive provision did, in some instances, apply extraterritorially.

Nonetheless, the Court did pause to criticize the theory that the “enterprise” constituted the RICO statute’s regulatory focus. First, the Court noted that selecting the criminal “enterprise” would present predictable problems of localizing a diffuse and intangible “focus.” Second, the Court noted that, even if a predictable means to locate the “enterprise” were devised, it would be too easy for racketeers to avoid RICO by moving their “enterprise” abroad. This would undermine the very purposes of the statute by permitting foreign racketeering to engage in conduct with the United States without the threat of the most applicable U.S.

100 Compare United States v. Chao Fan Xu, 706 F.3d 965 (9th Cir. 2013) (holding that the appropriate “focus” of the RICO statute is the pattern of racketeering activity), with Cedeno v. Intech Grp., Inc., 733 F. Supp. 2d 471, 474 (S.D.N.Y. 2010), aff’d sub nom. Cedeno v. Castillo, 457 F. App’x 35 (2d Cir. 2012) (holding that the appropriate “focus” of the RICO statute is the criminal “enterprise”).
101 See Brief for the U.S. as Amicus Curiae Supporting Vacatur at 9, RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016), at *9 (“Contrary to petitioners’ claim, RICO contains no domestic-enterprise requirement. RICO’s ‘focus’ is on the ‘pattern’ as well as the enterprise. Accordingly, if a pattern of domestic racketeering activity occurs, RICO may be violated whether the enterprise is foreign or domestic.” (internal citation omitted)).
102 RJR Nabisco, 136 S. Ct. at 2102–03 (2016) (holding that RICO may apply extraterritorially). As described below, the Court held that the focus of RICO’s private right of action provision is the injury sustained from the racketeering activity. See infra Section III(A) (discussing the RJR Nabisco holding).
103 The Court further noted that the statutory “indication” of extraterritoriality need not be found in the portion of the statute that concerns its focus. See RJR Nabisco, 136 S. Ct. at 2103 (2016) (“This argument misunderstands Morrison . . . . [O]nly at the second step of the inquiry do we consider a statute’s ‘focus.’ Here, however, there is a clear indication at step one that RICO applies extraterritorially. We therefore do not proceed to the ‘focus’ step.”).
104 See id. at 2104 (“It is easy to see why Congress did not limit RICO to domestic enterprises. A domestic enterprise requirement would lead to difficult line-drawing problems and counterintuitive results . . . . RJR also offers no satisfactory way of determining whether an enterprise is foreign or domestic.”).
105 Id. (“It would exclude from RICO’s reach foreign enterprises—whether corporations, crime rings, other associations, or individuals—that operate within the United States.”).
C. The Domestic Fraudulent Conveyance

Currently, the central issue on the ongoing Madoff receivership is whether the Trustee for the defunct Madoff brokerage can claw back payments made to foreign investors as part of the Madoff Ponzi scheme. These foreign investors typically made their investment in the Madoff brokerage though foreign “feeder funds,” themselves Cayman or British Virgin Islands entities. These investors were then paid through the foreign feeder funds. The United States Court of Appeals for the Second Circuit recently held that the clawback provision of the U.S. Bankruptcy Code could reach these transactions because of the “focus” of the statute was domestic.

Section 550 of the Code empowers the Trustee to clawback any funds fraudulently transferred that would have constituted “the property of the estate,” defined to include property “wherever located and by whomever held . . . .” This statutory language may well constitute a “clear indication” that the Morrison presumption is rebutted, particularly in light of the U.S. Supreme Court’s holding in RJR Nabisco that statutory language incorporated by reference can meet this bar. But if it does not—as the

---

106 Id. (“Congress, after all, does not usually exempt foreigners acting in the United States from U.S. legal requirements.”); see also European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 138 (2d Cir. 2014) (“Surely the presumption against extraterritorial application of United States laws does not command giving foreigners carte blanche to violate the laws of the United States in the United States.”), rev’d, 136 S. Ct. 2090 (2016).
108 Id.
110 See 11 U.S.C. § 550(a)(2) (2012) (“The trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property.”).
111 Id. § 541(a) (2012).
112 Other Courts of Appeals have so held. See, e.g., In re French, 440 F.3d 145, 152 (4th Cir. 2006) (“Congress thus demonstrated an affirmative intention to allow avoidance of transfers of foreign property that, but for a fraudulent transfer, would have been property of the debtor’s estate. Therefore, the presumption against extraterritoriality does not prevent application of § 548 here.”). In the Madoff litigation, law professors (including this one) have supported such a result. See Brief of Professors of Conflict of Laws as Amici Curiae in Support of Appellant at 17, In re: Picard, No. 17-2992 (2d Cir. 2018), 2018 WL 564701 (“Section 550(a) [c]ontains a [c]lear [i]ndication of [e]xtraterritoriality.”). But see Michael J. Colarossi, An Uncertain Future: The Questionable Extraterritoriality of the Bankruptcy Code’s Core Pre-Petition Avoidance Provisions, 25 AM. BANKR. INST. L. REV. 229, 272–73 (2017) (“Irrespective of whether Congress actually intended the avoidance provisions to apply extraterritorially, the Supreme Court seems fully committed to barring such application absent an unmistakable instruction of Congress’ pro-extraterritorial intent.”).
lower court held\(^\text{113}\) — the question of the “regulatory focus” of section 550 of the Code is placed squarely before the courts.

The Trustee argued before the lower courts that the proper regulatory focus of section 550 of the Code is the estate itself. The district court held that the regulatory focus is the ultimate transaction — the final transfer from the foreign feeder fund to the foreign investor.\(^\text{114}\) In another case, the same S.D.N.Y. Bankruptcy Judge as in the Madoff case held that the regulatory focus is the initial transfer that depletes the estate — in other words, the transfer from the Madoff brokerage to the foreign feeder funds (opening a split within the S.D.N.Y.).\(^\text{115}\) The United State Court of Appeals for the Second Circuit reversed the district court, holding that it had overlooked the necessary link between the Code’s substantive avoidance provisions and the recovery provision embodied in section 550.\(^\text{116}\) Doing so, the appellate court held that the focus of section 550 was the initial transfer that depletes the estate.\(^\text{117}\)

The Code is clearly concerned with the estate, transfers that deplete the estate, and the liability of transferees. Section 550 itself speaks to all three elements, “the benefit of the estate,” “the property transferred,” and in the title of the section “Liability of transferee of avoided transfer.”\(^\text{118}\) The appellate court and the district court each supposed that a plain text reading of the Code clearly supplied any answer to the focus inquiry, but the vigorous disagreement of judges and commentators belies this supposed...

\(^\text{113}\) See Picard v. Bureau of Labor Ins. (In re BLMIS), 480 B.R. 501 (Bankr. S.D.N.Y. 2012) (holding that the focus of the section 550 of the Code was the initial transfer and that the Morrison presumption was rebutted by the language of the statute (Lifland, J.)), Sec. Investor Prot. Corp. v. BLMIS (In re BLMIS), 513 B.R. 222 (S.D.N.Y. 2014) supplemented by 12-MC-115, 2014 WL 3778155 (S.D.N.Y. July 28, 2014) (holding that the focus of the section 550 of the Code was the ultimate transfer and that the Morrison presumption was not rebutted by the language of the statute (Rakoff, J.), on remand Sec. Inv’t Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, No. AP 08-01789 (SMB), 2016 WL 6900689, at *1 (Bankr. S.D.N.Y. Nov. 22, 2016) (“I do not write on a clean slate.” (Bernstein, J.)), vacated and remanded sub nom. In re Picard, Tr. for Liquidation of Bernard L. Madoff Inv. Sec. LLC, 917 F.3d 85 (2d Cir. 2019) (holding that the focus of Section 550 is the initial transfer), Weisfelner v. Blavatnik, (In re Lyondell Chem. Co.), 543 B.R. 127 (Bankr. S.D.N.Y. 2016) (holding that the fraudulent transfer provision of the Code did apply extraterritorially (Gerber, J.)), In re Ampal-Am. Israel Corp., 562 B.R. 601, 613 (Bankr. S.D.N.Y. 2017) (holding that the focus of the Code’s fraudulent transfer provision is the initial transfer and that the Morrison presumption is not rebutted (Bernstein, J.)). See also Edward R. Morrison, Extraterritorial Avoidance Actions: Lessons From Madoff, 9 BROOK. J. CORP. FIN. & COM. L. 268, 271 (Fall 2014).

\(^\text{114}\) Id. at 228.

\(^\text{115}\) See In re Ampal-Am. Israel Corp., 562 B.R. 601, 613 (Bankr. S.D.N.Y. 2017), BLI, 480 B.R. at 524; see also supra at note 113.

\(^\text{116}\) In re Picard, Tr. for Liquidation of Bernard L. Madoff Inv. Sec. LLC, No. 17-2992(L), 2019 WL 903978, at *8 (2d Cir. Feb. 25, 2019) (“The Appellees would have us ignore § 548(a)(1)(A) entirely and look only to § 550(a)(2).”)

\(^\text{117}\) See id.

clarity.\textsuperscript{119} Plainly, further tools are needed to either supplement this analysis or, better still, to recognize the fictive nature of any attempt to divine a single focus from a complicated regulatory regime.

D. The Domestic Right to Privacy

U.S. prosecutors requested a “warrant”\textsuperscript{120} under the Stored Communications Protection Act (SCPA) to obtain e-mail data relevant to a drug conspiracy prosecution. The data was under the control of Microsoft, which stated that it was principally associated with one of its servers in Dublin, Ireland.\textsuperscript{121} All parties agreed that the procedure provided for in the SCPA did not apply extraterritorially.\textsuperscript{122} The question of whether the prosecutors could obtain the information therefore turned on whether the “objects of the statute’s solicitude” were domestic or not.\textsuperscript{123}

Microsoft argued that the regulatory focus of the SCPA was the data itself, which was “located” in Dublin at the servers with which the data is principally associated.\textsuperscript{124} The U.S. prosecutors argued that the focus was production of documents\textsuperscript{125}—and the “place of production” would be a terminal located at Microsoft’s offices in the U.S. where a Microsoft employee would be directed to access the data. The United State Court of Appeals for the Second Circuit held the the focus was “the invasion of privacy.”\textsuperscript{126} The court located this “invasion” at the place of the Irish servers.\textsuperscript{127}

The court’s decision was swiftly criticized by other courts, which did not follow it.\textsuperscript{128} It was also attacked by other members of the same court,
who argued in several separate dissents from denial of rehearing en banc, that it was “not marginally more useful than thinking of Santa Claus as a denizen of the North Pole,” and a severe restriction on “an essential investigative tool used thousands of times a year [in] important criminal investigations around the country.”

A recent online symposium on the Microsoft case featured scholars of criminal procedure, civil procedure, conflict of laws, intellectual property, and information technology—none endorsed the appellate court’s holding. The U.S. Supreme Court granted certiorari. Though, as one scholar put it, when “I realized that the Supreme Court had granted certiorari in an electronic evidence case that turned on extraterritoriality, I buried my head in my hands.”

This despair turned to be premature thanks to an unlikely hero: The United States Congress. On March 23, 2018, Congress passed and the President signed (as part of the omnibus spending bill) the Clarifying Lawful Overseas Use of Data (CLOUD) Act of 2018. The CLOUD Act mooted the litigation on the reach of the SCA by specifying that an order under the SCA applies to all data that is in the “possession, custody, or control” of the provider, regardless of where that data is stored. The bill thus “rejects any distinction between data stored in the United States and data stored abroad,” and instead “lists eight factors courts must consider when deciding whether to quash a demand for stored data that might set up a conflict between United States and foreign law, including the customer’s location and nationality, the provider’s ties to the United States, and the availability of alternative means.” The bill also contains a mechanism to “pave the way for executive agreements . . . to allow foreign governments to request content directly from American providers.”

---

129 Matter of a Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp., 855 F.3d 53, 62 (2d Cir. 2017) (Jacobs, J., dissenting) (“Localizing the data in Ireland is not marginally more useful than thinking of Santa Claus as a denizen of the North Pole. Problems arise if one over-thinks the problem, reifying the notional: Where in the world is a Bitcoin? Where in my DVR are the images and voices? Where are the snows of yesteryear?”).

130 Id. at 63 (Cabranes, J., dissenting) (internal quotation marks omitted) (“To top this off, the panel majority’s decision does not serve any serious, legitimate, or substantial privacy interest.”).


136 Grimmelmann, supra note 133.

137 Woods & Swire, supra note 135.
Justice Scalia might have defended this legislative intervention as the sort of reaction by democratically accountable elected officials that he celebrated. Nevertheless, it is noteworthy that, as the Court has pushed ever more toward territorially-bounded approaches, the legislature has moved away. After Aramco, after Morrison, and after Microsoft, the legislature overturned these decisions, in part or in whole, by shifting the focus away from simple territorial location.\textsuperscript{138} Initiatives by other legislatures have taken a similar approach. And yet, the U.S. Supreme Court seems determined to march further down the path of territorial formalism.

There may be many reasons for courts to institute a particular canon or presumption, including that it avoids clashes with international law or reflects concerns of international comity. Indeed, these were justifications for earlier versions of the presumption.\textsuperscript{139} However, Justice Scalia justified the Morrison revolution on the basis that it was descriptively accurate. He noted that the presumption reflected the assumption that Congress is “primarily concerned with domestic conditions.”\textsuperscript{140} If the new presumption were not descriptively accurate, it would have been far more difficult to justify such a dramatic change to the allegedly “stable background against which Congress can legislate with predictable effects.”\textsuperscript{141}

If the presumption was intended to be a stable background, it has elicited a sustained preference. Congress may be principally concerned with “domestic conditions,” but each time it has legislated in the face the presumption’s application, it has registered a desire to move away the formalisms imposed by the new test.

\section*{III. The Focus Formalisms}

In Morrison, the focus test was “rather simplistic”\textsuperscript{142}—but that simplicity could have led to flexibility in application.\textsuperscript{143} Instead, the further iterations of Morrison’s second step have encrusted it with formalisms, like so many barnacles. In some instances, these formalisms have come from the Supreme Court itself. In others, they seem to have congealed in the lower

\begin{footnotes}
\textsuperscript{139} See William S. Dodge, The New Presumption Against Extraterritoriality, \textit{___} HARV. L. REV. \textit{___} (forthcoming 2019) (manuscript at 9) (noting that “over time, the presumption against extraterritoriality has changed significantly,” and has evolved “from a rule based on international law, to a canon of comity, to an approach for determining legislative intent”).
\textsuperscript{140} Morrison, 561 U.S. at 255 (quoting Aramco, 111 S.Ct. 1227).
\textsuperscript{141} \textit{id.} at 261. See Dodge, \textit{supra} note 139, manuscript at Section III (analyzing Morrison as a change to the presumption against extraterritoriality canon of interpretation).
\textsuperscript{143} See Dodge, \textit{supra} note 139, manuscript at 7 (“I argue that academic criticisms of the new presumption are misguided. The Morrison/RJR version of the presumption is significantly more flexible than its Aramco and American Banana predecessors, and thus decidedly better.”).
\end{footnotes}
courts for no articulable reason. As we approach Morrison’s ten-year anniversary, the focus test resembles a mutant purposivism. Lower courts attempt to locate the statute’s principal aim—but do so through the lens of formalist restrictions that privilege irrelevant facts, impose interpretative hurdles, and force bizarre conclusions.

A. The Atomized Focus

The RJR Nabisco majority itself added one of these barnacles. The RJR Nabisco majority endorsed the argument that the private right of action provision of RICO, § 1964(c), had to itself have a “regulatory focus.”144 Both the decision below and Justice Ginsburg’s dissent argued that it made no sense to layer requirements upon requirements when, as the Supreme Court had previously held, “the compensable injury addressed by § 1964(c) necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern.”145 The majority overruled the lower court,146 relying principally on amicus briefs filed thirteen years earlier in a different case by Germany and the United Kingdom.147 The majority compounded the scope of the Morrison presumption—applying it to all federal statutes—with a blatant legal fiction—that Congress legislates with a particularly “regulatory focus” in mind for each section of each regulatory statute. The Court could have dealt with its stated concern, avoiding conflict with other sovereigns, in far more transparent ways than by requiring that Morrison’s concept of a “regulatory focus” be atomized across every section and subsection of every statute.

B. The Single Focus

A second formalism is traceable to the U.S. Supreme Court, though not

146 The issue of the “focus” of RICO’s private right of action provision was not initially raised in the RJR Nabisco case at all. Rather, a divided panel of the United States Court of Appeals held that they had to consider the focus of the private right of action provision in the Commodities Exchange Act. See Loginovskaya v. Batratchenko, 764 F.3d 266, 272 (2d Cir. 2014) (“Loginovskaya argues that Morrison governs substantive (conduct-regulating) provisions rather than procedural provisions such as § 22. Morrison, however, draws no such distinction . . . . (Jacobs, J.).), Id. at 277 (“In my view, Kiobel, on which the majority relies, actually endorses the distinction between ‘substantive provisions and those that only create a cause of action,’ Majority Op. at 272, and underscores that the presumption applies only to the former.” (Lohier, J., dissenting)). The United State Court of Appeals for the Second Circuit denied the petition for panel rehearing and rehearing en banc, with Judge Hall, a member of the original panel, concurring to address the argument from Loginovskaya. See European Cmty. v. RJR Nabisco, Inc., 783 F.3d 123, 124 (2d Cir. 2015).
directly attributable to it. Lower courts seem to have assumed that each statute (or perhaps each section of each statute) can only have a single regulatory focus. The *Morrison* majority did not state that each statute (or each section of a statute, after *RJR Nabisco*) must have a “singular” focus, but “apparently assumed that there can be only one.”\(^{148}\) Perhaps the “singular” focus requirement was an unstated assumption—but perhaps not. Perhaps *Morrison* was merely an example of one application of one statute in which there happened to be only one focus. After all, Justice Scalia’s opinion referred to the “objects”—plural—of the statute’s solicitude.\(^{149}\)

The rhetoric used and sources cited by the *Morrison* majority suggest as much. *Morrison* emphasized repeatedly the importance of international comity—a theme similarly emphasized by Professors Silberman and Choi in their article cited prominently by the Court.\(^{150}\) Silberman and Choi make two points, one grounded in conflict of laws and the other in substantive securities law. First, they argue that, for purposes of balancing concerns of comity, the exchange is the appropriate focus of the Act.\(^{151}\) Second, they argue that, to achieve the appropriate level of securities fraud deterrence, the exchange is the appropriate regulatory target.\(^{152}\) Their argument is expressly tailored to the question of equity securities traded on a public exchange and do not suggest that a “singular” focus is a trans-substantive\(^{153}\) requirement of the domestic application inquiry.\(^{154}\) Seen in this light, the long-standing and continuing fight over whether RICO regulates a racketeering enterprise or a pattern of racketeering activity seems foolish. RICO regulates both—the notion that Congress envisioned only one regulatory focus is a legal fiction that serves no obvious aim.\(^{155}\)

---


151 See id. at 501 (“[A]n exchange-based rule gives courts a simple rule of thumb to follow.”).

152 See id. at 497 (“Another divergence between the private deterrence incentives under an exchange-based rule lies with the expense of litigation.”).

153 It may be a bad idea in general to imply trans-substantive doctrines where they are not expressly required. See generally Aaron Simowitz, *Legislating Transnational Jurisdiction*, 57 VA. J. INT’L L. 325 (2018).

154 The language of the Act itself, as interpreted in *Morrison*, also supports such a conclusion. As the *Morrison* majority observes, the Act regulates only fraud and the resulting injuries “in connection with the purchase or sale of any security.” *Morrison*, 561 U.S. at 266 (2010) (internal quotation marks omitted). In other words, the fraudulent conduct and its effects would be wholly behind the reach of the statute but for the purchase and sale of securities. Therefore, in this particular statute, it may well have made sense to select the singular focus of the exchange.

155 See Aaron D. Simowitz, *Siting Intangibles*, 48 N.Y.U. J. INT’L L. & POL. 259, 269–70 (2015) (examining Lon Fuller’s critique of legal fictions, including the distinction between a presumption, which is rebuttable, and a fiction, which is not).
C. The Sufficient Focus

Two further formalisms flowed from Morrison—though these have already been questioned by the lower courts grappling with Morrison’s aftermath. Morrison announced a “transactional test” for the Act—but, as discussed above, it is unlikely that the Morrison majority intended to institute a transactional test for every statute (if the Morrison majority even envisioned that the Morrison presumption would apply to every statute). However, the lower courts read two additional formalisms into the Court’s emphasis on the “transaction test.” The lower courts initially interpreted Morrison to require a concrete, localizable focus. (Though, as discussed above, it is questionable whether many “transactions” can, in fact, be so localized.) The lower courts also initially interpreted the focus test to be the end of the domestic application inquiry—the determination of whether the “object of the statute’s solicitude” was within or without the United States was deemed sufficient to end the domestic application inquiry. Both of these formalisms have come under question in the subsequent cases.

In Absolute Activist Master Fund v. Ficeto, the United States Court of Appeals for the Second Circuit applied the Morrison test developed for publicly traded equities to off-exchange securities transactions. The court was already supplied (or saddled) with Morrison’s holding that the focus of the Securities Exchange Act of 1934 was the “transaction.” In Morrison, this equated easily to the place of the exchange. In Absolute Activist Master Fund, the Second Circuit held that the transaction took place where “irrevocable liability was incurred or title was transferred.” But the court expressly rejected the argument that any contacts beyond the presence of the transaction were needed to ground a “domestic application” of the statute. Simply put, the “transactional test announced in Morrison does not require” conduct in the United States.

The court retreated from this simple rule less than two years later. In Parkcentral v. Porche, the transactions were plainly domestic: swap

---

156 See Morrison, 561 U.S. at 267 (“The Court [in Morrison] held that ‘it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies.’”); supra notes 85–89 and accompanying text.

157 See, e.g., Absolute Activist Master Fund Ltd. v. Ficeto, 677 F.3d 60, 69 (2d Cir. 2012) (rejecting the argument that “it is still necessary to determine whether each individual defendant engaged in at least some conduct in the United States,” because “the transactional test announced in Morrison does not require that each defendant alleged to be involved in a fraudulent scheme engage in conduct in the United States.”).

158 Id. at 66–67.

159 Id. at 68–69 (“Accordingly, rather than looking to the identity of the parties, the type of security at issue, or whether each individual defendant engaged in conduct within the United States, we hold that a securities transaction is domestic when the parties incur irrevocable liability to carry out the transaction within the United States or when title is passed within the United States.”).

160 Id. at 68.

161 Id. at 69.
contracts in which every contact but the reference security was in the United States. The reference security was Volkswagen stock. (No party to the transaction actually held Volkswagen stock, making this a purely “synthetic” swap.) The defendant, Porsche, had fraudulently misrepresented that it had no intentions to acquire Volkswagen. In fact, Porsche was planning a takeover of Volkswagen. When these plans got out, Volkswagen momentarily became the most valuable company in the world. The swap counter-party betting the Volkswagen’s stock price would fall sued Porsche in U.S. court under U.S. securities law. After all, the transaction was clearly domestic.

The court declined to apply U.S. securities law. The court added an important qualification to Absolute Activist (and by extension, to Morrison itself): “[W]hile a domestic transaction or listing is necessary to state a claim under § 10(b), a finding that these transactions were domestic would not suffice to compel the conclusion that the plaintiffs’ invocation of § 10(b) was appropriately domestic.” Neither the Second Circuit nor the U.S. Supreme Court had considered the situation of a pure-third party to a domestic transaction who commits a fraud that is nevertheless “in connection with” that transaction. In that instance, the appeals court held that something additional—some conduct—was required. The Morrison decision derided

162 The United States Court of Appeals for the Second Circuit notes that the “plaintiffs have, to varying degrees, alleged that they entered into the swap agreements referencing VW shares in the United States,” including allegations that they “took all steps necessary to transact the securities-based swap agreements from their offices in New York City”; they “signed a confirmation required by [the] . . . swap counterparty in New York City”; their “swap transactions were entered into, terminated, and based entirely in the United States, with Deutsche Bank in New York acting as the counterparty”; their swap agreements were “entered into with New York-based Morgan Stanley in the United States”; their “counterparties were acting on behalf of financial institutions located in New York”; and their “swap agreements contained New York choice-of-law provisions and forum selection clauses designating New York federal and state courts as the forum in which legal disputes would be heard.” Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 207 (2d Cir. 2014). The court’s recitation demonstrated, among other things, that there is no agreement among very sophisticated hedge funds as to what defines a “domestic” U.S. swap contract.

163 Id. at 201.
164 Id. at 205.
165 Id. at 201.
166 Id.
167 Id. at 205.
168 Id. at 201.
169 Id. at 207 (“[T]he securities-based swap agreements in this case [were] concluded domestically . . . .”).
170 Id. at 216.
171 Id.
172 See id. at 217 (explaining that this situation is a “case of first impression”).
173 See id. at 215–16 (explaining that “treating the location of a transaction as the definitive factor in the extraterritoriality inquiry[ ]” is a “problem” and holding that “a finding that these transactions were domestic would not suffice to compel the conclusion that . . . invocation of § 10(b) was appropriately domestic.”).
the combination of conduct and effects as too uncertain a rubric to evaluate extraterritoriality. Now, conduct was being combined with the metaphysical location of off-exchange transactions to ground precisely the same analysis—whether U.S. law should govern a dispute with both domestic and foreign connections.

In Parkcentral, the United States Court of Appeals for the Second Circuit unintentionally made a profound statement on the folly of attempting to reduce such a complex question to the location of transaction. The court noted that the “conclusion we have reached on these facts cannot, of course, be perfunctorily applied to other cases based on the perceived similarity of a few facts.” The court observed that, “[i]n a world of easy and rapid transnational communication and financial innovation, transactions in novel financial instruments—which market participants can freely invent to serve the market’s needs of the moment—can come in innumerable forms of which we are unaware and which we cannot possibly foresee.” Morrison’s promise of a simple, predictable, rules-based approach to extraterritorial application of securities law (let alone all laws) seemed to be slipping away. Indeed, the court stated that “[w]e do not purport to proffer a test that will reliably determine when a particular invocation of § 10(b) will be deemed appropriately domestic or impermissibly extraterritorial.” Other courts have agreed that the court failed to proffer a generally applicable test, and declined to apply what they characterize as Parkcentral’s “predominantly foreign” test.

The current draft Restatement (Fourth) of U.S. Foreign Relations law recognizes this erosion of Morrison’s promised simplicity. The new draft Restatement largely attempts to inter any case-by-case balancing of sovereign interests as inconsistent with recent U.S. Supreme case law. But in light of cases like Parkcentral, the Restatement acknowledges that “application of the presumption does not preclude U.S. courts from interpreting a statute to include other comity limitations if doing so is consistent with the text, history, and purpose of the provision.” The Restatement is ecumenical as to the form of these additional comity

176 Parkcentral, 763 F.3d at 217.
177 Id.
178 Id.
179 See, e.g., Vancouver Alumni Asset Holdings Inc. v. Daimler AG, No. CV 16-02942 SJO (KKS), 2017 WL 2378369, at *11 (C.D. Cal. May 31, 2017) (stating that “[d]efendants’ reliance on Parkcentral is misplaced—not just because the ‘predominantly foreign’ test is non-binding on this Court” but because the facts of Parkcentral are distinguishable).
180 Restatement (Fourth) of the Foreign Relations of the United States § 405 cmt. c (AM. LAW INST. 2018).
limitations, noting that “U.S. courts have construed statutory provisions to include a variety of other comity limitations depending on the text, history, and purpose of the particular provision.” 181 This is a welcome acknowledgement of the irreducible complexity of the extraterritoriality analysis—but it also a statement that the Morrison test is neither complete nor sufficient to determine issue of extraterritorial application of U.S. law.

D. The Localizable Focus

The last formalism is the legal fiction that all “objects” are reducible a physical location in space—that they are localizable. This is plainly false. 182 Courts have made a similar error with regard to intangible assets and personal jurisdiction, where the attempt “to imagine the situs of an asset with no actual situs is a logical error with predictably confusing and arbitrary results.” 183 The legal fiction of situs should be discarded for personal jurisdiction. 184 Unfortunately, the very nature of Morrison’s “focus test” may prevent courts from doing so for extraterritorial application of U.S. law.

But not so for Congress. Morrison is a default rule of statutory interpretation for federal statutes—it is not more than that. Congress can displace it with legislation. 185 Indeed, Congress has recently done so with passage of the CLOUD Act as part of the March 23, 2018 omnibus spending bill. 186 The CLOUD Act would replace the courts’ approach in Microsoft—which turned on divining a situs for the “right of privacy” 187—with a conflict of laws approach grounded in balancing the interests of multiple sovereigns. 188 This is welcome change—though how the U.S. Supreme Court will respond is yet to be seen.

However, this problem will persist in other areas, absent further Congressional action. Courts are in a difficult position. Courts may choose

181 Id. § 405 cmt. d. Nonetheless, the Restatement forcefully asserts a vision of this comity analysis that takes place wholesale—at the statutory interpretation level rather than the retail level—in each particular case. See id. § 405 cmt. a (“Reasonableness is a principle of statutory interpretation and not a discretionary judicial authority to decline to apply federal law. It operates in conjunction with other principles of statutory interpretation. When the intent of Congress to apply a particular provision is clear, a U.S. court must apply that provision even if doing so would interfere with the sovereign authority of other states.”).

182 See Simowitz, supra note 155, at 259 (“Debts, shares of stock, intellectual property, wire transfers, LLC interests, and all other intangible assets have no physical location.”).

183 Id. at 292.

184 Id. (“Once the situs fiction is discarded, the problem of where an enforcing court can exert power over an intangible asset can be viewed anew through the lens of conflict of laws principles.”).

185 Id. at 261 (“Congress introduced the concept of intangible situs into the law of tax as a deliberate legal fiction to address a particular problem.”).

186 Woods & Swire, supra note 135.

187 See supra notes 120–133 and accompanying text (explaining the court’s holding in Microsoft focusing on the “invasion of privacy” and locating the invasion in Ireland).

188 See supra notes 134–137 and accompanying text (explaining that the CLOUD Act mooted Microsoft and describing the Act’s balancing test).
a “regulatory focus” that is intangible and not subject to easy localization, such as the “right to privacy.” But this carries risks. The entire question of whether U.S. law will apply—often a question that will determine the outcome—will depend on seemingly arbitrary or irrelevant facts. For example, in Microsoft, it was far from clear why Microsoft’s decision on where to locate its servers should control whether U.S. law applies. It is not even clear that the location of the servers had any necessary connection to the location of the user’s “right to privacy.” After all, they are Microsoft’s servers and it is not Microsoft’s “right to privacy” at issue. (Although Microsoft could face serious concerns if were caught in the vise of foreign compulsion.) Nor is it at all clear why the larger question of which sovereign’s law should apply should turn on server location. Before passage of the CLOUD Act, the question of whether the relevant data would be disclosed under U.S. law—and likely disclosed at all—turned on just these sorts of arbitrary and irrelevant factors.\(^{189}\)

On the other hand, if courts choose a regulatory focus that is readily localizable, but readily moveable, the application of U.S. law may turn entirely on decisions by private parties. In other words, Microsoft could effectively opt out of U.S. discovery and data protection law by locating its servers in Ireland. The Madoff operation (or future fraudulent enterprises) could easily opt out of U.S. fraudulent conveyance law by forming a foreign feeder fund. As the U.S. Supreme Court itself observed in RJR Nabisco, racketeers could easily move their enterprise abroad (particularly under the “nerve center” test that some lower courts had imported from the diversity jurisdiction context).\(^ {190}\) Counterparties to off-exchange securities transactions could easily opt out of U.S. securities law by moving their transactions abroad.

This danger can arise when a court selects a concrete, localizable focus or even when a court selects a diffuse, intangible regulatory focus.\(^ {191}\) As the Microsoft case illustrates, a diffuse focus (the right to privacy) can quickly become yoked to a tangible and moveable on-the-ground object (the Dublin

\(^{189}\) See Jennifer Daskal, The Un-Territoriality of Data, 125 YALE L.J. 326, 326 (2015) ( “[D]ata undermines longstanding assumptions about the link between data location and the rights and obligations that should apply.”). Daskal argues that server location has no “normative significance” to a user of electronic communications. This may be true to the average natural person—probably including the John Doe at issue in the Microsoft case. But it matters very much to the third-party e-mail providers—like Microsoft—that choose where to locate their server facilities. Whether that should matter in the analysis is a different question.


\(^{191}\) The current draft Restatement (Fourth) of Foreign Relations Law attempts to deal with some of this confusion by identifying a category of “non-geographic” focuses. See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION § 404 Reporters’ Note 10 (AM. LAW INST. 2018) (“If a court concludes that the focus of a provision is non-geographic, then it would apply equally in foreign and domestic cases and no clear indication of extraterritoriality would be required.”).
servers).\(^\text{192}\) It may not always be obvious when the choice of a concrete focus or a concrete situs for an intangible focus will raise this concern. For example, corporate nationality is easily manipulable in many contexts.\(^\text{193}\)

Under the rule adopted by the Madoff district court,\(^\text{194}\) a U.S. transaction could be transformed into a Cayman Islands transaction merely by incorporating a Cayman special purpose entity as an intermediary. For the average hedge fund, that is practically costless. The Commodity Futures Trading Commission (CFTC) encountered this exact problem in attempting to promulgate regulations governing extraterritorial regulation of swap transaction.\(^\text{195}\) The CFTC settled on a rule requiring the registration under Dodd-Frank if the swap was guaranteed by a U.S. party (recognizing that limited the statute’s reach to U.S. counterparties would fail to adequately protect U.S. economic interests).\(^\text{196}\) The CFTC quickly found that the same swaps suddenly had foreign guarantors—in turn guaranteed by U.S. entities.\(^\text{197}\)

IV. A NEW FOCUS

Morrison could have been interpreted very differently. The sources cited in Justice Scalia’s majority suggest that commentators and perhaps the Court itself were trying to craft a predictable, simple rule for exchange traded securities cases—and perhaps not more than that.\(^\text{198}\) Viewed in that light, Morrison is not especially troubling. It could have been viewed as a specification of the broader “reasonableness” principles in this one area. It may not be possible to frame a more precise than “reasonableness” for all

---


\(^{193}\) William J. Moon, Regulating Offshore Finance, 72 Vand. L. Rev. 1, 2 (2019) (“[R]ecent U.S. Supreme Court cases restricting the geographic scope of federal statutes create a space for commercial actors to circumvent regulation by incorporating in offshore jurisdictions.”).


\(^{196}\) Morici, supra note 195.

\(^{197}\) See Coffee, supra note 195, at 1274 (“[S]wap transactions do not need to be based in the United States and could easily be moved offshore—if such a migration would allow the swap dealer to escape regulation. Thus, the incentive to engage in regulatory arbitrage is uniquely high, and an angry Congress decided in the Dodd-Frank Act to respond by deeming U.S. law to apply if a U.S. entity was involved.”).

\(^{198}\) See Morrison v. Nat’l AustrL Bank, 561 U.S. 247, 260 (2010) (“Commentators have criticized the unpredictable and inconsistent application of § 10(b) to transnational cases.” (citations omitted)).
cases of extraterritoriality—but surely the test could be more precisely defined in a particular area of law.

But that is not what happened. The lower courts expressed reluctance to apply *Morrison* to other statutes.\textsuperscript{199} The U.S. Supreme Court did not. *Kiobel*\textsuperscript{200} and *RJR Nabisco*\textsuperscript{201} seemed to lay down the principle that the *Morrison* test would apply to all statutes—though the Court may yet retreat from that position.\textsuperscript{202} And so *Morrison*, steps one and two, are here to stay. A more rational, sensible, and yes, predictable, approach is required. Future courts can help to ameliorate some of the uncertainties inherent in the “focus test” by hewing to a few principles.

A. *Apply prescriptive comity*

Courts should recognize that the so-called “focus test” is a fundamentally transnational inquiry. It makes little sense to identify “the objects of the statute’s solicitude” without considering the context of the question. Indeed, the sources relied on by the *Morrison* Court suggest as much.\textsuperscript{203} A transnational approach to the focus test strongly suggest that courts should look to the principles of prescriptive comity to guide the inquiry.

The new Restatement (Fourth) of Foreign Relations Law moves the principle of “prescriptive comity” to the center of statutory interpretation and extraterritorial application. The Restatement describes the “principle of ‘prescriptive comity’” as “a principle of statutory interpretation and not a discretionary judicial authority to decline to apply federal law.”\textsuperscript{204} Prescriptive comity “does not seek to avoid all interference with the sovereign authority of other states, but rather to avoid unreasonable

---

\textsuperscript{199} See, e.g., United States v. Weingarten, 632 F.3d 60, 66 (2d Cir. 2011) (“In addition, although we find the available evidence here sufficient to overcome the presumption against extraterritoriality, there is reason to doubt that the presumption against extraterritoriality applies to § 2423(b) at all.”).


\textsuperscript{201} *RJR Nabisco*, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016) (applying the *Morrison* test to the Racketeer Influenced and Corrupt Organizations Act).

\textsuperscript{202} In its most recent decision applying the presumption against extraterritoriality, the Court declined to consider whether the presumption applied to remedial provisions, instead turning first to the focus test. See *WesternGeco*, 138 S. Ct. 2129 at 2136.


\textsuperscript{204} *RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION* § 405 cmt. a. (AM. LAW INST. 2018).
interference with such authority.”

This principle is most clearly embodied in the U.S. Supreme Court’s decision in F. Hoffmann-La Roche v. Empagran. In Empagran, the Court rejected the most plausible textual reading of the statute in favor of a construction that would be avoid potential conflict with a U.K. regulatory scheme. The Court stated that it “ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations,” and that “[t]his rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.” The Court signaled the strength of the principle of prescriptive comity by acknowledging that “considerations” of “comity and history” actually motivated it to reject the statutory reading that “might” be “the more natural reading.” The Court observed that, “[i]f the statute’s language reasonably permits an interpretation” that avoids unreasonable interference with another sovereign’s laws, “we should adopt it.”

Strangely, U.S. courts have almost entirely neglected to invoke this principle when faced with the question of determining the statute’s focus. Even the Restatement—which uses “prescriptive comity” as the organizing principle for the extraterritorial application of U.S. law—declines to mention the principle in reference to Morrison’s second step. The Restatement acknowledges that the “Supreme Court has adopted a two-step framework for applying the presumption against extraterritoriality to federal statutory provisions and causes of action,” and lays out in some detail the parameters for application of this second step. The Restatement observes that “[d]ifferent federal statutory provisions focus on different things” some on “the proscribed conduct,” some on “transactions,” and some on

---

205 Id. (“Interference with the sovereign authority of foreign states may be reasonable if such application would serve the legitimate interests of the United States.”).
207 Id. at 174.
208 Id. at 164–65 (“It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today’s highly interdependent commercial world.”).
209 Id. at 174 (“At most, respondents’ linguistic arguments might show that respondents’ reading is the more natural reading of the statutory language. But those arguments do not show that we must accept that reading. And that is the critical point.”).
210 Id. (“And, for the reasons stated, we believe that the statute’s language permits the reading that we give it.”).
211 RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION § 404, Reporters’ Note 6 (AM. LAW INST. 2018) (citing RJR and Morrison).
212 Id. at n.8.
213 Id. (citing Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 455 (2007); Pasquantino v. United States, 544 U.S. 349, 371 (2005)).
As for the method for determining the statutory focus, the Restatement observes that the “focus of a provision may be indicated by its text,” or that “focus of the statute as a whole may also be relevant in determining the focus of its individual provisions,” or that the “focus of a statutory provision may also ‘be inferred from the nature of the offense.’” The Restatement also acknowledges that “[s]ometimes, the focus of a federal statutory provision is non-geographic” and that “[i]f a court concludes that the focus of a provision is non-geographic, then it would apply equally in foreign and domestic cases and no clear indication of extraterritoriality would be required.

The Restatement’s approach is thus ecumenical and descriptive. It lists all the various approaches that the Supreme Court and (to a lesser extent) lower courts have taken in determining the “focus” of a statute. But it suggests no tool or recommended approaches for making that inquiry—or for choosing among multiple plausible focuses. Perhaps the proliferation of approaches makes any such articulation chancy at best. But it is striking that “prescriptive comity” is completely absent as an interpretative principle or tool. After all, the second step of Morrison does the exact same practical work as the first step—determining whether a U.S. statute will apply to a particular claim or constellation of facts. One may argue that step-one resolves these questions wholesale, whereas step-two is more retail. But this both overstates the simplicity of step-one and understates the impact of step-two.

The Restatement endorses the notion that a court may impose additional limitations of the reach of a U.S. statute even if the presumption against extraterritoriality has been rebutted. The Restatement (Fourth) of Foreign Relations Law states that the “application of the presumption does not preclude U.S. courts from interpreting a statute to include other comity limitations if doing so is consistent with the text, history, and purpose of the provision,” and that “U.S. courts have construed statutory provisions to include a variety of other comity limitations depending on the text, history,

216 Id. (citing United States v. Bowman, 260 U.S. 94, 98 (1922)).
217 Id. at n.10 (citation omitted).
218 Id.
219 See supra notes 211–18 and accompanying text (highlighting sections of the Restatement that discuss Supreme Court approaches to determining a statute’s focus).
220 RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION § 404 (AM. LAW INST. 2018).
221 Id.
222 Id. § 405 cmt. c.
and purpose of the particular provision.”223 Similarly, the resolution of step-two is not a case-by-case inquiry—rather, it resolves whether an entire class of claims will be included under the statute’s reach.

Some courts seem to articulate concerns based in prescriptive comity, although not under that name. In his Madoff opinion, Judge Rakoff proclaimed that he was engaging in a “straightforward reading” that yielded a regulatory focus on the ultimate transfer, rather than on the estate.224 At the outset, Judge Rakoff rejected that Trustee’s argument that the regulatory focus was on the estate because, on “the level of policy, this approach could raise serious issues of international comity.”225 However, Judge Rakoff did not treat comity as a principle of statutory interpretation226—as the Restatement and Empagram suggest—but as a free-standing “choice-of-law analysis to determine whether the application of U.S. law would be reasonable under the circumstances, comparing the interests of the United States and the relevant foreign state,” that would apply “even if the presumption against extraterritoriality were rebutted.”227

The United States Court of Appeals for the Second Circuit overturned the district court on this point as well, but introduced yet another variation of the comity analysis. In the appellate court’s account, the choice of the statutory focus drove the subsequent comity analysis. The court was careful to note that it was engaging in a prescriptive, rather than adjudicative, comity analysis, but following a prior panel’s decision in In re Maxwell, seemed to treat the comity analysis as additional separate step to be added at the very end of the analysis. However, the choice of the initial transfer as the focus, rather than the ultimate transfer drove the comity analysis: “The lower courts, erroneously focusing on the subsequent transfer, found that the jurisdictions adjudicating the feeder funds’ liquidations had a greater interest in resolving these disputes than the United States. . . . This conclusion rests on incorrect premises.” The appellate court concluded that, because the “focus is on regulating and remedying a debtor’s fraudulent transfer of property . . . [t]he domestic nature of those transfers, and our nation’s compelling interest in regulating them, tips the scales of In re Maxwell’s choice-of-law test in favor of domestic adjudication.”228

223 Id. § 204 cmt. d.
225 Id.
228 In re Picard, Tr. for Liquidation of Bernard L. Madoff Inv. Sec. LLC, 917 F.3d 85 (2d Cir. 2019)
B. Recognize multiple focuses

In its amicus brief in *RJR Nabisco v. European Community*, the United States government argued that the RICO statute focused on multiple things: racketeering enterprises, patterns of racketeering conduct, and the injuries of those harmed by racketeering activity.\(^\text{229}\) In a vacuum, this assertion seems uncontroversial—practically obvious. Of course Congress had been concerned with stamping out racketeering enterprise, deterring racketeering conduct, and redressing the harms suffered by victims of that conduct.

And yet, multiple circuit courts had been “deeply divided”\(^\text{230}\) by the question of which of these “objects of the statute’s solicitude” was the sole focus on the RICO statute. The origins of this resistance are not clear—but the most likely explanation is that lower courts have been extremely wary of any holdings that would appear to recapitulate the “conduct and effects” test derided in *Morrison*. However, this unconditional resistance has distorted the application of these statutes and does not necessarily reflect the thrust of the *Morrison* opinion.

Justice Scalia derided the Second Circuit’s long-standing approach to the extraterritorial application of § 10(b). In his telling, the Second Circuit ignored the presumption against extraterritoriality, a principle “long and often recited in our opinions,” because the lower court “believed that, because the Exchange Act is silent as to the extraterritorial application of § 10(b), it was left to the court to ‘discern’ whether Congress would have wanted the statute to apply.”\(^\text{231}\) He stated that this approach has “produced a collection of tests for divining what Congress would have wanted, complex in formulation and unpredictable in application.”\(^\text{232}\) He argued that the Second Circuit “had excised the presumption against extraterritoriality from the jurisprudence of § 10(b) and replaced it with the inquiry whether it would be reasonable (and hence what Congress would have wanted) to apply the statute to a given situation.”\(^\text{233}\) The conduct and effects test “became the north star of the Second Circuit’s § 10(b) jurisprudence, pointing the way to

\(^{229}\) See Brief of the United States as Amicus Curiae Supporting Vacatur, RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016) (No. 15-138), 2015 WL 9268185, at *9 (“Contrary to petitioners’ claim, RICO contains no domestic-enterprise requirement. RICO’s ‘focus’ (Morrison, 561 U.S. at 266) is on the ‘pattern’ as well as the enterprise. Accordingly, if a pattern of domestic racketeering activity occurs, RICO may be violated whether the enterprise is foreign or domestic.”).

\(^{230}\) See Petition for a Writ of Certiorari, RJR Nabisco, Inc. v. European Cmty., (2016) (No. 15-138), 2015 WL 4572754, at *11 (“Prior to the panel decision below, the courts had unanimously concluded at step one of *Morrison* that RICO ‘does not apply extraterritorially.’ At step two, however, the courts sharply divided over how to distinguish between domestic and extraterritorial applications.” (citation omitted)).

\(^{231}\) *Morrison*, 561 U.S. at 255.

\(^{232}\) Id. at 255–56.

\(^{233}\) Id. at 257.
what Congress would have wished.”

Justice Scalia observed that the “Second Circuit never put forward a textual or even extratextual basis for these tests.”

Justice Scalia devoted a paragraph each to his critiques that the the conduct and effects test was difficult administer and non-uniform. He then returned to his principal theme—quoting Judge Bork—“that rather than courts’ divining what Congress would have wished if it had addressed the problem,” a “more natural inquiry might be what jurisdiction Congress in fact thought about and conferred.” In turning to commentary, Justice Scalia noted the perceived violence that the conduct and effects test did to proper textual interpretation.

To the extent that Justice Scalia did focus on administration of the test—rather than its extra-textual origins—his comments do not suggest an absolute aversion to focusing on conduct and effects, as such. Rather, the test as applied by the lower courts improperly “resolv[ed] matter of policy.”

C. Vindicate statutory purpose

The Court examined only in dicta RJR Nabisco’s argument that the racketeering “enterprise” was the focus of RICO. The Court noted that an “enterprise” is difficult to locate and that if more definite tests are used to

234 Id. at 257–58.
235 See id. at 258 (noting language from the appellate court that “if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond” (citing Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975)).
236 See id. at 260 (noting that Judge Bork had deferred to the Second Circuit approach in light of its “preeminence” in the field of securities law (Zoelsch v. Arthur Anderson & Co. 824 F.2d, 27, 32 (1987))).
237 See id. (“Some have challenged the premise underlying the Courts of Appeals’ approach, namely that Congress did not consider the extraterritorial application of § 10(b) (thereby leaving it open to the courts, supposedly, to determine what Congress would have wanted.”) (citing Margaret V. Sachs, The International Reach of Rule 10b–5: The Myth of Congressional Silence, 28 COLUM. J. TRANSNAT’L L. 677 (1990)); id. at 260–61 (“Others, more fundamentally, have noted that using congressional silence as a justification for judge-made rules violates the traditional principle that silence means no extraterritorial application.” (citing John D. Kelly, Note, Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence with Regard to the Extraterritorial Application of the Anti–Fraud Provisions of the 1933 and 1934 Securities Acts, 28 LAW & POL’Y INT’L BUS. 477, 492–93 (1997))).
238 Morrison, 561 U.S. at 259 (“While applying the same fundamental methodology of balancing interests and arriving at what seemed the best policy, they produced a proliferation of vaguely related variations on the ‘conduct’ and ‘effects’ tests.”). The sources relied on by the Court also give greater context to the Court’s concern. Professors Silberman and Choi’s work was prominently cited in the Morrison majority. See, e.g., Choi & Silberman, supra note 150 (arguing only that the exchange was the appropriate point of regulatory concern for publicly traded equities and refusing to argue against a wholesale rejection of the conducts-and-effects test, even though its issues were recognized).
239 See RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2104 (2016). (“It is easy to see why Congress did not limit RICO to domestic enterprises. A domestic enterprise requirement would lead to difficult line-drawing problems and counterintuitive results . . . . RJR also offers no satisfactory way of determining whether an enterprise is foreign or domestic.”).
so, it will render racketeering enterprises easy to relocate. Therefore, the choice of the enterprise as the “regulatory focus” of RICO would undermine the very purposes of the statute itself: “It would exclude from RICO’s reach foreign enterprises—whether corporations, crime rings, other associations, or individuals—that operate within the United States.”

Or in the words of the United States of Appeals for the Second Circuit: “Surely the presumption against extraterritorial application of United States laws does not command giving foreigners carte blanche to violate the laws of the United States.”

Much of the criticism of the lower court opinions in the Madoff and Microsoft disputes followed this theme: If selection of a certain regulatory focus would permit easy evasion of the regulatory law itself—it should be rejected. Parties should not be able to evade the United States’s regulatory apparatus simply by engaging in data localization abroad and by incorporating a foreign feeder fund. In other words, Morrison analysis should be conduct with a simple anti-evasion principle in mind. The choice required of Morrison step-two—the statute’s “regulatory focus”—should not undermine the regulatory scheme itself. A court’s selection of a “focus” will dramatically affect how the statute functions in transnational disputes. The court should therefore select a focus that vindicates, rather than undermines or defeats, the functioning of the regulatory scheme.

The United State Court of Appeals for the Second Circuit concluded its analysis in the Madoff case by invoking this anti-evasion, anti-loophole principle. The court noted that “[f]actoring the transferee’s receipt of property into our analysis would not only misread the Bankruptcy Code’s avoidance and recovery provisions, but also open a loophole.” The court noted that, if a “fraudster transferred the property to a foreign entity that then transferred it to another foreign entity,” and the Bankruptcy Code could not reach subsequent foreign transfers, “that transfer would make the property recovery-proof, even if the subsequent foreign transferee then sent the property to someone located in the United States.” The court closed its analysis with the observation: “We cannot imagine how [the Morrison presumption] should guide us to read the Bankruptcy Code’s creditor-protection provisions in this self-defeating way.”

CONCLUSION

Congress has developed a bit of a habit of reversing the courts on issues of...
extraterritoriality. Congress reversed the U.S. Supreme Court’s decision in *Aramco*, amending to Title VII to apply to U.S. citizens applied by U.S. entities abroad. Congress reversed the Court’s decision in *Morrison*, at least with regard to government actions, explicitly restoring the conduct-and-effects test. Most recently, Congress reversed the United State Court of Appeals for the Second Circuit’s decision in the *Microsoft* litigation, setting by legislation the rule the location of the data is irrelevant to the analysis of whether the date will be disclosed.

The problem is not simply that the *Morrison* test is flawed. The problem is that, in some instances, any choice will be wrong. In the *Microsoft* litigation, the court was faced with a choice of everything or nothing. Either every bit of data accessible in the United States would be disclosable subject to U.S. law—or every bit of data localized abroad would be shielded from it. That sort of in-or-out choice is in the very nature of the “focus test.” And that decision will not turn on the competing interests of sovereigns—but rather of seemingly arbitrary or irrelevant facts such as the location of computer terminals or servers.

The *Morrison* test seems here to stay. But it can be improved with the excision of some of the formalisms that have accumulated since *Morrison* was decided. This article seeks both to scrape off those barnacles and to set a few guiding principles for a less troubled path forward.