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The Eras of Extraterritoriality in the United States

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ABSTRACT

This article uses the research from Kal Raustiala's book, *Does the Constitution Follow the Flag? : The Evolution of Territoriality in American Law*, and the research from several of my articles on extraterritorial applications to explain how the United States has used the regulatory tool, extraterritoriality, since the time of the American Founding and how such use has differed as the United States gained power. The manner by which the United States has relied on extraterritoriality has differed depending on a particular era of history. For instance, this article articulates five eras that have characterized the U.S. decision-making process for extraterritoriality: cautionary, progressive, indiscriminate, withdrawal, and arbitrary. The United States within each era has embraced certain customary principles more than others such as sovereignty, territorialism, international comity, and global constitutionalism. Its reliance on these principles is volatile and changes in each era. What is remarkable is the extent to which the United States has and has not considered international issues as a part of its practice of utilizing extraterritoriality. As a young nation, the United States greatly clung to notions of sovereignty and territorialism and eschewed extraterritoriality because it was not strong enough to exert such power nor could it handle an invasion from another foreign power. Sovereignty and territorialism gave the United States the peace of mind and security against an uprising. International considerations were prominent and commonplace in the early eras. But as the nation grew in strength throughout each successive era, it no longer needed the bedrock of sovereignty and territorialism to safeguard it from other foreign powers. The United States instead sought to inject its laws extraterritorially and engage in global policing. Its rise in economic and political power gave it the strength to do so. Extraterritorial regulation was on the rise. However, the more its use of extraterritoriality rose, the more domestic struggles the United States encountered, which led to arbitrary judicial decisions and policy-making. Further, during the later eras, the United States relied less and less on international considerations and engaged in withdrawal tactics, causing some to view its behavior as hegemonic. There is a great imperative of examining history with the law. How U.S. history and politics can inform the future of the law is critical. The findings laid out within this article will serve a starting point for future research regarding potential future eras.

KEYWORDS

Extraterritoriality; International Comity; Regulatory Tool; Citizenship; U.S. Constitution

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INTRODUCTION

The United States is not the same country it was at the time of the Founding. It has grown substantially as a global power and leader. From asserting its independence to domestic funding to international policing, the United States is a pioneer country. A large part of its dominance, both internally and abroad, has been the proliferation of federal legislation beginning in the 1930s and the use of the regulatory tool, extraterritoriality.[1] Extraterritoriality involves the application and use of U.S. law to regulate foreign conduct. The key to this tool is that some part of the regulable conduct must take place outside the territory of the United States. As can be imaginable, extraterritorial applications create foreign friction, harm international relations efforts, and conjure up multiple issues with another state's sovereignty, determination, and territoriality. What is interesting about this article is that it tells the story of the United States' use of extraterritoriality in a series of stages – eras – each of which is accompanied by certain attendant circumstances such as evolved notions of territoriality and citizenship, differing attitudes about the international realm, and varying degrees of coordination and uncertainty between the U.S. branches of government.

This Article proceeds in the following manner. Part II presents the eras of extraterritoriality in the United States and describes the attendant circumstances associated with each era. The United States has proceeded through five eras: (1)

[1] For Kal Raustiala's book *see* KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? : THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009). *See also* Alina Veneziano, *Applying the U.S. Constitution Abroad, from the Era of the U.S. Founding to the Modern Age,* 46 FORDHAM URB. L.J. 602 (2019) [hereinafter Veneziano, *Applying the U.S. Constitution Abroad*]; *see also* Alina Veneziano, *Studying the Hegemony of the Extraterritoriality of U.S. Securities Laws : What It Means for Foreign Investors, Foreign Markets, and Efforts at Harmonization*, 17 GEORGETOWN J.L. & PUB. POL'Y 343 (2019) [hereinafter Veneziano, *Studying the Hegemony of the Extraterritoriality of U.S. Securities Laws*]; *see also* Alina Veneziano, *A New Era in the Application of U.S. Securities Law Abroad : Valuing the Presumption Against Extraterritoriality and Managing the Future with the Sustainable-Domestic-Integrity Standard*, 23 ANN. SURV. OF INT'L & COMP. L. 79, 111 (2019) [hereinafter Veneziano, *A New Era in the Application of U.S. Securities Law Abroad*].

Cautionary with international focus, (2) Progressive with international focus, (3) Indiscriminate without international focus, (4) Withdrawal without international focus, and (5) Arbitrary without international focus. Part III explains the significance of classifying the United States into these eras of extraterritoriality. As will be demonstrated, it is important to understand how the United States began and continued to use extraterritoriality to regulate foreign conduct as well as how its use of this tool differed throughout history depending on factors such as power, attitudes on international law, security, and territoriality/citizenship. Lastly, Part IV presents the conclusions of this article.

1. PRESENTING THE ERAS OF EXTRATERRITORIALITY IN THE UNITED STATES

The history of the United States has proceeded through a series of eras regarding the judiciary's practice of utilizing the tool, extraterritoriality. Each era is characterized by a rise in global power and differing attitudes towards international law and relations. The eras are outlined below:

- Cautionary with international focus.
- Progressive with international focus.
- Indiscriminate without international focus.
- Withdrawal without international focus.
- Arbitrary without international focus.

These five era classifications are important because they demonstrate how the United States as a nation reacted to an increase in power and handled international considerations as it began and continued to use the regulatory tool, extraterritoriality.

1.1. CAUTIONARY WITH INTERNATIONAL FOCUS (FOUNDING – EARLY 1900s)

The Treaty of Westphalia of 1648 declared that each sovereign state has its own exclusive territory.[2] Little did many know at the time of the American Revolution, but America –

[2] *See* RAUSTIALA, supra note 1.

a new, unstable, and uncertain young nation – would slowly but progressively become a world dominator of politics, finance, and regulation. The year 1776 "foreshadowed a range of future rebellions by peoples who chafed under imperialism and sought ultimately to control their own political destiny".[3] And this is exactly what America sought to do. With only thirteen colonies, the nation arduously expanded by "conquest, purchase, and treaty".[4] This power to conquer territory was a power possessed by all states as a part of their sovereignty.[5]

The theory of strict territorialism and its limited constitutional reach dates back to the nineteenth century notion that the United States had no legal obligations outside its territory. At this time, the scope and extent of the "U.S. law" was more like the scope and extent of the U.S. Constitution. While extraterritorial applications were uncommon, it was not unheard of. The Constitution itself outlines several instances of authority for congressional regulation of matters beyond the U.S. territory. For instance, Article I grants Congress the power "to define and punish Piracies and Felonies committed on the High Seas".[6] This reference to such crimes "on the High Seas" certainly implies some authority to regulate beyond the territory of the United States.[7] Thus, the U.S. Constitution was both the symbol of the United States' power and a tool utilized for its increased regulation and expansion. Nevertheless, extraterritorial applications embraced a very cautionary approach. The impact of U.S. law took the same reasoning.[8] To extend a law extraterritorially at this time was seen as a "dangerous repudiation of Westphalian principles".[9] The Supreme Court has held in the early nineteenth century that U.S. law applies within the "full and absolute territorial jurisdiction"[10] of the United States; however, it had "no force to control the sovereignty or rights of any other nation".[11] International considerations were very much a top consideration.

Decisions on territorial expansions were not always to make. For instance, President Thomas Jefferson had doubts regarding the constitutionality of the Louisiana Purchase of 1803, despite its immense addition to the territory of the United States.[12] Throughout the decades (and centuries as we shall see later on), America was always plagued by territorial distinctions when expanding. Even as early as the 1800s, America

[3] *Id.* at 31.
[4] *Id.*
[5] *Id.* at 36.
[6] U.S. Const. art. I, § 8, cl. 10.
[7] *See* Raustiala, *supra* note 1, at 34.
[8] *Id.* at 239.
[9] *Id.*
[10] The Exchange v. McFaddon, 11 U.S. 116, 137 (1812).
[11] *The Apollon*, 22 U.S. 362, 370 (1824).
[12] Raustiala, *supra* note 1, at 37.

was facing tensions between its "global ambition and constitutional tradition".[13] But to expand globally, America had to be cognizant of international law. All its new territories became fully sovereign U.S. territory to other nations.[14] And once new territory was acquired, constitutional law came into play, meaning that the United States had to decide which rights applied in its newly acquired territories vis-à-vis its states. For instance, as the nation discovered all too well, an area where less constitutional rights apply allows the government to have more power and greater flexibility.[15] In other words, the fact that a territory was "unequivocally under U.S. control" did not automatically mean that the protections of U.S. law such as the guarantees of the U.S. Constitution were fully applicable.[16]

America's territorial expansion virtually eliminated the Indian tribes and soon created further internal territorial distinctions during the Civil War between the North and South, "slave" or "free".[17] Nevertheless, the nation's expansion after the Civil War displayed a "cautious approach" regarding other great foreign powers.[18] But simultaneously, the United States still managed to "engage more closely and forcefully in international relations" beginning in the years of the Reconstruction.[19] Further complicating matters at this point in this era was whether there were any exceptions to the applicability of U.S. law in foreign areas that are occupied by the U.S. military. In *Ex parte Milligan*, the Supreme Court held in 1866 that using military tribunals to try citizens during the Civil War, while civilian courts were still in operation, was unconstitutional.[20] But the applicability of the Constitution outside the territory of the United States was non-existent. In 1891, the Supreme Court in *In re Ross* held that "[t]he Constitution can have no operation in another country", meaning that U.S. nationals who are abroad cannot enjoy the same constitutional guarantees as U.S. nationals within the U.S. territory.[21] The Supreme Court adopted a "completely formalistic approach" to confine constitutional protections within the territory of the United States only.[22] Its outlook was cautionary, but nevertheless exhibited reference and care to international concerns.

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[13] *Id.* at 38.
[14] *Id.* at 44.
[15] *Id.* at 44, 46:

> From the vantage point of the outside world, the sovereignty of the United States enjoyed the greatest territorial ambit. But as an internal matter, American land was differentiated intraterritorially: there was a core where the Constitution and all laws applied fully, and there was a periphery where American law applied only partially.

[16] *Id.* at 32.
[17] *Id.* at 43.
[18] *Id.* at 27.
[19] *Id.* at 60.
[20] *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).
[21] *In re* Ross, 140 U.S. 453, 464 (1891).
[22] *See* Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 610.

Between 1901 and 1922, the Supreme Court decided several cases that dealt with the status of territories that the United States acquired in and after the Spanish-American War, known as the *Insular Cases*.[23] These series of cases are significant because they articulated the distinction between incorporated and unincorporated territories and the types of constitutional protections that are applicable. Specifically, Justice White's concurrence described in detail that incorporated territories that are entitled to statehood have full constitutional rights while unincorporated territories only have those constitutional rights that are deemed fundamental.[24] The *Insular Cases* "played a critical role in America's move toward empire" by giving the federal government more territorial control even though the residents of such "unincorporated" territories had less constitutional rights than those in the colonies.[25]

Therefore, whether the United States could regulate a certain area depended on the location of the territory. These principles were consistent with the judiciary's stance on acquired territories. The Marshall Court has generally held that land acquired at this time traditionally retained its pre-existing law and was not automatically subject to the provisions of the U.S. Constitution.[26] At this time, it was not necessary to apply U.S. law everywhere indiscriminately. The limited and restricted approach still allowed America to expand. For instance, the executive branch was given flexibility, which helped fuel American expansion and its growth as a global power.[27] In other words and in a peculiar way, the *Insular Cases* "enabled American empire by limiting the reach of the Constitution",[28] albeit in a cautious manner.

As America expanded westward, it gained territory but not overseas territory.[29] Theories of the empire were gaining in popularity. Not only was the empire regarded as "force for good", but America's expansion of islands, as opposed to contiguous expansions, was very attractive.[30] However, whether this expansion or empire of the United States – American imperialism – would prevail in the long-run, was uncertain.[31] But following World War I, the United States retracted from its imperialistic attitude.[32] The nation had begun "a reallocation of territorial possessions" and "a reallocation of

[23] De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. N.Y. & P.R.S.S. Co., 182 U.S. 392 (1901).
[24] *See Downes,* 182 U.S. at 311-12.
[25] RAUSTIALA, *supra* note 1, at 87.
[26] *Id.* at 50.
[27] *Id.* at 24.
[28] *Id.*
[29] *Id.* at 72.
[30] *Id.* at 73, 75.
[31] *Id.* at 81.
[32] *Id.* at 90.

power in world politics".[33] The federal government grew stronger as a force of power in the lives of the American people.[34] This trend continued into the progressive era, as discussed in the next Part.

But again, this era was not devoid of considerations of international issues such as foreign states and foreign law. In fact, one can easily assert that this early era exhibited the highest preoccupation with international concerns compared with the later and present-day eras. Its focus on sovereignty, territoriality, and respect for international comity illustrates this assertion. A nation's sovereign jurisdiction was regarded as "exclusive and congruent with demarcated political borders".[35] Additionally, as a young nation, the United States focused much attention on both international law and strict territorialism. Westphalian territoriality provided the United States with security. Specifically, the nation could not handle an invasion at this time from either Britain or France and was thus comforted by international law, which "denied one sovereign influence or control in another".[36]

The strict territorialism approach also enabled America to grow as a global power because it prevented foreign powers, such as the stronger European powers, from "threaten[ing] to intrude on the domestic domain of the United States".[37] Had this approach not been the norm, it would have been both easy and legitimate for other nations to exert their dominance over America. In a sense, America greatly relied on strict territorialism and sovereignty to grow as a young nation until it no longer needed this security to expand.

American constitutionalism during this era demonstrated that the U.S. Constitution applied to anyone as long as they were on U.S. soil.[38] The trickier question was whether the U.S. Constitution followed the people – U.S. national or not – into an area that was not U.S. territory.[39] Thus, the U.S. Constitution was largely citizen-blind, but not territorially-blind. Any extensions of U.S. law beyond these mandates would not be a cautious means of regulation and would certainly cause international interference, something America could not risk at the time. Post-war U.S. practices used and viewed extraterritoriality differently and relied on different forms, the forms of which "reflected the dramatic extent of postwar U.S. hegemony".[40] The following Part elaborates on this successive era.

[33] *Id.* at 93.
[34] *Id.*
[35] *Id.* at 32.
[36] *Id.* at 137.
[37] *Id.* at 35.
[38] *Id.* at 57.
[39] *Id.*
[40] *Id.* at 91.

1.2. PROGRESSIVE WITH INTERNATIONAL FOCUS (EARLY 1900s – 1950s)

Beginning in the twentieth century, the United States had a firm footing as an international power. The Federal Government gained strength and took on a great role at mending the nation from the repercussions of the Great Depression. The New Deal under the Roosevelt Administration led a series of economic and industrial reforms and laws aimed at repairing America from the financial crisis.[41] However, these reforms were effectively a means of "subjecting economic and social activity to government power".[42] The notion that U.S. extraterritoriality was limited to U.S. territory was "a relic from another era".[43] This era struck the most impact around the mid-twentieth century with the "decline of strict interpretations of Westphalian territoriality and the rise of effects-based extraterritorial jurisdiction".[44] The nation had well begun a new era of progressive development characterized by a fuelled economy and desire for power. The United States' economic progress provided the necessary financial assistance by significantly funding the progression of American power internationally.

While the reach of U.S. law had expanded, it was accompanied by debates as to whether it should protect actors abroad.[45] At the time, it was very common for constitutional protections to vary depending on location and this was well-known. The same held true for federal legislation.[46] Sometimes U.S. nationals enjoyed different rights abroad compared to the rights guaranteed had they been on U.S. territory. This "more unusual form of extraterritoriality" involved the "fictional *projection* of U.S. territory abroad" by which U.S. law – constitutional or federal – was applied abroad to "insulate American citizens from foreign law".[47] Overseas policing was attractive for a variety of reasons but began to take force as federal courts became "increasingly solicitous" of the Constitution's reach over defendants' rights.[48] This attentive and considerate stance of U.S. regulation easily involved considerations of international law and foreign impact.

Specifically, such practice began as a policy and nationalistic decision. The United States ought to protect its nationals when they travel outside the territory of the United States by not only guaranteeing the protections of its law to those U.S. nationals abroad, but also by protecting those U.S. nationals against the possible application of

[41] RAUSTIALA, supra note 1, at 93-94.
[42] *Id.* at 94.
[43] *Id.* at 95.
[44] *Id.* at 28.
[45] *Id.* at 29.
[46] *Id.* at 6.
[47] *Id.*
[48] *Id.* at 29.

foreign law. The nation had the power and monetary means to accomplish this task via extraterritorial applications. This regulatory tool of extraterritoriality was a method "to control and manage the interests of Western powers in foreign lands".[49] It was certainly powerful and viewed as a progressive form of international regulation. But it was also more than a policy decision. As the United States realized that it could not or did not want to conquer foreign land, it resorted to "extraterritoriality" to achieve the same result, albeit to promote trade and protect its citizens abroad.[50]

While U.S. extraterritoriality may seem like it would disrupt the potential for harmonization of any sort, it was used to create consistency in the international realm or, in other words, to "manage and minimize legal difference".[51] On this point, scholars have noted that "[t]he desire for territorial security thus encouraged extraterritorial regulation".[52] Extraterritoriality would have no purpose if the laws of nations were already harmonized on a legal matter. Its use allowed the United States to inject its laws into a foreign state's – usually a weaker foreign state – sovereign territory.[53] The extraterritoriality experiment by the United States was a great success story, especially during the progressive era. The United States used this regulatory tool to weed out and eliminate differences that would have been applied against its own nationals. Therefore, because of this, U.S. nationals abroad were protected from "the strange, the different, and the dangerous" laws of the foreign nation to which they visited.[54]

The proliferation of legislation passed in this era beginning in the 1930s with the U.S. federal securities laws gave the United States ample options and "extensive opportunities" to regulate foreign actors and foreign conduct.[55] The primary focus of such regulation began with protecting U.S. markets and the economy.[56] Thus, foreign cartels that took advantage of U.S. markets were regulable under U.S. law in order to protect the economy of the United States. This phenomenon is most noticeable in the area of antitrust regulation, which took a progressive approach to foreign regulation. In *United States v. Aluminum Company of America*, decided by the Second Circuit in 1945, Judge Learned Hand discussed foreign agreements in restraint of trade under the Sherman Antitrust Act, such as monopolies, and held that any state may regulate conduct and actors outside its borders that have consequences within.[57] About four years later, the

[49] *Id.* at 20.
[50] *Id.*
[51] *Id.* at 21.
[52] *Id.* at 184.
[53] *Id.* at 21.
[54] *Id.*
[55] *Id.* at 117.
[56] *Id.* at 94.
[57] United States v. Alcoa, 148 F.2d 416, 427 (2d Cir. 1945).

Supreme Court in *Foley Brothers v. Filardo* stressed on the importance of employing the *presumption against extraterritoriality* when adjudicating cases with cross-border elements.[58] Simply put, the presumption is a judicially-invented tool that holds that courts must start with the presumption in cross-border cases that "Congress is primarily concerned with domestic conditions".[59] Use of the presumption was to prevent the abuses of applying a law abroad when this was not the intent of Congress. Another purpose was to uphold international comity and avoid instances where international friction could occur with the extension of U.S. law abroad. Therefore, international considerations were also a priority in this era. Additionally, as this is a presumption, it is also rebuttable.[60] The most common means of rebutting the presumption is by congressional indication in the statute to the contrary, though the presumption is frequently overcome, either because Congress' intent is not clear or courts loosen the presumption's standards.[61] Therefore, as will also be shown in the later era, the presumption is highly malleable.

When a nation extends its laws abroad to regulate the conduct of another nation, an interesting issue arises as to whether that area of law should be harmonized or whether it is better for the dominant nation to utilize extraterritorial application of its laws. Harmonization is usually accomplished by negotiating international agreements.[62] Logically, extraterritoriality is not a multilaterally agreed upon practice. It is instead better understood as "an alternative to more familiar cooperative efforts".[63] This alternative entails unilateral application. Many in this era considered the use of extraterritoriality to be "not only wrong, but dangerous" as well as a direct repudiation of the doctrine of territoriality, which had long been promoted as the optimal means to avoid infringements upon other nations' sovereignty.[64] Foreign nations did not consent to its practice and often found it an infringement of their sovereignty. The United States used it to influence its Western allies.[65] But instead of consent to regulate based on treaty power, it was based on statutes[66] – statutes with explicit provisions or judicially-implied provisions primarily for effects-based extraterritorial applications. During the 1940s, effects-based extraterritoriality was "a rational response" as the costs of this practice decreased, and the benefits increased.[67]

[58] Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949).
[59] *Id.* at 285.
[60] *See* Veneziano, *A New Era in the Application of U.S. Securities Law Abroad, supra* note 1.
[61] Raustiala, *supra* note 1, at 99.
[62] *Id.* at 120.
[63] *Id.* at 121.
[64] *Id.*
[65] *Id.* at 23.
[66] *Id.*
[67] *Id.* at 124.

Despite the common acceptance of U.S. extraterritoriality, its practice was nevertheless debated as a matter of policy and ethics. For instance, the U.S. Constitution's applicability outside the territory of the United States was an unsettled and debated issue, which made international issues very much a consideration in this era. And it had been the U.S. Supreme Court that took on the role of determining the limits and reach of U.S. extraterritoriality. The Supreme Court confronted the issue of the constitutionality of habeas petitions for captured enemy combatants in U.S. territory in *Ex parte Quirin* in 1942.[68] The German saboteurs' trial in the United States had to constitutionally provide the right to habeas; the trickier question was the extraterritorial reach of habeas, a question that was confronted later.[69]

In 1950, the Supreme Court decided *Johnson v. Eisentrager* where it held that German prisoners of war held in a U.S. prison located in Germany could not challenge their detention in U.S. courts.[70] While a foreign nation's presence on U.S. territory gives U.S. courts the authority to extend constitutional protections over those foreign nationals, the claimants in *Eisentrager* were at no time physically present on the territory of the United States.[71] This case articulated a citizenship distinction when individuals are not within the territory of the United States. *Eisentrager* stands for the proposition that the U.S. Constitution asserts a strong "territorial nexus over one based on citizenship".[72]

Seven years later, the Supreme Court confronted the issue of constitutional protections with respect to U.S. nationals abroad. In *Reid v. Covert*, the issue was whether civilian wives of military men were entitled to the constitutional right of a jury trial as opposed to being tried for the murders of their husbands overseas in a U.S. military court.[73] The Supreme Court in *Reid* held in a plurality opinion that the U.S. Constitution fully applies to U.S. nationals living abroad in a foreign state.[74] Justice Black's plurality opinion notably "reject[ed] the idea that, when the United States acts against citizens abroad, it can do so free of the Bill of Rights".[75] *Reid* was a seminal holding because it was an outright "abandonment of the strict, formalistic approach".[76] But despite the differing approaches between this era and the last, an international focus was still adhered to in policy-making and judicial decision-making.

[68] *Ex parte Quirin*, 317 U.S. 1, 20-21 (1942).
[69] Raustiala, *supra* note 1, at 135.
[70] Johnson v. Eisentrager, 339 U.S. 763 (1950).
[71] *Id.* at 771.
[72] Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 613.
[73] Reid v. Covert, 354 U.S. 1, 3-5 (1957).
[74] *Id.* at 18-19.
[75] *Id.* at 5.
[76] Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 614.

While the U.S. Constitution was citizen-blind when individuals are on U.S. territory, this blindness disappears and creates categories when abroad. As we shall see later, the notion that wartime detainees could not rely on the U.S. Constitution's protections when abroad "helped propel the strategy of offshore detention pursued in Guantanamo Bay".[77] But for now, suffice to say that World War II and its aftermath changed the extraterritorial jurisprudence by the United States in that it allowed it to become a progressive world leader and gave it "both the confidence and power to regulate extraterritorially".[78]

1.3. INDISCRIMINATE WITHOUT INTERNATIONAL FOCUS (1950s – 1990s)

The United States used extraterritoriality and favored it extensively as a new tool to increase its political and economic interests.[79] Its use became widely acknowledged during the second half of the twentieth century and paved the way for its indiscriminate application – an application that lacked consideration for international issues and the impact on foreign states.[80] Soon, extraterritorial regulations by the United States no longer regulated solely the weaker states but began to regulate its "coequal sovereigns".[81] It was not long before the United States' use of extraterritorial regulation became accepted.[82] The United States pursued this tool regardless of the resulting international frictions that it foresaw and ultimately created. Scholars have contended that the reason for this change in attitude by the United States was the change in its "global power relations".[83] Specifically, the rise in the United States' political and military power allowed it to play a central role in regulating the international realm.[84]

The United States made its mark with the new form of extraterritorial regulation by justifying everything based on the authority to regulate situations which caused effects within the territory of the United States. Thus, regardless of where such unlawful acts originated, the United States asserted the authority to regulate it if it caused an effect within its territorial borders.[85] Additionally, the United States was also able to justify its extraterritorial applications by conduct-based extraterritoriality. Both the effects and conduct-based forms of exterritoriality comprise the territoriality basis of prescriptive jurisdiction under international law. There are five bases of prescriptive

[77] Raustiala, *supra* note 1, at 137-138.
[78] Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 612.
[79] Raustiala, *supra* note 1, at 35.
[80] *Id.* at 178.
[81] *Id.* at 95.
[82] *Id.* at 113.
[83] *Id.* at 121.
[84] *Id.*
[85] *Id.* at 95.

jurisdiction – the authority to prescribe a rule abroad – and they include territoriality (objective effects-based and subjective conduct-based), nationality, protective principle, passive personality, and universality principles.[86]

The use of the conduct and effects tests were over-inclusive.[87] Cross-border securities cases from this era serve as an excellent example of the indiscriminate use by the United States of extraterritoriality. Cases regarding cross-border securities law often used one form or another of the conduct and effects tests. For instance, the effects test found extraterritorial jurisdiction appropriate where foreign conduct injured U.S. investors.[88] The effects test was used in securities law cases such as where the unlawful conduct caused an adverse impact on the domestic capital markets in the United States.[89] The conduct test found extraterritorial jurisdiction where the conduct that occurred in the United States was an essential link in perpetrating the fraud or where substantial misrepresentations were made in the United States.[90] Decided on the same day and usually read together as one holding, *Bersch* and *Vencap* held that more than "merely preparatory" is needed to find U.S. extraterritorial jurisdiction,[91] while the "perpetration" of fraudulent conduct would be sufficient to find such extraterritorial jurisdiction.[92] In *SEC v. Kasser*, the Third Circuit articulated an approach that added the policy considerations involved in the case to determine that extraterritoriality necessary.[93] For instance, even though the fraud in *Kasser* had little to no direct impact on U.S. investors, the Third Circuit nevertheless applied the law extraterritorially because the defendant's activities were carried out in the United States.[94] *Kasser* was significant because the Third Circuit found extraterritorial application appropriate despite the "lack of domestic impact and little domestic conduct" present in the case.[95] Thus, the law applied abroad despite the international considerations that weighed against such a weak justification.

Therefore, it is easy to see the subjectivity and unrestrained approach in this era within the context of cross-border securities regulation and enforcement. Further, subsequent decisions in the cross-border securities context in the 1980s-90s resulted in "multiple judicially-created versions and standards of the conducts/effects tests".[96] The

[86] *See* Curtis A. Bradley, International Law in The U.S. Legal System 186 (2nd ed. 2015).
[87] Veneziano, *A New Era in the Application of U.S. Securities Law Abroad, supra* note 1, at 111.
[88] *See* Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968).
[89] *See* Des Brisay v. Goldfield Corp., 549 F.2d 133- 134 (9th Cir. 1977).
[90] *See* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1335, 1337 (2d Cir. 1972).
[91] *See* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 992 (2d Cir. 1975).
[92] *See* IIT v. Vencap Ltd., 519 F.2d 1001, 1018 (2d Cir. 1975).
[93] *See* SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977).
[94] *Id.* at 110.
[95] Veneziano, *A New Era in the Application of U.S. Securities Law Abroad, supra* note 1, at 124.
[96] *Id.* at 84.

Second Circuit stood as the "nationwide leader [in] securities litigation", as other circuit courts either adopted the approach used by the Second Circuit or formulated different standards.[97]

Sometimes, to avoid being encompassed by U.S. federal law or, more likely at this time, constitutional law, U.S. enforcement agents would move offshore to give themselves more flexibility.[98] This was common when referring to the mandates of the U.S. Constitution, which was more territorially-bound compared to the reach of federal statutes. Federal statutes, on the other hand, exhibited more of an extended geographic reach, as demonstrated by the cross-border securities law cases noted above. The United States could police foreign conduct and foreign actors who affected its markets, nationals, and other domestic interests via federal legislation.[99] During the Cold War, the nation's quest for self-determination increased its efforts to become a global superpower and developed the attitude that self-policing – inclusion policing that crossed international borders – was necessary.[100] This increase in the geographic scope of the U.S. was also controversial since it sometimes gave criminal suspect's legal protections outside of U.S. territory.[101]

Globalization made it necessary for the United States to enact more legislation and for federal agencies to enforce and police actors falling within the legislation's regulatory reach. Many in this era believed that to fail to apply a nation's regulatory rules outside U.S. territory "would weaken or even undermine the regulatory efforts taking place at home".[102] Thus, extraterritorial regulation was inevitable. After all, how could goods and services cross international borders at an increased rate – both legally and illegally – when regulations could not?[103]

Globalization and technology not only mandated increased international regulation but also facilitated innovative ways at circumventing regulatory requirements and engaging in new unlawful enterprises. But despite the significant impact of technology and globalization upon the United States' excessive use of extraterritoriality, the United States itself showed very little concern for international law and the rights of foreign states and foreign nationals. The rise of globalization after the war also brought with it an increase in international commerce.[104] This was beneficial for the United

[97] *Id.* at 125.
[98] Raustiala, *supra* note 1, at 159.
[99] *Id.* at 22.
[100] *Id.* at 21.
[101] *Id.* at 155.
[102] *Id.* at 177-78.
[103] *Id.* at 159.
[104] *Id.* at 179.

States and continued to fuel its international expansion and economic growth. But there was, and continues to be, a dark side of globalization. With the increase in international commerce came the increase in international crime.[105] For instance, international crime took precedence in the 1970s and necessitated foreign policing.[106] While a nation would normally be expected to cooperate with other nations to combat novel issues of transnational crime, unilateral options were more popular for the United States especially where "foreign law was more lax than, or simply different from, American law".[107] Thus, international issues became weak topics of consideration for the United States in its decision-making, even – if not especially – when tackling regulation and crime of an international character.

This was soon labelled "American hegemony" and was characterized by "a marked willingness to project power and law, sometimes unilaterally, within the territorial borders of other sovereign states to better control and deter transboundary threats".[108] Extraterritoriality in this era was "decidedly controversial" and created severe friction between the United States and its closest allies.[109] In a sense, the rise of the United States' global power and the increase in trade created a globalization movement that emphasized an extreme form of competitiveness over cooperativeness in the international realm. And it has been the United States, through its indiscriminate use of extraterritoriality, that has succeeded in this competitive environment. In short, "extraterritorial applications create[d] the golden ticket for U.S. dominance in the international sphere".[110]

1.4. WITHDRAWAL WITHOUT INTERNATIONAL FOCUS (1990s – 2010)

Despite the continued use of extraterritorial regulation, there has been "a moderate cut-back and cautionary approach" taken with respect to the extensions of U.S. law extraterritorially.[111] More generally, the United States in this era continued in its path towards world dominance but did so in a peculiar way that involved the withdrawal from international law issues, a steep cut-back in extraterritorial applications of U.S. law, and the adoption of formalistic standards in certain areas.

[105] *Id.*
[106] *Id.* at 162.
[107] *Id.* at 179.
[108] *Id.* at 180.
[109] *Id.* at 115.
[110] *See* Veneziano, *Studying the Hegemony of the Extraterritoriality of U.S. Securities Laws, supra* note 1, at 349.
[111] *Id.*

The United States in this era exhibited a curious behavior of lost interest in negotiating and concluding international agreements.[112] International withdrawal was high and extraterritoriality seemed to lose force – if only briefly, though inconsistently. The presumption against extraterritoriality was revived during this era to lessen the unintended extensions of U.S. law and, therefore, limit extraterritorial applications.[113] The most prominent case that articulated that revitalization was *EEOC v. Arabian American Oil Company* [hereinafter *Aramco*], decided in 1991.[114] In *Aramco*, the Supreme Court made clear that the presumption against extraterritoriality is a longstanding principle of American law and that Congress is primarily concerned with domestic conditions when it legislates.[115] Had Congress desired to include a provision for extraterritorial application, it should have been placed inside the statute; if Congress still wishes to do so, it can amend the statute accordingly.[116] Such an amendment in this era needed a clear statement of the congressional intent to apply that provision extraterritorially; if not, the presumption cannot, and will not, be overcome.[117]

Statutory interpretation has been very inconsistent where the Court has been faced with cross-border claims. Consider the extraterritorial application of the Sherman Act. In 1993, the Supreme Court in *Hartford Fire Insurance Company v. California*, held that the Sherman Act applies extraterritorially to foreign conduct and is not subject to the presumption,[118] but then held in 2004 in *F. Hoffmann-La Roche Ltd v. Empagran* that the Sherman Act does not extend to independent foreign harm.[119] Thus, "judges have sometimes applied a strict presumption only to render it completely meaningless in other similar cases".[120] This is harmful to foreign nations and does not involve an adequate and thorough consideration of international law issues.

While the extended reach of U.S. statutory provisions – or, shall we say, the reduced extraterritorial applications of statutory provisions – was an important part of this era, issues surrounding the geographic reach of constitutional provisions proved to be an even bigger feature in this era. The prior era saw expanded uses of U.S. extraterritoriality. But after the Supreme Court decided an opinion in 1990 – *United States v. Verdugo-Urquidez* – that significantly curtailed the reach of the Fourth Amendment to

[112] *Id.* at 350.
[113] *Id.* at 347.
[114] *See* EEOC v. Aramco, 499 U.S. 244 (1991).
[115] *See Aramco,* 499 U.S. at 248; *see also* Veneziano, *A New Era in the Application of U.S. Securities Law Abroad, supra* note 1, at 111.
[116] *See* Veneziano, *A New Era in the Application of U.S. Securities Law Abroad, supra* note 1, at 111.
[117] *Id.*
[118] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796, 814, 818-20 (1993).
[119] *SeeF.* Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155, 159 (2004).
[120] *See* Veneziano, *Studying the Hegemony of the Extraterritoriality of U.S. Securities Laws, supra* note 1, at 348.

foreign criminals searched outside the United States by U.S. agents,[121] America entered a new era. This new era of "traditional territoriality" and withdrawal from the international realm was "welcomed by the executive branch".[122] While it was certainly commonplace for U.S. law to regulate not only the weak states but also America's strong, foreign allies, it was also understood that the reach of the U.S. Constitution was confined within U.S. territory. The reason for this was that the United States desired "freedom from constitutional restraint" and "flexibility" when dealing with sensitive issues.[123] Such a stance ignored the concerns of other international powers. As two prominent examples, consider the war on terror and the U.S.-Mexican border.

As for the war on terror, the Supreme Court has decided several cases during this era that involved a retreat to territorialism and a blind-eye towards international law. The 9/11 terrorist attacks and conflicts in Iraq and Afghanistan "have led to a range of territorial quandaries" such as whether U.S. law applies to military companies outside the United States but working for the United States or, most notably, whether U.S. law applies to the foreign detainees at Guantanamo Bay.[124] Guantanamo Bay was chosen as the site to hold prisoners of war because it was thought to be "beyond the reach of the federal courts".[125] But the policy decisions, ethics, and constitutionality surrounding Guantanamo made it a very tricky issue, though ripe for judicial review. Cases shortly after the turn of the century centered on the "executive authority to designate individuals as enemy combatants and hold them without counsel or judicial review".[126] Cases in this era such as *Hamdi v. Rumsfeld*,[127] *Rasul v. Bush*,[128] *Hamdan v. Rumsfeld*,[129] and *Boumediene v. Bush*[130] are "notorious for their rejection not only of absolute territorialism, but also of the Executive's claim of power to detain these suspects without certain Constitutional restraints".[131]

In 2004, the Supreme Court in *Rasul* held that the federal habeas statute was applicable to detainees being held at Guantanamo.[132] After *Rasul*, Congress enacted the Detainee Treatment Act of 2005 [hereinafter DTA], which stripped the federal courts of jurisdiction from hearing habeas petitions from detainees at Guantanamo.[133] In *Rasul*,

[121] *See* RAUSTIALA, *supra* note 1, at 189.
[122] *Id.*
[123] *Id.* at 189-90.
[124] *Id.* at 29.
[125] *Id.*
[126] *See* Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 618.
[127] *See generally* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
[128] *See generally* Rasul v. Bush, 542 U.S. 466 (2004).
[129] *See generally* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
[130] *See generally* Boumediene v. Bush, 553 U.S. 723 (2008).
[131] Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 618.
[132] *See Bush,* 542 U.S. at 484.
[133] *See* Pub. L. No. 109-148, §§ 1001–06, 119 Stat 2680 (2005).

the Court was able to find a "very narrow" reasoning for its holding by distinguishing the constitutional appeal right from the statutory right and, thereby, avoided the "thorny constitutional questions".[134] The takeaway from *Rasul* at this point was that the statute applied to citizens and aliens – including foreign prison of war detainees; whether there was a constitutional right possessed by the individual detainees at Guantanamo was "carefully avoided" by the Court and unsettled after *Rasul*.[135] As a last point, *Rasul* gave the executive exactly what it wanted: the power to have freedom and discretion over the detainees at Guantanamo without constitutional restraint.[136]

The Supreme Court decided *Hamdi* also in 2004; Hamdi was a U.S. national who was alleged to be an enemy combatant.[137] The Court's decision in *Hamdi*, also decided in 2004, was significant because it stood for the proposition that "threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator".[138] Two years later, the Supreme Court in *Hamdan* had to decide whether the military commission convened by the President was valid under congressional legislation and the laws of war as well as whether the procedures used to try Hamdan – a Yemeni national – violated international and martial law.[139] The Supreme Court held that the DTA of 2005 was inapplicable to cases that were pending at the time of the statute's enactment and that the procedures used by the military commission to try Hamdan violated the both the Uniform Code of Military Justice and Common Article 3 of the Third Geneva Conventions.[140] Again in response to a Supreme Court holding that Congress disfavored, Congress passed the Military Commission Act in 2006; Section 7 of this Act stripped the federal courts of jurisdiction over the pending habeas petitions by those individuals determined by the United States to be enemy combatants.[141]

These cases came to a peak in 2008 with the Supreme Court opinion, *Boumediene v. Bush*. The issue for the Court in *Boumediene* was whether the Suspension Clause applied to the detainees at Guantanamo.[142] The Supreme Court held that the detainees held at Guantanamo Bay have the constitutional right to challenge their detentions with writs for habeas in the U.S. district courts.[143] *Boumediene* was important because it meant that

[134] Raustiala, *supra* note 1, at 202.
[135] *Id.*
[136] *Id.* at 204.
[137] *See Hamdi,* 542 U.S. at 510.
[138] *Id.* at 535.
[139] *See* Hamdan v. Rumsfeld, 548 U.S. 567 (2006).
[140] *Id.* at 575–76; 613, 635.
[141] *See* 28 U.S.C. § 2241 (2008).
[142] *See* Boumediene v. Bush, 553 U.S. 732 (2008).
[143] *Id.* at 793, 795.

the U.S. government "was no longer exempt from judicial scrutiny"[144] and showed in many ways how the U.S. judiciary was "quite uncomfortable with the idea that the government can slip its constitutional fetters by choosing the location of detention or . . . us[e] international agreements of a dubious nature to allocate sovereignty".[145] What we began to see with these cases is a shift from an expanded reach of U.S. law to "a more domestic orientation" under the purpose of national security concerns.[146] As Kal Raustiala rightfully asserted, "[i]n a world in which suspects, soldiers, and special agents can be flown around the world in a matter of hours, the idea that legal rights would still be tethered to territory is likely to strike at least some members of the federal judiciary as highly problematic".[147]

The majority placed great emphasis on the fact that there is a difference between formal sovereignty and practical sovereignty. The majority in *Boumediene* noted that sovereignty was not a clear-cut status, and that it was possible for territory to be under one nation's formal sovereignty and under another nation's practical sovereignty.[148] Therefore, using a functional approach, the Court determined that Guantanamo could not in any sense be considered "abroad"; this made it easy for the Court to extend habeas to the area.[149] And it was the opinion here in *Boumediene* where the Supreme Court first held that a constitutional right was applicable to a foreign national held outside the United States.[150]

As for issues regarding the U.S.-Mexican border, it is important to note that extraterritorial policing was on the rise beginning before the turn of the twenty-first century. Focus at this time was on "the transnational movement of illegal drugs, migrants, and money".[151] Such scrutiny and context led to the arrest of Verdugo-Urquidez, a Mexican drug lord who trafficked drugs into the United States.[152] *United States v. Verdugo-Urquidez* concerned the extraterritorial application of the Fourth Amendment's prohibition on unreasonable searches and seizures.[153] In *Verdugo-Urquidez*, a Mexican national who was prosecuted for narcotics-trafficking into the United States and participating in murdering a Drug Enforcement Administration [hereinafter DEA] agent was seized by Mexican police and extradited to the United States.[154] DEA agents

[144] Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 623.
[145] RAUSTIALA, *supra* note 1, at 235.
[146] *See* Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 610.
[147] RAUSTIALA, *supra* note 1, at 221.
[148] *Id.* at 215.
[149] *Id.* at 216.
[150] *Id.* at 218.
[151] *Id.* at 168.
[152] *Id.*
[153] *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).
[154] *Id.* at 262–63.

searched his home without a warrant the next day and confiscated records that implicated him and his smuggling business.[155] The Supreme Court held that this was not a violation of the prohibition against warrantless searches and seizures under the Fourth Amendment because this constitutional provision only applies to "the people" of the United States and does not operate to limit the conduct of the federal government when it acts "against aliens outside of the United States territory".[156] What is interesting about this case is that Verdugo-Urquidez was on U.S. soil when his home was searched, yet the Supreme Court did not provide him the protections of the U.S. Constitution. This was hard to rationalize with the common notion that everyone within the territory of the United States – even a foreign national – has constitutional rights. The Court obviously placed a much greater emphasis on citizenship in this case, but justified its decision by noting that the Fourth Amendment does not constrain U.S. government agents when they act abroad. Because the search occurred in Mexico, it did not violate the Fourth Amendment.

Thus, the focus was on the U.S. actors and not the foreign national inside the United States. Domestic issues clearly played a greater role in this case. *Verdugo-Urquidez* is also heavily focused on territorialism. Kal Raustiala describes this case as "a return to older understandings of territoriality"[157] – one that is more formalistic and internationally withdrawn. Some have promoted *Verdugo-Urquidez* as a proper response to a perceived trend of "globalizing constitutional rights".[158] Others decried it as "an anachronistic retrenchment" – a rejection of a liberal reasoning of the Bill of Rights and return of the old and outdated territorialism that has been slowly fading throughout the twentieth century.[159] Kal Raustiala notes that extraterritoriality in this era "was increasingly common, though not always consistent".[160]

In addition to the Fourth Amendment, the Fifth Amendment's extraterritorial reach has also been interpreted very formalistically by the Court.[161] In 2017, the Court decided *Hernandez v. Mesa*.[162] *Hernandez* involved the extraterritorial application of the Fourth and Fifth Amendments. The facts of this case involve the fatal shooting of Sergio Adrian Hernandez Guereca in 2010 by a Customs and Border Protection agent.[163] The U.S. agent was on U.S. soil and Hernandez was on Mexican soil.[164] The Supreme Court in

[155] *Id.*
[156] *Id.* at 265–66.
[157] RAUSTIALA, *supra* note 1, at 172.
[158] *Id.* at 177.
[159] *Id.*
[160] *Id.* at 179.
[161] *See* Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 615.
[162] *See* Hernandez v. Mesa, 137 S. Ct. 2003 (2017).
[163] *Id.* at 2004–05.
[164] *Id.*

this case held that the government had qualified immunity under the Fifth Amendment.[165] For the Fourth Amendment, the Court avoided determining the extent of extraterritorial application and instead noted that such a question is "sensitive and may have consequences that are far reaching".[166] Interestingly, the Supreme Court granted certiorari again on the facts of this case and has recently heard oral arguments on November 12, 2019 over the issue of whether federal courts can recognize a damage claim under *Bivens*[167] when the plaintiffs plausibly allege that a federal enforcement officer violated the Fourth And Fifth Amendments' rights with no other alternative.[168]

Accompanying the important characteristics of this era such as the reinvigoration of the presumption, Guantanamo, and the U.S.-Mexican border, the United States displayed a markedly potent aversion from international law. For instance, the Bush Administration's use of Guantanamo as a place beyond the reach of U.S. law stood as "a symbol of a larger American disregard for international law".[169] Despite the administration's arguments that this was Cuban and not American territory, the international community nevertheless recognized Guantanamo Bay as "American territory". It was not hard for the Court in *Boumediene* to hold that certain constitutional rights cannot be denied there.[170]

Upon reflection, it may seem difficult to articulate how to best proceed when dealing with cases of either constitutional or statutory extraterritorial applications. Regarding constitutional extensions, I had previously urged for a combination of the formalist approach from *Verdugo-Urquidez* and the functional approach of *Boumediene* to form a workable framework that "supports consistency in the application of the Constitution abroad, provides a clear standard for lower courts to follow, gives the Executive its needed flexibility in dealing with national security matters, respects foreign states' sovereignty by avoiding unnecessary infringements, and affords foreign claimants the fair administration of certain constitutional guarantees".[171] Nevertheless, whether America ought to extend the protections of its Constitution was and is ultimately based on the propriety for extending constitutional protections to foreign nationals outside of U.S. territory.[172] At this time, there was both tension and confusion as to U.S. territoriality and, as a result, the judiciary, namely the Supreme Court, has

[165] *Id.* at 2007.
[166] *Id.*
[167] *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).
[168] *See* Hernandez v. Mesa, 2019 U.S. LEXIS 3691.
[169] Raustiala, *supra* note 1, at 190.
[170] *Id.* at 192.
[171] *See* Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 640.
[172] *Id.* at 629.

been hesitant to make sweeping holdings; hence, "strict territoriality remained attractive".[173]

The question of the Constitution's applicability and continued viability abroad will remain a pressing issue. As I have argued previously, the approach should ultimately turn on fairness and practicality but will depend in large part on an individual's deep-rooted opinions on the desirability of an expanded Constitution:

> If one views the Constitution as a rigid document impervious to change, then the United States will be forced to justify its decisions with rationales that are outdated and ill-suited for a modern world . . . . However, if one views the Constitution as a living document that changes with every judicial opinion, every president, or every major political era, then its vitality and strength as a governing document of stability will be severely undermined.[174]

1.5. ARBITRARY WITHOUT INTERNATIONAL FOCUS (2010 – PRESENT)

"The United States does not occupy the same position it did over 200 years ago"; it is now a global leader and easily asserts its dominance "economically, politically, and socially".[175] Under present-day realities of U.S. law and the extraterritorial applications thereof, territoriality is not rooted in international law, but is instead rooted in the notion that "Congress is primarily concerned with domestic conditions".[176] Within the first several years of the turn of the century, the United States still seemed to struggle "between its constitutional traditions and its global ambitions".[177] The increase by the United States in moving sensitive activities offshore demonstrates first-hand how manipulable territoriality is to a nation's advantage.[178] Never has this been so apparent than with the United States' behavior in Guantanamo, as the prior Part has shown. To this day, one cannot tell for certain where the United States' constitutional protections and territorial jurisdiction begins and ends, as its "constitutional and jurisdictional borders remain complex, messy, and contingent".[179] Such an arbitrary approach to regulating foreign conduct is characteristic of this era along with continued instances of disregarding international considerations.

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[173] RAUSTIALA, *supra* note 1, at 185.
[174] Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 636-637.
[175] *Id.* at 635.
[176] *See* EEOC v. Aramco, 499 U.S. at 262 (quoting *Filardo,* 336 U.S. at 285).
[177] *See* RAUSTIALA, *supra* note 1, at 29.
[178] *See id.* at 225.
[179] *Id.* at 224.

One of the most monumental decisions of this era was *Morrison v. National Australia Bank*. In *Morrison*, decided in 2010, a class action lawsuit was filed by foreign investors against National Australia Bank alleging violations of the antifraud provisions of the Exchange Act in connection with shares purchased on foreign exchanges.[180] The issue was "whether § 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges".[181] The Supreme Court held in an opinion by Justice Scalia that the antifraud provisions of the Exchange Act of 1934 do not apply extraterritorially. Specifically, the Court held that the presumption against extraterritoriality will be applied in all cases to preserve "a stable background against which Congress can legislate with predictable effects".[182] Because there is no affirmative indication in the Exchange Act that the antifraud provisions apply extraterritorially, the Court held that "it does not".[183] Petitioners still claimed domestic application because National Australia Bank's subsidiary in Florida, HomeSide, engaged in the deceptive conduct of manipulating HomeSide's financial records.[184] The Court in *Morrison* held that courts must look to the "focus" of the statute in question to ascertain if extraterritorial application is appropriate. Under the facts of *Morrison*, the Court determined 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".[185] Thus, the transactional test was articulated, whereby the Exchange Act applies only to "securities listed on domestic exchanges, and domestic transactions in other securities".[186]

Morrison is significant in a broader sense in that it foreclosed the possibility of foreign-cubed transactions being litigated in U.S. courts – a situation that arises when a foreign plaintiff(s) (or foreign class action suit) sues a foreign defendant(s) in connection with alleged unlawful foreign conduct. Nevertheless, *Morrison* created a situation where "foreign transactions by both domestic and foreign investors will fall outside the protections of *Morrison*".[187] In other words, a U.S. investor will not be able to rely on U.S. law when they transact on a foreign exchange regardless of where they concluded the transaction or where the harm was ultimately felt. Thus, *Morrison*'s protections "are

[180] *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 250-51 (2010).
[181] *Id.*
[182] *Id.* at 261.
[183] *Id.* at 265.
[184] *Id.* at 266.
[185] *Id.*
[186] *Id.* at 267.
[187] Veneziano, *Studying the Hegemony of the Extraterritoriality of U.S. Securities Laws, supra* note 1, at 349.

wholly independent of the degree of harmful effects, amount of conduct in the United States, and the citizenship of the investor".[188]

In 2013, the Supreme Court applied the presumption against extraterritoriality to a jurisdictional statute, the Alien Tort Statute 28 U.S.C. § 1350 (1789) [hereinafter ATS]. Chief Justice Roberts for the Court held that even though the presumption is usually applied to discern whether a statute applies abroad, courts are also similarly constrained when considering causes of action under the ATS.[189] The standard here articulated by the Court was 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".[190] It was a very awkward holding when the Court applied the presumption to a clear and unambiguously jurisdictional statute. This is significant because the presumption againstextraterritoriality is a judicially-invented tool that regulates and safeguards against unintended extraterritorial applications only with respect to conduct-regulating statutes. Jurisdictional statutes are not meant to be covered here.

Implications for the future include the "continued manipulation of the laws" by various actors including the courts, the "increase in inconsistent litigation," and the "potential consequences on the state of Canada".[191] But the arbitrariness of the extensions of U.S. law did not stop there. In 2016, the Supreme Court decided *RJR Nabisco v. European Community*.[192] Here, RJR Nabisco allegedly participated in a "global money-laundering scheme" which was "orchestrated from their U.S. headquarters".[193] The complaint alleged a pattern of racketeering with RJR Nabisco as the Racketeer Influenced and Corrupt Organizations (hereinafter RICO) "enterprise".[194] All provisions in sections §1962(a)-(d) of RICO were alleged to have been violated by RJR Nabisco and resulted in harm to the European Community.[195] After a long procedural history that spanned about 16 years, the Supreme Court granted certiorari.[196] The Court held unanimously that the presumption against extraterritoriality had been overcome regarding the substantive provisions of § 1962 only if "each of those offenses violates a predicate statute that is itself extraterritorial"; however, the Court held 4-3 that the

[188] *Id.*
[189] *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013).
[190] *Id.* at 124-25.
[191] Veneziano, *Studying the Hegemony of the Extraterritoriality of U.S. Securities Laws, supra* note 1, at 358.
[192] *See* RJR Nabisco, Inc. v. European Community, 195 L. Ed. 2d 476 (2016).
[193] *Id.* at 489, 505.
[194] *Id.* at 490.
[195] *Id.*
[196] *Id.* at 489.

presumption was not overcome regarding the private right of action in § 1964(c) unless the private civil claimant proves "a *domestic* injury to its business or property".[197]

RJR Nabisco illustrates the severe confusion within the branches of the U.S. government when dealing with cases with a cross-border character. The RICO statute explicitly mentions that it reaches "interstate or *foreign* commerce"; how could the judiciary not see that Congress explicitly provided for extraterritorial application in this statute? Justice Ginsburg – who dissented in *RJR Nabisco* – stated that "[a]ll defendants are U.S. corporations, headquartered in the United States, charged with a pattern of racketeering activity directed and managed from the United States, involving conduct occurring in the United States"; thus, this case, Ginsburg asserts, "has the United States written all over it".[198] This was certainly far from a foreign-cubed transaction. Instead, the Supreme Court held that the presumption against extraterritoriality was not overcome with respect to the private right of action. It should have never gotten to this point because the presumption should never come into play when congressional intent is clear as to the geographic reach of the statute, as it was in RICO. But the Court in *RJR Nabisco* applied the presumption nevertheless to an express legislative private cause of action. This opinion is devoid of the consequences to international issues and the impact to foreign states. Nevertheless, *RJR Nabisco* is the law of the land now and lower courts are compelled to require those private civil RICO claimants in its jurisdiction to satisfy the domestic injury requirement first. As I have previously contended, this opinion and the lack of congressional action thereafter "impl[y] that the courts may have more power when deciding whether to apply a provision extraterritorially, even more so than congressional power".[199] The reason for this could simply be because congressional amendments are very unlikely in this modern era.

The United States has become increasingly hostile to international considerations. This is demonstrated in the *Morrison* and *RJR Nabisco* holdings. *Morrison*'s holding, for example, contains very few references to international law and comity.[200] Matters have gotten to the point where infringements between the political branches are out of control and repeatedly violate the competence of one another. In a previous commentary, I have argued that questions of extraterritorial application in congressional statutes that are silent as to their geographic reach should be political questions, and therefore, reserved to the executive and legislature to avoid these infringements.[201] As this is unlikely to happen, all that can be known for certain is that

[197] *Id.* at 495, 498.
[198] *Id.* at 508.
[199] *See* Veneziano, *Studying the Hegemony of the Extraterritoriality of U.S. Securities Laws, supra* note 1, at 347.
[200] *See* Veneziano, *A New Era in the Application of U.S. Securities Law Abroad, supra* note 1, at 111.
[201] *See generally* Alina Veneziano, *Should Extraterritoriality in the Midst of Congressional Silence Be a Political Question?*, 51 N.Y.U. J. Int'l L. & Pol. 637 (2019).

without further guidance, judicial discretion empowers the courts "to articulate its own standards and tests for which to decide cases involving cross-border claims".[202] And this trend is likely to continue.

2. SIGNIFICANCE OF THE ERA-CLASSIFICATIONS

The eras classifications teach us about the history of the United States, namely, what the power of one nation can do to the international world. This is not to say that power is a bad thing, but when a nation uses such power to become an international regulator who can craft its rules in a way that apply to actors abroad but not to its own federal agents abroad, then something unjust arises: hegemonic dominance. The United States was the underdog to become a world leader. The United States shocked the world as it swiftly evolved into an international leader in record time. But as it grew from its weak and newly formed position, it was accompanied by the growth of technology, globalization, and changes in global policy-making, politics, war, and mobility. All these factors dramatically influenced the way the United States utilized extraterritoriality to regulate foreign conduct and achieve its objectives.[203]

Throughout U.S. history, for example, extraterritoriality has appeared in many different forms.[204] For instance, what once began as an attempt to conquer more land, soon developed into cooperation efforts, and finally to bitter withdrawal from the international realm.[205] What these different purposes of extraterritorial applications had in common was "efforts to manage, minimize, or sometimes capitalize on legal differences".[206] The international order has decreased the barriers to using this regulatory tool and has also increased the incentives of the United States in using it.[207]

One must consider issues of extraterritoriality, including congressional intent about the geographic reach of statutes, the presumption against extraterritoriality, effects and conduct-based extraterritoriality; one must also consider intraterritoriality, including the domestic context used to facilitate growth such as federalism.[208] Kal Raustiala argues that we cannot understand the history and implications of the United

[202] Veneziano, *Studying the Hegemony of the Extraterritoriality of U.S. Securities Laws, supra* note 1, at 357.
[203] *See* RAUSTIALA, *supra* note 1, at 7.
[204] *See generally id.* at 6.
[205] *Id.* at 7.
[206] *Id.*
[207] *Id.* at 238-39.
[208] *Id.* at 6-7.

States' presence without understanding the international and domestic circumstances behind every move the United States makes.[209] For instance, extraterritoriality and intraterritoriality are both domestic tools and national features of the United States. Raustiala asserts, "we cannot understand the evolution of extraterritoriality and intraterritoriality in U.S. law without understanding the broader international context".[210]

How can one best summarize the use of extraterritoriality by the United States? Raustiala articulates that these concepts within the United States "cannot be understood absent a global context".[211] He argues in his book that high levels of interdependence before World War I coincided with strict territoriality and the increase in effects-based regulation coincided with less economic interdependence.[212] My thesis here presents a similar inverse relationship: the United States placed more consideration and emphasis on international relations, international law, and international politics when its use of extraterritoriality was relatively low or in its infancy stages. As the United States grew in power and utilized extraterritorial applications more extensively, it relied upon and considered these international concerns much less frequently. "International politics has deeply shaped not only domestic politics, but also domestic law", Kal Raustiala asserts,[213] but somewhere in the middle, it must be added, there lies extraterritoriality.

The territoriality of the United States can be explained by the actions and experiences of other major foreign powers.[214] "[T]erritoriality has neither been static nor treated as a given".[215] There is no right or wrong way of handling territoriality. It changes based on the political, social, and economic exigencies of each successive era. It is also affected by the ideology of the individuals leading the political branches and the judiciary – the Supreme Court – of the United States. Whether international considerations are heeded depends on the context of each era. Sometimes, too, the domestic internal struggles can affect the United States' use of extraterritoriality, as demonstrated by the war on terror cases and issues with the U.S.-Mexican border from the Withdrawal Era. Therefore, more often than not – and this is becoming truer today – "before harmony within the international sphere can take place, the U.S. branches must work together to achieve domestic harmony".[216]

[209] *Id.* at 6.
[210] *Id.* at 7.
[211] *Id.* at 241.
[212] *Id.* at 239.
[213] *Id.* at 241.
[214] *Id.*
[215] *Id.* at 7.
[216] Veneziano, *Studying the Hegemony of the Extraterritoriality of U.S. Securities Laws, supra* note 1, at 347.

CONCLUSION

This article presented a series of eras that have characterized the practice of the United States in utilizing the regulatory tool, extraterritoriality. Throughout each era, we have seen how the United States grew as a world power and, simultaneously, changed the way it conducted internal and global affairs. Specifically, the United States no longer had the need to rely on strict notions of sovereignty and territoriality as it gained more power and stability in the international realm. Further, to advance its own goals, the United States over time has found it less necessary to consider foreign impact and evaluate international law considerations during its policy making and judicial decision-making.

The desire for economic independence and stability is not bad nor does it automatically cast the nation as a global dominator. But there comes a point where the greed for power becomes hegemony, and this is a thin line that the United States tends to straddle. What makes this trend dangerous for the United States' use of the regulatory tool, extraterritoriality, is its consistent denial to consider international comity and foreign friction possibilities in a world that is becoming increasingly globalized. To better align with the realities of today's interconnected world, the United States ought to return to an era where it fosters its economic and social progression but does so with a consideration of international-related concerns.

While this article has presented the facts of U.S. history along with supporting assertions of U.S. behavior, there is much research to be done to more fully understand the consequences of U.S. extraterritoriality and implications for the future. It is the hope that this article has laid a solid foundation for further research on this or subsidiary topics such as whether such use of extraterritoriality is limited to the United States, what this means for the future, whether the United States will enter another era soon (e.g., with the 2020 election), or information on what was happening to the major foreign powers in each successive era. Additional research into the law and history would reveal these responses.