

Maurer School of Law: Indiana University

Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

2011

Symposium Introduction – Beyond Borders: Extraterritoriality in American Law

Austen L. Parrish

Indiana University Maurer School of Law, austparr@indiana.edu

Follow this and additional works at: <https://www.repository.law.indiana.edu/facpub>



Part of the [Jurisdiction Commons](#), and the [Transnational Law Commons](#)

Recommended Citation

Parrish, Austen L., "Symposium Introduction – Beyond Borders: Extraterritoriality in American Law" (2011). *Articles by Maurer Faculty*. 888.

<https://www.repository.law.indiana.edu/facpub/888>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact kdcogswe@indiana.edu.



LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

SYMPOSIUM

INTRODUCTION

BEYOND BORDERS: EXTRATERRITORIALITY IN AMERICAN LAW

Austen L. Parrish*

When should U.S. laws stop at the border? On November 12, 2010, Southwestern Law School and the *Southwestern Law Review* held a one-day symposium on the topic of extraterritoriality in American law. Its purpose was to explore the history, doctrine, and current issues related to American extraterritoriality in both the regulatory and constitutional law contexts. The timing was fortunate. Earlier in the year, the U.S. Supreme Court had decided *Morrison v. National Australia Bank*¹—a case characterized by one of the panelists as “the most important decision construing the geographic scope of a statute in almost twenty years.”²

The topic of extraterritoriality is an important one. A number of recent high-profile cases have involved disputes over the geographic reach of American laws.³ From the contentious uses of universal jurisdiction in the human rights context, to debates over the extent to which the U.S. Constitution applies outside U.S. territory, to the application of U.S. regulation abroad, extraterritorial transnational litigation has gripped headlines and remained at the center of heated controversies.⁴ Domestic

* Professor of Law and Vice Dean, Southwestern Law School.

1. 130 S. Ct. 2869 (2010).

2. William S. Dodge, *Morrison's Effects Test*, 40 S.W. L. REV. 687, 687 (2011).

3. See, e.g., *Morrison*, 130 S. Ct. 2869; *Boumediene v. Bush*, 553 U.S. 723 (2008). *Microsoft v. AT&T Corp.*, 550 U.S. 437 (2007).

4. See Harv. L. Rev., *Developments in the Law: Extraterritoriality*, 124 HARV. L. REV. 1226, 1228 (2010).

laws now commonly regulate conduct of foreigners outside U.S. borders and legislative jurisdiction cases have become a common fixture on the U.S. Supreme Court's docket.⁵ These developments not only have sparked controversy, but have raised a number of legal questions. The first part of this issue is devoted to these questions and exploring American extraterritorial assertions.

The authors in this issue represent some of the leading voices in this area. The resulting articles present a vivid snapshot of the role extraterritoriality plays in American law, from a variety of perspectives. The issue also represents some of the first scholarly analysis of the landmark *Morrison* case.

Empire and Extraterritoriality

The issue begins with two articles exploring how the United States has used extraterritorial jurisdiction and laws to build overseas empire. In the first article, Dan Margolies describes the United States' use of extraterritorial jurisdiction in the last three decades of the nineteenth century as a particularly important tool of foreign policy. He makes a unique contribution to the literature. Conventionally, scholars view the nineteenth century as a period where the United States—still in its nascent stages as a World Power—shied away from broad extraterritorial assertions of power. Professor Margolies argues persuasively that the conventional view is misleading, at least in the context of U.S.-Mexico relations and the U.S. southern border.

Professor Margolies' theme of extraterritoriality as empire is picked up and echoed in the second article by Kal Raustiala. Professor Raustiala focuses on how the United States after the Second World War used extraterritorial regulation as a way to exert global reach. He describes how an extraterritorial approach to empire—characterized by a global network of military bases, a variety of multilateral institutions aimed at maintaining economic openness, and the selective extraterritorial application of domestic law—replaced traditional imperialism as a way to build and maintain American power. Professor Raustiala shows how extraterritorial empire was more palatable to Americans than traditional territorial empire and more consistent with the nation's constitutional and republican traditions.

5. See generally Int'l Bar Ass'n, *Report of the Task Force on Extraterritorial Jurisdiction*, 2009 INT'L B. ASS'N 5, available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=597D4FCC-2589-499F-9D9B-0E392D045CD1>.

Constitutional Rights

The next article in the issue turns from history to current events. In the last decade, the question of when fundamental rights limit a government's action outside its own territory has increasingly claimed the attention of scholars and courts alike.⁶ The Court's decisions in the Guantánamo detainee cases and the nation's counter-terrorism efforts provide just a few poignant examples.⁷

In *Framing Constitutional Rights*, Chimène Keitner makes a significant contribution to this body of work by exploring the ways in which domestic courts have treated the geographic reach of constitutional rights. She approaches her analysis from a distinctly comparative perspective. Her article details the stories of five individuals who sought redress in five countries' courts for alleged rights violations. She builds on prior work,⁸ and concludes that non-citizen claimants are unlikely to find domestic courts receptive to their claims.

Legislative Jurisdiction and Extraterritorial Regulation

The symposium ends with three articles focused on extraterritorial regulation and the impact of *Morrison v. National Australia Bank*. Decided last term, *Morrison* is the Court's most recent pronouncement in the area of legislative jurisdiction. The case involved three Australian investors who had bought stock in Australia's largest bank.⁹ The critical issue was whether Congress intended the anti-fraud provisions of the American securities laws to apply to investment deals that occur abroad when the securities involve a company whose stock is not traded in the United States.¹⁰ More specifically, the case asked whether the 1934 Securities and Exchange Act covered this sort of extraterritorial action. The Supreme Court unanimously concluded it did not.¹¹ It reached that conclusion by forcefully reaffirming the presumption against extraterritorial application of

6. See generally Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 973 (2009) (noting how "[q]uestions concerning the extraterritorial applicability of the Constitution have come to the fore" in recent years in the context of the war on terror).

7. See Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 274 (2010); Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 261 (2009).

8. Chimène Keitner, *Rights Beyond Borders*, 36 YALE J. INT'L L. 55 (2011).

9. *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869, 2876 (2010).

10. *Id.*

11. *Id.* at 2888.

federal statutes.¹²

John Knox begins the analysis by criticizing the Court's ruling. He suggests that the presumption is problematic, and argues that the Court should have rejected a strict presumption against extraterritoriality "in favor of a renewed version of an older canon: a presumption against the extension of statutes beyond limits set by the international law of legislative jurisdiction." Professor Knox refers to this older canon as a presumption against extrajurisdictionality. For Professor Knox, "*Morrison* is the latest in the long line of Supreme Court decisions that highlight the weakness of a strict presumption against extraterritoriality."¹³

Lea Brilmayer also takes a critical stance but for different reasons. For Professor Brilmayer, the *Morrison* case is best understood as promoting the principles of legislative supremacy and respect for precedent. In promoting these principles, Professor Brilmayer argues that the Court "jettisoned decades of settled law," while "casting doubt on long-accepted practices of statutory construction."¹⁴ Critical of the Court's move, Professor Brilmayer also explains how the *Morrison* decision will likely have unintended consequences in a wide variety of areas.

In the final article, William Dodge takes a different tack by praising the Court in an unexpected and provocative way. For Professor Dodge, *Morrison* changed the presumption against extraterritoriality by shifting its focus from the location of the conduct to the location of the effects. *Morrison* "turns the presumption against extraterritoriality into an effects test" by ignoring "the location of the prohibited conduct and focusing the analysis on preventing harmful, domestic effects."¹⁵ Dodge argues that reading *Morrison* to change the presumption "harmonizes many of the Supreme Court's prior decisions, allowing order to emerge from a seemingly inconsistent series of precedents."¹⁶

All six articles highlight the difficult questions that extraterritoriality engenders. All make meaningful contributions to this area of law and should provide helpful insight as transnational litigation continues to blossom and issues of extraterritoriality remain prominent.

12. *Id.* at 2883.

13. John H. Knox, *The Unpredictable Presumption Against Extraterritoriality*, 40 S.W. Law Rev. 635, 653 (2011).

14. Lea Brilmayer, *Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. L. REV. 655, 655 (2011).

15. William S. Dodge, *Morrison's Effects Test*, 40 SW. L. REV. 687, 695-96 (2011).

16. *Id.* at 687.