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The Presumption Against Extraterritoriality After Morrison

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First, the Court, as I have noted, went out of its way—way out of its way—to criticize the effects test. The effects test had nothing to do with the Australian plaintiffs' claims, but Justice Scalia knew—in fact, he cites the relevant cases, just as he cited them in his dissent in *Hartford Fire*¹⁷—that it was the effects test that had obliterated the presumption against extraterritoriality in antitrust. The Court was trying to make sure that what happened there was not going to happen again.

Second, the specific holding reached by the Court—that the focus of the statute is on “domestic transactions”—is not consistent with the effects test. Under the pre-*Morrison* effects test, it was widely assumed, to the point where defendants would not even argue otherwise, that *Americans* who purchased shares on foreign exchanges could sue under the securities laws, because they suffer the effects of the fraud at home.¹⁸ But under *Morrison*, as Justice Stevens disapprovingly pointed out in his concurring opinion, those Americans can no longer sue.¹⁹ And district judges are all reading *Morrison* the same way.²⁰ The effects test is dead.

Third, *Morrison*'s “focus” analysis cannot be construed to restrict the scope of what is considered to be extraterritorial under the presumption. To the contrary, the “focus” analysis was about restricting what can be considered *domestic*: it was an effort to demonstrate why particular domestic conduct was *not* enough to cause extraterritoriality's watchdog to lose its bite; it was not an attempt to define what would always suffice. *Morrison* should thus be understood to mean that having domestic conduct that coincides with the domestic “focus” of congressional concern is a necessary, but not always sufficient, condition for avoiding the presumption.²¹

Finally, the Court's holding was quintessentially territorialist. The Court held that “the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States.”²² Someone once proposed rather similar choice-of-law rules to govern common-law fraud—“When a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent misrepresentations are made”—and for torts generally: “The place of the wrong is the state where the last event necessary to make an actor liable for an alleged tort takes place.” These rules are from Section 377 of the First Restatement of Conflicts.²³ Professor Beale, I suspect, would have unreservedly applauded *Morrison*.

THE PRESUMPTION AGAINST EXTRATERRITORIALITY AFTER *MORRISON*

*By William S. Dodge**

The Supreme Court's recent extraterritoriality jurisprudence has been a mess.¹ The Court has applied a presumption against extraterritoriality but has seemed to do so inconsistently.

¹⁷ See *Morrison*, 130 S. Ct. at 3886 n.11; *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting).

¹⁸ See, e.g., In re Rhodia S.A. Sec. Litig., 531 F. Supp. 2d 527, 537 (S.D.N.Y. 2007).

¹⁹ See *Morrison*, 130 S. Ct. at 2895 (Stevens, J., concurring in judgment).

²⁰ See, e.g., In re Vivendi Universal, S.A. Sec. Litig., No. 02 Civ. 5571 (RJH), 2011 WL 590915, at *10–*11 (S.D.N.Y. Feb. 17, 2011) (citing cases).

²¹ Cf. *Elliott Assocs. v. Porsche Auto. Holding SE*, No. 10 Civ. 0532 (HB), 2010 WL 5463846, at *7 (S.D.N.Y. Dec. 30, 2010) (holding that, under *Morrison*, federal law does not apply to derivatives contracts referencing foreign stock even if the contracts are made in the United States).

²² *Morrison*, 130 S. Ct. at 2884.

²³ RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 & note 4, at 457 (1934).

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The presumption has limited the reach of the federal eight-hours law,² but not the federal trademark statute;³ it has constrained antidiscrimination law,⁴ but not antitrust law.⁵

Justice Scalia's opinion in *Morrison* tries to bring order to the chaos. *Morrison* reiterates "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."⁶ It emphasizes that this principle applies "in all cases."⁷ And it clarifies what is necessary to overcome the presumption—not a "clear statement" but, taking context into account, a "clear indication of extraterritoriality."⁸ Less obviously but most importantly, *Morrison* changes the presumption by focusing not on the location of the prohibited conduct, but on the location of its effects.⁹

The traditional understanding of the presumption against extraterritoriality focused on "where the act is done."¹⁰ The *Morrison* plaintiffs argued that because the alleged fraud happened in Florida, the presumption did not apply, but Justice Scalia disagreed. Courts applying the presumption should concentrate not on where the acts were done, he reasoned, but rather on "the 'focus' of congressional concern."¹¹ "[W]e think that the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States."¹² What mattered was not where the conduct occurred but where its effects were felt.

To be sure, Justice Scalia criticized the Second Circuit's "effects test" along with its "conduct test."¹³ But the Second Circuit's effects test was broader than *Morrison*'s. For example, it applied the Exchange Act to transactions on a foreign exchange that affected the price of U.S.-listed shares in the same company¹⁴ and counted as "effects" the sending of misstatements into the United States.¹⁵ It was this broad effects test Justice Scalia condemned as "vague," "unpredictable," and "not easy to administer."¹⁶ In its place, *Morrison* substituted a narrower effects test that focuses exclusively on the location of the specific transaction affected by the fraud.¹⁷

Shifting the presumption to focus on effects is a positive development. First, it is consistent with the presumption's modern justification—that Congress "is primarily concerned with domestic conditions."¹⁸ Concern with domestic conditions usually means concern with

¹ See generally William S. Dodge, *Loose Canons: International Law and Statutory Interpretation in the Twenty-First Century*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 547 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011).

² *Foley Bros. v. Filardo*, 336 U.S. 281 (1949).

³ *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952).

⁴ *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244 (1991).

⁵ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

⁶ *Morrison*, 130 S. Ct. at 2877 (quotation marks omitted).

⁷ *Id.* at 2881.

⁸ *Id.* at 2883.

⁹ See William S. Dodge, *Morrison's Effects Test*, 40 Sw. L. Rev. 687 (2011).

¹⁰ *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

¹¹ *Morrison*, 130 S. Ct. at 2884 (quoting *Aramco*, 499 U.S. at 255).

¹² *Id.*

¹³ See *id.* at 2878–81.

¹⁴ See *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206–08 (2d Cir. 1968).

¹⁵ See *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 262 (2d Cir. 1989).

¹⁶ *Morrison*, 130 S. Ct. at 2879–80.

¹⁷ *Id.* at 2886.

¹⁸ *Morrison*, 130 S. Ct. at 2877 (quoting *Aramco*, 499 U.S. at 248). For a critique of other justifications, see William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 *BERKELEY J. INT'L L.* 85, 112–23 (1998).

domestic effects.¹⁹ Second, it makes sense of the Supreme Court's seemingly inconsistent extraterritoriality case law. Cases in which the Court has applied the presumption to limit the reach of a statute have not involved effects in the United States.²⁰ Cases in which the Court has held federal statutes to apply extraterritorially have.²¹ Tying the extraterritorial application of U.S. law to effects in the United States is not just good policy; it is what the Supreme Court has in fact been doing for the past hundred years.

What are *Morrison*'s implications for other statutes? Applying *Morrison*, the Second Circuit held in *Norex Petroleum Ltd. v. Access Industries, Inc.* that the Racketeer Influenced and Corrupt Organizations Act (RICO) did not apply extraterritorially, but the court did not examine the "focus" of the statute.²² The district court in *European Community v. RJR Nabisco, Inc.* did perform such an analysis, concluding that "[b]ecause the 'focus' of RICO is the 'enterprise,' a RICO 'enterprise' must be a 'domestic enterprise.'"²³ Thus, as another district court held, RICO should not apply to racketeering activity in the United States where "the alleged enterprise and the impact of the predicate activity upon it are entirely foreign."²⁴ Conversely, under *Morrison*, RICO should apply to racketeering activity abroad that causes effects in the United States on or through a domestic enterprise. Thus, the district court in *United States v. Philip Morris USA, Inc.* got it wrong when it released British American Tobacco (BATCo) from its final order on the ground that RICO did not apply after *Morrison*.²⁵ The court had earlier found that defendants established a RICO enterprise in the United States²⁶ and that "BATCo's activities and statements furthered the Enterprise's overall scheme to defraud, which had a tremendous impact on the United States."²⁷ Those findings are sufficient to establish RICO liability irrespective of where the predicate acts occurred.

Finally, what about the Alien Tort Statute (ATS)?²⁸ The "focus" of the ATS was to provide redress for violations of the law of nations,²⁹ and at least one such violation—piracy—would typically have occurred on the high seas, outside the territorial jurisdiction of the United States. A 1795 Attorney General's opinion confirms this understanding. Asked what actions might be taken against Americans who had violated the law of nations on neutrality by helping the French attack a British outpost in Sierra Leone, Attorney General Bradford expressed "no doubt" that injured aliens could bring a civil suit under the ATS.³⁰ This should be a sufficiently "clear indication" of Congress's intent to apply the ATS

¹⁹ Indeed, in the antitrust context, Congress has expressly permitted anticompetitive conduct in the United States if its harmful effects are felt exclusively abroad. *See, e.g.*, Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §§ 6a & 45a(3).

²⁰ *See, e.g.*, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991); *Foley Bros. v. Filardo*, 336 U.S. 281 (1949). Effects on Americans abroad are not effects in the United States. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. g (1987) (distinguishing passive personality principle).

²¹ *See, e.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952). *Morrison* expressly distinguished both the antitrust and Lanham Act cases. *Morrison*, 130 S. Ct. at 2887 n.11.

²² 631 F.3d 29 (2d Cir. 2010) (per curiam).

²³ 2011 WL 843957 (E.D.N.Y. Mar. 8).

²⁴ *Cedeño v. Intech Group Inc.*, 733 F. Supp. 2d 471, 474 (S.D.N.Y. 2010). *Cedeño*, *Norex*, and *European Community* were all properly dismissed for this reason.

²⁵ 783 F. Supp. 2d 23 (D.D.C. 2011).

²⁶ *United States v. Philip Morris USA, Inc.*, 449 F. Supp.2d 1, 867–72 (D.D.C. 2006).

²⁷ *Id.* at 873.

²⁸ For a pre-*Morrison* discussion of the question, see William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 HARV. INT'L L.J. ONLINE 35 (2010).

²⁹ *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004).

³⁰ 1 Op. Att'y Gen. 57, 59 (1795).

extraterritorially, and it is worth noting that the Bush administration raised the presumption in *Sosa v. Alvarez-Machain* and got not a single vote for its argument.³¹

At a more fundamental level, there is an important distinction between the ATS and the antifraud provisions of the Exchange Act: the ATS is simply a jurisdictional provision, whereas Section 10(b) is a rule of substantive law. It is true that the Supreme Court has applied the presumption to the Foreign Sovereign Immunities Act and the Federal Tort Claims Act,³² but these acts codify federal rules of sovereign immunity in addition to granting jurisdiction. The ATS, by contrast, is “strictly jurisdictional.”³³ This distinction can be found in *Morrison* itself. Justice Scalia applied the presumption against extraterritoriality to Section 10(b) of the Exchange Act, a substantive provision prohibiting fraud.³⁴ He did not apply the presumption to Section 27,³⁵ the jurisdictional provision for Exchange Act violations, even though it contained no clear indication that it applied extraterritorially at the time.³⁶ Rather, Justice Scalia emphasized that the district court *did* have subject matter jurisdiction under Section 27.³⁷ The most plausible reason for the Court’s differing treatment of Section 10(b) and Section 27 is that the presumption applies only to substantive statutes and not to jurisdictional ones.

Morrison is the Supreme Court’s most important extraterritoriality decision in almost two decades, but understanding it requires care. *Morrison* shifts the focus of the presumption from the location of the conduct to the location of the effects. This means that RICO should not apply to conduct in the United States that causes effects abroad on or through a foreign enterprise, but should apply to conduct abroad that causes effects in the United States on or through a domestic enterprise. But *Morrison* does not mean that the presumption applies to jurisdictional statutes like the ATS.

MORRISON, THE EFFECTS TEST, AND THE PRESUMPTION AGAINST EXTRATERRITORIALITY: A REPLY TO PROFESSOR DODGE

By Austen L. Parrish*

Last term, in *Morrison v. National Australia Bank Ltd.*, the U.S. Supreme Court decided what may be the most significant legislative jurisdiction case of the last few decades. In putting an end to so-called “foreign-cubed” securities cases, the Supreme Court strongly reaffirmed the presumption against extraterritoriality. Specifically, the Court held that insufficient evidence existed that Congress intended Section 10(b) of the 1934 Securities and Exchange Act to “provide a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges.”¹

³¹ See Brief for the United States as Respondent Supporting Petitioner at 46–50, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 182581.

³² See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428 (1989); *Smith v. United States*, 507 U.S. 197 (1993).

³³ 542 U.S. 692, 713 (2004); see also *id.* at 743 (Scalia, J., concurring) (describing ATS as “purely jurisdictional”). If the presumption applies to the ATS, it would presumably apply equally to the federal diversity statute, 28 U.S.C. § 1332, and to the grant of subject matter jurisdiction over “all offenses against the laws of the United States.” 18 U.S.C. § 3231. This would be contrary to common practice.

³⁴ 15 U.S.C. § 78j(b).

³⁵ 15 U.S.C. § 78aa.

³⁶ It has since been amended by § 929P(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

³⁷ *Morrison*, 130 S. Ct. at 2877.

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¹ *Morrison v. National Australia Bank, Ltd.*, 130 S. Ct. 2869, 2875, 2883, 2888 (2010).