



UNC  
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

---

Volume 95 | Number 4

Article 2

---

5-1-2017

# Chevron Deference and Extraterritorial Regulation

William S. Dodge

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

---

## Recommended Citation

William S. Dodge, *Chevron Deference and Extraterritorial Regulation*, 95 N.C. L. REV. 911 (2017).

Available at: <http://scholarship.law.unc.edu/nclr/vol95/iss4/2>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

## CHEVRON DEFERENCE AND EXTRATERRITORIAL REGULATION\*

WILLIAM S. DODGE\*\*

*What happens when Chevron deference meets the presumption against extraterritoriality? Many statutes with potential extraterritorial applications are administered by federal agencies. Should courts determine the geographic scope of such statutes for themselves by applying the presumption? Or should courts defer to reasonable agency interpretations of geographic scope? Are agencies free to change their interpretations of a statute's geographic scope or to interpret that scope differently than courts have?*

*This Article argues that the presumption against extraterritoriality should be incorporated at step two of the Chevron framework. Courts should defer to an agency's reasonable interpretation of a statute's geographic scope if the agency has considered the normative values that underlie the presumption against extraterritoriality. Contrary to the conventional wisdom, not all normative canons are applied at Chevron step one; moreover, the presumption against extraterritoriality never has been. Agency interpretations of geographic scope should receive deference because agencies are likely to have a better understanding than courts of statutory purposes, regulatory options, and potential conflicts with foreign interests. Agencies can also calibrate extraterritorial regulation to maximize effectiveness and minimize conflicts far better than courts. Finally, this Article argues that agencies may change their minds about geographic scope and that they are free to depart from lower court decisions applying the presumption against extraterritoriality and perhaps even from Supreme Court decisions applying the presumption.*

---

\* © 2017 William S. Dodge.

\*\* Martin Luther King, Jr. Professor of Law, University of California, Davis, School of Law. An earlier version of this Article was presented at the Yale-Duke Foreign Relations Law Roundtable. Thanks to Eyal Benvenisti, Ash Bhagwat, Curt Bradley, Zach Clopton, Kristina Daugirdas, Chris Elmendorf, Anita Krishnakumar, Maggie Lemos, Al Lin, Nina Mendelson, Jon Michaels, Julian Mortenson, Anne O'Connell, Leticia Saucedo, Reuel Schiller, Jodi Short, Ganesh Sitaraman, Paul Stephan, and Ingrid Wuerth for comments, suggestions, and insights.

912	<i>NORTH CAROLINA LAW REVIEW</i>	[Vol. 95]
INTRODUCTION .....		912
I. TWO FRAMEWORKS FOR STATUTORY INTERPRETATION .....		919
A. <i>Deference to Administrative Agencies</i> .....		920
B. <i>The Presumption Against Extraterritoriality</i> .....		922
II. CANONS IN THE <i>CHEVRON</i> FRAMEWORK .....		925
A. <i>Canons Applied at Step One</i> .....		926
B. <i>Canons Applied at Step Two</i> .....		928
C. <i>Canons Foreclosed by Agency Interpretations</i> .....		931
III. THE PRESUMPTION AGAINST EXTRATERRITORIALITY IN THE FRAMEWORK OF DEFERENCE .....		934
A. <i>Foley Bros. v. Filardo</i> .....		934
B. <i>K Mart Corp. v. Cartier, Inc.</i> .....		936
C. <i>EEOC v. Arabian American Oil Co.</i> .....		938
D. <i>Morrison v. National Australia Bank Ltd.</i> .....		940
IV. THE CASE FOR STEP TWO .....		943
A. <i>The Strengths of Agency Interpretation</i> .....		944
B. <i>The Proper Role of Courts</i> .....		948
V. THE PRESUMPTION AT STEP TWO .....		951
A. <i>The Form of Delegation Should Not Matter</i> .....		952
B. <i>Four Models for Evaluating Reasonableness</i> .....		955
C. <i>Three Examples</i> .....		958
1. <i>Hart-Scott-Rodino</i> .....		959
2. <i>Regulation S</i> .....		962
3. <i>Volcker Rule</i> .....		965
VI. CHANGING INTERPRETATIONS .....		968
A. <i>Changing Agency Interpretations</i> .....		969
B. <i>Changing Court Interpretations</i> .....		971
CONCLUSION .....		973

## INTRODUCTION

We live in a world where transactions, information, pollution, and many other things cross national borders. In such a world, nations often have a legitimate interest in regulating persons or conduct outside their territories. Many U.S. statutes clearly indicate that they apply extraterritorially.<sup>1</sup> Others say nothing about their geographic scope.<sup>2</sup>

---

1. See, e.g., Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 to -3 (2012) (prohibiting bribery of foreign officials); Civil Rights Act, 42 U.S.C. §§ 2000e(f), -1(b), -1(c)(2) (2012) (extending Title VII's prohibition of employment discrimination to U.S. citizens employed in foreign countries, but exempting discrimination required by foreign law and discrimination by foreign companies not controlled by U.S. companies).

When U.S. courts have to determine the scope of a statute for themselves, they typically employ a presumption against extraterritoriality.<sup>3</sup>

But sometimes a statute that says nothing about its geographic scope also gives an administrative agency authority to interpret the statute. In a few instances, Congress expressly delegates to an administrative agency the authority to determine the geographic scope of the statute.<sup>4</sup> In most instances, Congress does not, and whatever authority the agency might have to determine the statute's scope is a function of its more general interpretive authority. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>5</sup> courts generally must defer to a reasonable interpretation of a statute by an agency exercising delegated lawmaking authority.<sup>6</sup> And under *Skidmore v. Swift & Co.*,<sup>7</sup> even when an agency is not exercising delegated lawmaking authority, courts may defer to agency interpretations to the extent they are persuasive.<sup>8</sup> Where does the presumption against extraterritoriality fit into this framework of deference? Are questions of geographic scope different from other questions of statutory interpretation, or should they be treated similarly?

These questions have significant implications for extraterritorial regulation. For decades, agency regulations have defined the geographic scope of the registration requirements under the Securities Act<sup>9</sup> and the premerger notification requirements of Hart-Scott-Rodino Antitrust

2. See, e.g., Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (2012); Securities Act of 1933 § 5, 15 U.S.C. § 77e (2012).

3. See, e.g., *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100–01 (2016) (applying presumption against extraterritoriality to determine the geographic scope of Racketeer Influenced and Corrupt Organizations Act's ("RICO's") substantive provisions and private right of action); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (applying presumption against extraterritoriality to determine the geographic scope of Securities Exchange Act § 10(b)); *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (applying presumption against extraterritoriality to determine the geographic scope of Title VII of the 1964 Civil Rights Act prior to its 1991 amendment).

4. See, e.g., Securities Exchange Act § 30(a), 15 U.S.C. § 78dd(a) (2012) (giving the Securities Exchange Commission ("SEC") authority to make rules governing certain transactions "on an exchange not within or subject to the jurisdiction of the United States").

5. 467 U.S. 837 (1984).

6. *Id.* at 844 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

7. 323 U.S. 134 (1944).

8. *Id.* at 140 (noting that an agency's interpretations "constitute a body of experience and informed judgment" that may have the "power to persuade"); see also *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001) (holding that an agency interpretation not entitled to deference under *Chevron* is still "eligible to claim respect according to its persuasiveness" under *Skidmore*).

9. Regulation S, 17 C.F.R. §§ 230.901–.905 (2016).

Improvements Act (“HSR”).<sup>10</sup> More recently, agency regulations have defined the geographic scope of the so-called “Volcker Rule” under the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), which prohibits banks from proprietary trading.<sup>11</sup> If questions of geographic scope must be decided exclusively by courts applying the presumption against extraterritoriality, these regulations may be invalid.

If, on the other hand, agency interpretations of geographic scope are entitled to deference under *Chevron* and *Skidmore*, then court decisions applying the presumption against extraterritoriality to agency-administered statutes may be merely provisional.<sup>12</sup> In *Morrison v. National Australia Bank Ltd.*,<sup>13</sup> for example, the Supreme Court of the United States applied the presumption to hold that § 10(b) of the Securities Exchange Act<sup>14</sup> extends only to fraud involving transactions in the United States.<sup>15</sup> If Securities Exchange Commission (“SEC”) interpretations of § 10(b)’s geographic scope are entitled to *Chevron* deference, the SEC might use its delegated rulemaking authority effectively to reverse *Morrison*.<sup>16</sup>

Courts are divided on how the presumption against extraterritoriality fits into the *Chevron-Skidmore* framework. One district court has held that the presumption is a traditional tool of

10. 16 C.F.R. §§ 802.50–.52 (2016).

11. 12 C.F.R. § 44.6(e) (2016).

12. See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (“A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”). For a prescient article discussing this question, see Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272 (2002).

13. 561 U.S. 247 (2010).

14. 15 U.S.C. § 78j(b) (2012).

15. *Morrison*, 561 U.S. at 273. For further discussion of *Morrison*, see *infra* Section III.D.

16. See *infra* Section VI.B. This Article also suggests that the SEC might use its regulatory authority in a more limited way to solve other problems that have arisen after *Morrison*. For example, Joseph Grundfest has raised the concern that *Morrison* may effectively preclude aftermarket buyers from bringing claims under § 11 of the Securities Act and proposes a number of steps the SEC might take to address the problem. See Joseph A. Grundfest, *Morrison, the Restricted Scope of Securities Act Section 11 Liability, and Prospects for Regulatory Reform*, 41 J. CORP. L. 1, 48–69 (2015). While consideration of § 11 is beyond the scope of this Article, its analysis suggests that the SEC could address this problem much more directly by using its authority under § 19 of the Securities Act to define the geographic scope of § 11, even if its interpretation departs from *Morrison*’s. See *infra* note 339 and accompanying text (discussing Securities Act § 19 in the context of Regulation S).

statutory interpretation to be applied at *Chevron* step one.<sup>17</sup> Two circuits have suggested that an agency interpretation applying a statute extraterritorially might be entitled to deference under *Chevron* or *Skidmore* if the agency could point to some basis for that interpretation in the statute.<sup>18</sup> And one circuit has suggested that an agency interpretation could be considered reasonable at *Chevron* step two if there were “some indication that the agency has considered the effect of the presumption against extraterritoriality . . . .”<sup>19</sup>

Scholarly opinion is also divided. Some treat the presumption against extraterritoriality as a canon of construction to be applied at *Chevron* step one.<sup>20</sup> Others have argued that the presumption should be applied at *Chevron* step two so that courts should defer to reasonable interpretations of a statute’s geographic scope by agencies exercising delegated lawmaking authority.<sup>21</sup> Professor Cass Sunstein has been on both sides of the question. Initially, he suggested that the presumption against extraterritoriality “probably cannot be defeated by the agency’s contrary view.”<sup>22</sup> More recently, in an article co-authored with Professor

17. *Souryal v. Torres Advanced Enter. Sols., LLC*, 847 F. Supp. 2d 835, 842 (E.D. Va. 2012).

18. *See Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 182 (2d Cir. 2014) (“[I]t is far from clear that an agency’s assertion that a statute has extraterritorial effect, unmoored from any plausible statutory basis for rebutting the presumption against extraterritoriality, should be given [*Chevron*] deference.”); *Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 846 (9th Cir. 2012) (“Because the Director cites no textual evidence of Congress’s clear intention to authorize the extraterritorial application of the Act, the Director’s interpretation lacks persuasive force [under *Skidmore*].”).

19. *Validus Reinsurance, Ltd. v. United States*, 786 F.3d 1039, 1049 (D.C. Cir. 2015).

20. *See, e.g.*, William N. Eskridge, Jr. & Kevin S. Schwartz, *Chevron and Agency Norm-Entrepreneurship*, 115 *YALE L.J.* 2623, 2629 & n.33 (2006) (referring to presumption against extraterritoriality as a “clear statement rule[] relevant to Step One”). For discussion of the *Chevron* framework, *see infra* Section I.A.

21. *See, e.g.*, Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 *VA. L. REV.* 649, 694 (2000) (arguing that the presumption against extraterritoriality “reflects a desire to push certain issues away from the courts, not a preference for congressional as opposed to Executive determination”); Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 *B.U. L. REV.* 1, 40 (2014) (noting that “the extraterritoriality question is exactly the sort of statutory ambiguity for which the [*Chevron*] doctrine was designed”); *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 203 cmt. e (AM. LAW INST., Tentative Draft No. 2, 2016) (“If Congress has not spoken directly to the geographic scope of a statutory provision, courts in the United States must defer to a reasonable construction of the statute by an administering agency exercising delegated lawmaking authority.”).

22. Cass R. Sunstein, *Law and Administration After Chevron*, 90 *COLUM. L. REV.* 2071, 2114–15 (1990) [hereinafter Sunstein, *Law and Administration*]; *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 *U. CHI. L. REV.* 315, 333 (2000) [hereinafter Sunstein, *Nondelegation Canons*] (“[A]gencies are not permitted to apply statutes outside of the territorial borders of the United States. If statutes are to receive extraterritorial application, it must be as a result of a deliberate congressional judgment to this effect.” (footnote omitted)).

Eric Posner, Sunstein argued “that in cases in which the executive has adopted an interpretation via rulemaking or adjudication, or is otherwise entitled to deference under standard principles of administrative law, the executive’s interpretations should prevail over the comity doctrines,” the presumption against extraterritoriality among them.<sup>23</sup>

This Article argues that the presumption against extraterritoriality is properly applied at *Chevron* step two and that courts must therefore defer to reasonable agency interpretations of a statute’s geographic scope.<sup>24</sup> First, contrary to the conventional wisdom, not all canons of interpretation are applied at *Chevron* step one.<sup>25</sup> Second, again contrary to the conventional wisdom, the Supreme Court has never applied the presumption against extraterritoriality at step one. Rather, it has suggested that the presumption should be incorporated at step two of the *Chevron* analysis.<sup>26</sup> Third, and most important, agencies are in a far better position than courts to weigh and apply the normative values that

23. Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1204 (2007). While this Article agrees with Posner and Sunstein about agency interpretations of geographic scope, it does not endorse Posner and Sunstein’s more expansive argument that courts should defer to the executive branch in applying comity doctrines outside the context of administrative law. *See id.* at 1205. To the contrary, I have argued that deference to case-specific determinations by the executive branch undermines both the rule of law and the foreign relations interests of the United States. *See* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2132–40 (2015). *Chevron* and *Skidmore* deference are not case-specific—rather, they establish interpretations of statutes that courts apply across all cases.

24. This argument is subject to the important limitation that the agency’s interpretation does not violate international law. Under the so-called *Charming Betsy* canon, “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 205 (AM. LAW INST., Tentative Draft No. 2, 2016) (“Where fairly possible, U.S. courts construe federal statutes to avoid conflict with international law governing jurisdiction to prescribe. Where a federal statute cannot be so construed, the federal statute is controlling as a matter of U.S. law.”). Some scholars have taken the position that *Chevron* deference with respect to the presumption against extraterritoriality should extend to the *Charming Betsy* canon as well. *See, e.g.*, Bradley, *supra* note 21, at 685–90; Clopton, *supra* note 21, at 44–45. I would distinguish the *Charming Betsy* canon on the ground that the President is constitutionally bound to obey international law under the Take Care Clause. *See* William S. Dodge, *After Sosa: The Future of Customary International Law in the United States*, 17 WILLAMETTE J. INT’L L. & DISP. RESOL. 21, 34–38 (2009). At a minimum, because the constitutional authority of the executive branch to violate international law is not clearly established, an agency interpretation that violates international law should be reviewed at *Chevron* step one under the constitutional avoidance canon. *See infra* notes 96–98 and accompanying text (discussing application of the constitutional avoidance canon at *Chevron* step one).

25. *See infra* Part II.

26. *See infra* Part III.

underlie the presumption against extraterritoriality. Agencies are likely to have a better understanding of the statutory policy, the regulatory options available to effectuate that policy, and the degree of conflict with other countries that each option might cause. Agencies can also calibrate their interpretations to a far greater degree than courts in order to maximize the effectiveness of statutory policies while minimizing conflicts with other nations.<sup>27</sup>

Beyond the practical implications of the question,<sup>28</sup> this Article makes contributions in two distinct areas. First, it adds to the substantial literature on extraterritorial regulation in general and on the presumption against extraterritoriality in particular.<sup>29</sup> While other articles have briefly considered the question of deference to agency interpretations of geographic scope,<sup>30</sup> none have attempted such a comprehensive consideration.

27. See *infra* Part IV. This Article accords with recent literature arguing that questions of foreign relations law should be treated similarly to purely domestic questions. See generally Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380 (2015) (arguing that the Roberts Court no longer defers to the executive branch in foreign affairs law); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015) (arguing that courts properly treat foreign relations issues like domestic issues). But it is also possible to argue for deference to administrative agencies from an exceptionalist perspective on the ground that foreign relations concerns make deference to the Executive particularly important. See, e.g., Bradley, *supra* note 21, at 693 (citing “general understandings regarding executive branch authority and expertise” in international relations); Posner & Sunstein, *supra* note 23, at 1207 (arguing that “the expertise rationale for deference to the executive is stronger in the foreign relations setting than in the traditional *Chevron* setting”).

28. See *supra* notes 9–11 and accompanying text.

29. For articles discussing extraterritoriality in various contexts, see generally Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT’L L. 1 (1992); Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 L. & POL’Y INT’L BUS. 1 (1992); Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505 (1997); Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT’L L. 14 (2007); Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303 (2014); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85 (1998); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057 (2009); Franklin A. Gevurtz, *Determining Extraterritoriality*, 56 WM. & MARY L. REV. 341 (2014); John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351 (2010); Jenny S. Martinez, *New Territorialism and Old Territorialism*, 99 CORNELL L. REV. 1387 (2014); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110 (2010); Gerald L. Neuman, *Extraterritoriality and the Interests of the United States in Regulating Its Own*, 99 CORNELL L. REV. 1441 (2014); Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815 (2009).

30. See Bradley, *supra* note 21, at 691–94; Clopton, *supra* note 21, at 35–43; Posner & Sunstein, *supra* note 23, at 1204–07.

Second, with respect to administrative law, this Article contributes to the literature concerning the place of interpretive canons under *Chevron* and *Skidmore*. The majority view is that all canons of interpretation should be applied at *Chevron* step one.<sup>31</sup> But some scholars have argued that normative canons should be applied at *Chevron* step two.<sup>32</sup> This Article suggests that normative canons fall into three categories: (1) those that operate as non-delegation rules and must be applied at *Chevron* step one; (2) those that properly apply at *Chevron* step two when a court determines whether an agency's interpretation of a statute is reasonable; and (3) those whose application is foreclosed by an agency's interpretation of a statute. The presumption against extraterritoriality is an important example—though by no means the only example—of a step-two normative canon.

Part I introduces the two frameworks for statutory interpretation relevant to this Article—deference to administrative agencies under *Chevron* and *Skidmore*, and the presumption against extraterritoriality. Part II looks at how the Supreme Court has treated other canons of interpretation within the *Chevron* framework. It distinguishes canons applied at *Chevron* step one, canons applied at *Chevron* step two, and canons whose application may be foreclosed by agency interpretations of a statute.

Part III looks at what the Supreme Court has already said about deference to agency interpretations of geographic scope, concluding that the Court has applied the normal rules of deference to questions of geographic scope, that the Court has never applied the presumption against extraterritoriality at *Chevron* step one but has suggested that it could be applied at step two, and that the Court has in fact deferred to agencies on questions of geographic scope. Part IV argues that incorporating the presumption against extraterritoriality at step two of the *Chevron* analysis makes sense because agencies are better than

---

31. See Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 66 (2008) (noting majority view “that courts should continue to interpret legislation independently when normative canons would apply, even when Congress has charged a particular agency with the statute’s administration”).

32. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 206 (2006) (“[J]udges should defer to agencies’ choices about whether, when, and how to employ the traditional tools where a linguistic gap or ambiguity exists in the provision immediately at hand.”); Bamberger, *supra* note 31, at 111 (“[I]n reviewing otherwise deference-deserving agency constructions, the canon inquiry should be incorporated into *Chevron*’s second-step analysis of the agency construction’s reasonableness.”). A recent student note has also attempted to distinguish normative canons that should be applied at *Chevron* step one from those that should be applied at *Chevron* step two. See generally Note, *Chevron and the Substantive Canons: A Categorical Distinction*, 124 HARV. L. REV. 594 (2010).

courts at understanding statutory purpose, evaluating alternatives, assessing foreign relations implications, and calibrating extraterritorial regulatory schemes.

Part V considers in greater detail just how the presumption against extraterritoriality may be incorporated at *Chevron* step two. This Part first considers and rejects the argument that the form of delegation matters—that is, that either an express delegation of authority to regulate extraterritorially or a clear indication of extraterritoriality in the statute should be a precondition to deference. Part V next considers four possible models for evaluating reasonableness, concluding that courts should uphold an agency’s interpretation of a provision’s geographic scope if the agency considered the normative values reflected in the presumption, even if the agency did not apply the presumption itself. Part V then tests these models by providing three examples in which agencies have interpreted the geographic scope of statutes they administer: HSR, Regulation S, and the Volcker Rule. It concludes that each of these interpretations should be held reasonable at *Chevron* step two.

Finally, Part VI considers two implications from this conclusion. Section VI.A concludes that agencies are free to change their interpretations of a provision’s geographic scope in response to changing circumstances, changing policy views, or both. Section VI.B considers whether agencies may depart from the geographic scope that federal courts applying the presumption have given a statutory provision. It concludes that the answer is clearly yes with respect to the interpretations of lower federal courts. With respect to Supreme Court decisions, the answer depends on whether the Court decides to extend *National Cable & Telecommunications Ass’n v. Brand X Internet Services* (“*Brand X*”)<sup>33</sup> to its own decisions. In sum, deference to administrative agencies will not only produce better interpretations of geographic scope in the first instance but will also provide a mechanism for such interpretations to change.

#### I. TWO FRAMEWORKS FOR STATUTORY INTERPRETATION

Deference to administrative agencies and the presumption against extraterritoriality are two different frameworks for statutory interpretation. Sometimes only one of these frameworks comes into play. Some statutes interpreted by agencies have no extraterritorial application, and some statutes with extraterritorial application are not

---

33. 545 U.S. 967 (2005).

interpreted by agencies. But often both frameworks apply.<sup>34</sup> Before considering their interaction, it may be useful to review each framework independently.

A. *Deference to Administrative Agencies*

Although the Supreme Court had long grappled with questions of deference to administrative interpretations of statutes, its 1984 decision in *Chevron* articulated a new framework<sup>35</sup>—one that the Court has elaborated and applied ever since.<sup>36</sup> At step one of the *Chevron* analysis, the question is “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>37</sup> To ascertain Congress’s intent at step one, a court employs “traditional tools of statutory construction,”<sup>38</sup> tools that include some—but not all—of the canons of statutory interpretation.<sup>39</sup> At *Chevron* step two, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”<sup>40</sup>

*Chevron* based its regime of deference on a theory of delegation: “If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”<sup>41</sup> Importantly, *Chevron* also applied a rule of deference to *implicit* delegations of authority: “Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>42</sup> *Chevron*

---

34. For discussion of a few important examples, see *infra* Section V.C.

35. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).

36. See, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868–71 (2013) (holding that courts must defer under *Chevron* to an agency’s interpretation of its own jurisdiction).

37. *Chevron*, 467 U.S. at 842–43.

38. *Id.* at 843 n.9.

39. See *infra* Part II.

40. *Chevron*, 467 U.S. at 843.

41. *Id.* at 843–44. With respect to express delegations, the Court said “[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 844 (citations omitted).

42. *Id.* at 844 (citations omitted). Whether *Chevron*’s arbitrary and capricious standard for express delegations and its reasonableness standard for implicit delegations are one and the same is a question this Article need not resolve. Questions of extraterritoriality usually, though not always, involve implicit delegations.

buttressed its framework with notions of agency expertise<sup>43</sup> and accountability.<sup>44</sup> In recent cases, the Supreme Court has emphasized that its regime of deference to administrative agency “is rooted in a background presumption of congressional intent.”<sup>45</sup> If Congress left an agency-administered statute ambiguous, it “understood that the ambiguity would be resolved first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.”<sup>46</sup>

There are, of course, questions preliminary to *Chevron*’s two steps: whether Congress intended to delegate interpretive authority to the agency in the first place, and whether the agency in fact exercised that authority. These questions have been called *Chevron* step zero.<sup>47</sup> To find that Congress has delegated interpretive authority, a court need not determine that “*the particular issue* was committed to agency discretion.”<sup>48</sup> It suffices that Congress has vested an agency “with general authority to administer [a statute] through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.”<sup>49</sup> But even if the agency has interpretive authority, its views will not be given *Chevron* deference unless the agency has actually exercised that authority. In *Negusie v. Holder*,<sup>50</sup> for example, the Court found that the Board of Immigration Appeals (“BIA”) had not exercised its interpretive authority under the Immigration and Nationality Act because the BIA mistakenly thought itself bound by an earlier Supreme Court decision.<sup>51</sup>

If an agency interpretation is not entitled to *Chevron* deference, either because the agency lacks interpretive authority or because it failed to exercise that authority, that interpretation may still be entitled to a lesser degree of deference under *Skidmore* based on its “power to persuade.”<sup>52</sup> In *United States v. Mead Corp.*,<sup>53</sup> the Supreme Court made

43. *Id.* at 865 (noting that agencies may have “great expertise” and that “[j]udges are not experts”).

44. *Id.* (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . .”).

45. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

46. *Id.* (quoting *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740–41 (1996)).

47. See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 873 (2001) (describing the threshold inquiries as “step zero”).

48. *City of Arlington*, 133 S. Ct. at 1874.

49. *Id.*

50. 555 U.S. 511 (2009).

51. *Id.* at 522. The Court remanded to the agency to interpret the statute and apply that interpretation to the case. *Id.* at 524.

52. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

clear that “*Chevron* did nothing to eliminate *Skidmore*’s holding that an agency’s interpretation may merit some deference, whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires.”<sup>54</sup> Deference to agency interpretations thus runs along a continuum. As *Mead* put it, “[t]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.”<sup>55</sup>

### B. *The Presumption Against Extraterritoriality*

The presumption against extraterritoriality provides a separate framework for statutory interpretation. Since 1991, the presumption has been the Supreme Court’s principal tool for determining the geographic scope of federal statutes.<sup>56</sup> The modern presumption is based on two rationales.<sup>57</sup> First, “it serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries.”<sup>58</sup> In other words, it accounts for foreign interests.<sup>59</sup> Second, the presumption

53. 533 U.S. 218 (2001).

54. *Id.* at 234 (quoting *Skidmore*, 323 U.S. at 139).

55. *Id.* at 228.

56. See *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100–01 (2016) (RICO); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664–65 (2013) (federal common law cause of action under the Alien Tort Statute); *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (Securities Exchange Act); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454–56 (2007) (Patent Act); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173–74 (1993) (Immigration and Nationality Act); *Smith v. United States*, 507 U.S. 197, 203–04 (1993) (Federal Tort Claims Act); *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (Title VII of 1964 Civil Rights Act). Before its 1991 decision in *Aramco*, the Supreme Court had briefly invoked the presumption against extraterritoriality in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440–41 (1989) (territorial tort exception to the Foreign Sovereign Immunities Act), but otherwise had not employed the presumption since 1949. See *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) (Eight Hour Law).

57. Originally, the presumption against extraterritoriality was based on the so-called *Charming Betsy* canon—that Congress does not intend to violate international law. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”). See generally *Knox*, *supra* note 29, (discussing original rationale). As international law limits on jurisdiction weakened, new justifications for the presumption developed. See *Dodge*, *supra* note 23, at 2092–93.

58. *RJR Nabisco*, 136 S. Ct. at 2100.

59. The first rationale is sometimes expressed more narrowly as avoiding conflicts with foreign law. See, e.g., *Kiobel*, 133 S. Ct. at 1664 (“This presumption ‘serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.’” (quoting *Aramco*, 499 U.S. at 248)). Because international discord

“reflects the more prosaic ‘commonsense notion that Congress generally legislates with domestic concerns in mind.’ ”<sup>60</sup> Both these rationales are grounded in congressional intent.<sup>61</sup>

As with *Chevron*, the Supreme Court has elaborated on this framework over time. In *RJR Nabisco, Inc. v. European Community*,<sup>62</sup> the Court even articulated—in what is surely a coincidence—two steps in the analysis.<sup>63</sup> At *RJR* step one, the Court asks “whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially.”<sup>64</sup> But the presumption is not a “clear statement rule.”<sup>65</sup> The Supreme Court has looked to “context,”<sup>66</sup> “structure,”<sup>67</sup> and “legislative history”<sup>68</sup> to determine whether the presumption has been rebutted—in short, to all the tools of statutory interpretation that courts normally employ.<sup>69</sup>

At *RJR* step two, if the presumption has not been rebutted, the Court asks whether applying the statute would be domestic or extraterritorial, and it does this “by looking to the statute’s ‘focus.’ ”<sup>70</sup> The Court first developed this “focus” approach in *Morrison v. National Australia Bank Ltd.*,<sup>71</sup> a case interpreting the geographic scope of Securities Exchange Act § 10(b),<sup>72</sup> which prohibits fraud. There, the plaintiffs argued that applying § 10(b) would be domestic because the alleged fraud occurred in the United States.<sup>73</sup> The Court concluded, however, “that the focus of the Exchange Act is not upon the place

---

may occur even in the absence of a conflict with foreign law, this Article treats the presumption as designed to avoid conflicts with foreign interests, not just conflicts with foreign law.

60. *RJR Nabisco*, 136 S. Ct. at 2100 (quoting *Smith*, 507 U.S. at 204 n.5); see also *Aramco*, 499 U.S. at 248 (stating that unless Congress speaks clearly, “we must presume it ‘is primarily concerned with domestic conditions’ ” (quoting *Foley Bros.*, 336 U.S. at 285)).

61. See *Aramco*, 499 U.S. at 248 (describing presumption as “a valid approach whereby unexpressed congressional intent may be ascertained” (quoting *Foley Bros.*, 336 U.S. at 285)).

62. 136 S. Ct. 2090 (2016).

63. See *id.* at 2101 (describing “two-step framework”); see also William S. Dodge, *The Presumption Against Extraterritoriality in Two Steps*, 110 AM. J. INT’L L. UNBOUND 45, 45 (2016).

64. *RJR Nabisco*, 136 S. Ct. at 2101.

65. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010).

66. *Id.*

67. *RJR Nabisco*, 136 S. Ct. at 2103.

68. *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

69. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177 (1993) (looking to “all available evidence”).

70. *RJR Nabisco*, 136 S. Ct. at 2101.

71. 561 U.S. 247, 255 (2010).

72. 15 U.S.C. § 78j(b) (2012).

73. *Morrison*, 561 U.S. at 266.

where the deception originated, but upon purchases and sales of securities in the United States.”<sup>74</sup> Because the focus of the provision was not found in the United States—plaintiffs had purchased their shares abroad—the Court held that applying § 10(b) would be extraterritorial.<sup>75</sup>

Different statutory provisions focus on different things. Some focus on conduct,<sup>76</sup> some on injuries,<sup>77</sup> some on transactions,<sup>78</sup> and some on employment.<sup>79</sup> If the provision’s focus is found in the United States, then its application is considered domestic and permissible.<sup>80</sup> If the provision’s focus is not found in the United States, then application of the provision is considered extraterritorial and impermissible.<sup>81</sup>

If, on the other hand, the presumption against extraterritoriality has been rebutted at *RJR* step one, then the statute’s geographic scope “turns on the limits Congress has (or has not) imposed on the statute’s foreign application, and not on the statute’s ‘focus.’”<sup>82</sup> In *RJR*, for example, the Supreme Court held that at least two of RICO’s substantive provisions had rebutted the presumption by incorporating predicate acts that clearly apply extraterritorially.<sup>83</sup> It then refused to impose further limits based on RICO’s alleged focus on the enterprise

74. *Id.*

75. *Id.* at 273.

76. *See, e.g., Pasquantino v. United States*, 544 U.S. 349, 371 (2005) (explaining that the Federal Wire Fraud Statute punishes fraudulent schemes in the United States even if the object of the scheme is to defraud a foreign government).

77. *See, e.g., RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2111 (2016) (“Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries.”); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) (stating that antitrust laws “reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused” (citations omitted)).

78. *See, e.g., Morrison*, 561 U.S. at 266 (explaining that the focus of Securities Exchange Act § 10(b) is “upon purchases and sales of securities in the United States”).

79. *See, e.g., EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 255 (1991) (stating that Title VII of the 1964 Civil Rights Act, prior to 1991 amendment, had a “purely domestic focus”); *Foley Bros. v. Filardo*, 336 U.S. 281, 286 (1949) (stating that the federal Eight Hour Law reflects “concern with domestic labor conditions”).

80. *See, e.g., Pasquantino*, 544 U.S. at 371 (upholding wire fraud convictions because defendants executed the scheme inside the United States); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (permitting antitrust claims based on the alleged conduct’s substantial effects in the United States).

81. *See, e.g., RJR Nabisco*, 136 S. Ct. at 2111 (dismissing civil RICO claims based exclusively on foreign injury); *Morrison*, 561 U.S. at 273 (dismissing securities claims based on foreign transactions); *Empagran*, 542 U.S. at 165, 175 (dismissing antitrust claims based on independent foreign injury and remanding for determination of domestic effects); *Aramco*, 499 U.S. at 259 (dismissing Title VII discrimination claims arising from employment abroad).

82. *RJR Nabisco*, 136 S. Ct. at 2101.

83. *Id.* at 2101–03; *see also id.* at 2103 (limiting holding to 18 U.S.C. §§ 1962(b) and (c) and declining to decide the geographic scope of 18 U.S.C. §§ 1962(a) and (d)).

being corrupted.<sup>84</sup> Because there was “a clear indication at step one that RICO applies extraterritorially,” the Court did “not proceed to the ‘focus’ step.”<sup>85</sup>

To summarize, the presumption against extraterritoriality rests on congressional intent—more specifically, on a presumed desire to avoid unnecessary conflict with other countries and on an assumption that Congress is primarily concerned with domestic conditions. The analysis typically proceeds in two steps. At *RJR* step one, the court looks to see if the presumption has been rebutted by a clear indication of extraterritoriality, employing all the usual tools of statutory interpretation. If the presumption has been rebutted at step one, then a court applies the statute extraterritorially according to its terms, without further limitations based on the statute’s focus. If the presumption has not been rebutted at step one, then the court examines the provision’s “focus” at *RJR* step two. If the provision’s focus is found in the United States, then applying the statute is domestic and permissible; if the provision’s focus is not found in the United States, then applying the statute is extraterritorial and impermissible.

## II. CANONS IN THE *CHEVRON* FRAMEWORK

There are several ways that the presumption against extraterritoriality might fit into the *Chevron* regime of deference to administrative agencies. One option would be for a court to apply the presumption at *Chevron* step one to resolve any ambiguity about a statute’s geographic scope, leaving no question for the agency to interpret. A second option would be for a court to apply the presumption against extraterritoriality at *Chevron* step two, by deferring to the agency’s application of the presumption or its weighing of the normative considerations on which the presumption is based.<sup>86</sup> A third option would be for a court not to apply the presumption at all if the agency has determined the geographic scope of the statute.

This Part looks at how the Supreme Court has treated other canons of interpretation within the *Chevron* framework, showing—contrary to the conventional wisdom—that not all canons are applied at *Chevron* step one. The Supreme Court has applied the textual canons and some

---

84. *Id.* at 2103–04 (“[W]e do not need to determine which transnational (or wholly foreign) patterns of racketeering [RICO] applies to; it applies to all of them, regardless of whether they are connected to a ‘foreign’ or ‘domestic’ enterprise.”).

85. *Id.* at 2103. While the Court expressed a preference for taking the steps in this order, it made clear that courts are not “preclude[d] . . . from starting at step two in appropriate cases.” *Id.* at 2101 n.5.

86. Part V considers various ways to structure a step-two reasonableness analysis.

normative canons at step one. But the Court has applied other normative canons at *Chevron* step two when evaluating the reasonableness of an agency's interpretation, and the Court has held that an agency's interpretation of a statute may render others inapplicable.<sup>87</sup> Understanding how the Supreme Court has treated canons of interpretation in general prepares the way to consider how the Supreme Court has treated the presumption against extraterritoriality in particular, which is the subject of Part III.

#### A. *Canons Applied at Step One*

Describing step one in *Chevron* itself, the Supreme Court wrote that “[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”<sup>88</sup> Certainly some canons of interpretation fall into this category.

The clearest examples of step-one canons are the textual canons. In *Dole v. United Steelworkers of America*,<sup>89</sup> the Court invoked “[t]he traditional canon of construction, *noscitur a sociis*, . . . that ‘words grouped in a list should be given related meaning’ ” to reject an agency's interpretation of a statute at step one.<sup>90</sup> In *National Credit Union Administration v. First National Bank & Trust Co.*,<sup>91</sup> the Court deployed two other textual canons at step one: the rule against making statutory language “surplusage”;<sup>92</sup> and “the established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning.”<sup>93</sup> As Professor Elizabeth Garrett explained, “[m]any textual (or syntactic) canons are guides to what a particular statutory provision would typically mean to an ordinary speaker of the language. They reflect shared linguistic conventions and understandings, and thus they are helpfully, and uncontroversially, used by courts at step one.”<sup>94</sup>

87. A few scholars have similarly recognized that normative canons differ in ways that might affect their application within the *Chevron* framework. See Bamberger, *supra* note 31, at 67 (“Normative canons . . . vary greatly in their formulation and their application.”); Note, *supra* note 32, at 602–15 (distinguishing normative canons that should be applied at *Chevron* step one from those that should not).

88. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

89. 494 U.S. 26 (1990).

90. *Id.* at 36 (quoting *Massachusetts v. Morash*, 490 U.S. 107, 114–15 (1989)).

91. 522 U.S. 479 (1998).

92. *Id.* at 501.

93. *Id.* (citing *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 225 (1992)).

94. Elizabeth Garrett, *Step One of Chevron v. Natural Resources Defense Council*, in *A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES* 55, 69 (John F. Duffy

Courts have also developed a set of normative canons that reflect extra-statutory values.<sup>95</sup> The Supreme Court has applied some of these normative canons at step one of the *Chevron* analysis. Perhaps the best example of a step-one normative canon is the constitutional avoidance canon.<sup>96</sup> In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,<sup>97</sup> the Court invoked the constitutional avoidance canon to trump *Chevron* deference, concluding that “we must independently inquire whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to” the statutory provision.<sup>98</sup> Similarly, in *Solid Waste Agency v. U.S. Army Corps of Engineers*,<sup>99</sup> the Court concluded that it would not defer to an “administrative interpretation [that] alters the federal-state framework by permitting federal encroachment upon a traditional state power.”<sup>100</sup> And in *INS v. St. Cyr*,<sup>101</sup> the Court held that the canon against retroactive application of statutes applies at *Chevron* step one.<sup>102</sup>

Professor Cass Sunstein has defended applying normative canons like these at *Chevron* step one as a “contemporary nondelegation

---

& Michael Herz eds., 2005). Occasionally, there have been suggestions that textual canons should have less force when an agency has interpreted a statute. See *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 102 (2002) (O'Connor, J., dissenting) (“Because of the deference given to agencies on matters about which the statutes they administer are silent, however, *expressio unius* ought to have somewhat reduced force in this context.” (citations omitted)); Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1868 (2015) (arguing for reduced effect of textual canons “at least with respect to the judicial review of *longstanding* agency statutory interpretations”).

95. See Bamberger, *supra* note 31, at 72; Stephen F. Ross, *Where Have You Gone Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992). Others refer to these as “substantive” canons. See William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 68 (1994); Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. (forthcoming 2017).

96. See *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” (citations omitted)); see also *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (listing this canon and other principles of constitutional avoidance).

97. 485 U.S. 568 (1988).

98. *Id.* at 577.

99. 531 U.S. 159 (2001).

100. *Id.* at 173 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)).

101. 533 U.S. 289 (2001).

102. *Id.* at 321 n.45 (“Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.” (citation omitted)).

doctrine.”<sup>103</sup> The idea is that, in some cases, “Congress must decide the key questions on its own.”<sup>104</sup> Because the nondelegation canons require a clear statement from Congress at *Chevron* step one, they foreclose the possibility of deference to the administrative agency at *Chevron* step two. Sunstein notes that “[t]hese canons impose important constraints on administrative authority, for agencies are not permitted to understand ambiguous provisions to give them authority to venture in certain directions; a clear congressional statement is necessary.”<sup>105</sup>

Originally, Sunstein placed the presumption against extraterritoriality among these nondelegation canons.<sup>106</sup> But Sunstein later reconsidered this classification, arguing that the presumption against extraterritoriality (along with a number of other “comity doctrines”) “should not be treated as part of the court’s analysis under *Chevron* Step One” and that “courts should defer to the executive’s judgment unless it is plainly inconsistent with the statute, unreasonable, or constitutionally questionable.”<sup>107</sup> Emphasizing the executive branch’s expertise in foreign affairs, he wrote that “resolution of statutory ambiguities involves judgments of policy, and those judgments are best made by the executive.”<sup>108</sup>

### B. *Canons Applied at Step Two*

Other normative canons have not been applied at *Chevron* step one, but rather at step two, when a court determines whether an agency’s interpretation of a statute is reasonable. A good example is the presumption against preemption of state law.<sup>109</sup> The Supreme Court has

---

103. Sunstein, *Nondelegation Canons*, *supra* note 22, at 316–17. As Sunstein notes, the older nondelegation doctrine is generally thought to be dead, since the Supreme Court has not struck down an act of Congress on nondelegation grounds since 1935. *See id.* at 315. William Eskridge and Philip Frickey have similarly argued that some of the normative canons amount to a form of constitutional lawmaking. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992) (“[T]he Court’s new canons amount to a ‘backdoor’ version of the constitutional activism that most Justices on the current Court have publicly denounced.”).

104. Sunstein, *Nondelegation Canons*, *supra* note 22, at 317.

105. *Id.* at 330.

106. *Id.* at 332–33 (“[E]xtraterritorial application calls for extremely sensitive judgments involving international relations; such judgments must be made via the ordinary lawmaking process (in which the President of course participates). The executive may not make this decision on its own.”).

107. Posner & Sunstein, *supra* note 23, at 1179, 1204. Posner and Sunstein further argued for *Skidmore* deference “even if the executive is not exercising delegated authority to make rules or conduct adjudications.” *Id.* at 1205.

108. *Id.* at 1207.

109. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

given *Chevron* deference to an agency's reasonable interpretation of an express preemption provision in a statute;<sup>110</sup> to an agency's reasonable interpretation of a substantive provision in a statute that would have the effect of preempting state law;<sup>111</sup> and to an agency's reasonable interpretation of the preemptive effect of its own regulations.<sup>112</sup> As the Court explained in *Medtronic, Inc. v. Lohr*,<sup>113</sup> "the agency is uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' and, therefore, whether it should be preempted."<sup>114</sup>

Even when an agency's views on preemption are not entitled to *Chevron* deference, the Court has still given them "some weight" under *Skidmore*.<sup>115</sup> In *Geier v. American Honda Motor Co.*,<sup>116</sup> the Court deferred to an agency's view of whether state tort law would interfere with a regulatory standard, even though its view was expressed in its brief rather than in the standard itself, because "[t]he agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements."<sup>117</sup> In *Wyeth v. Levine*,<sup>118</sup> the Court explained that, under *Skidmore*, "[t]he weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness,

110. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495 (1996) ("[O]ur interpretation of the pre-emption statute is substantially informed by those [FDA] regulations."); *id.* at 496 (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to support "giving substantial weight to the agency's view of the statute" (other citation omitted)).

111. See *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 743–44 (1996) (rejecting argument that presumption against preemption "trumps *Chevron*, and requires a court to make its own interpretation of [the substantive provision] that will avoid (to the extent possible) pre-emption of state law").

112. *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714 (1985) ("The FDA's statement is dispositive on the question of implicit intent to pre-empt unless either the agency's position is inconsistent with clearly expressed congressional intent . . ." (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984))); see also *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2481 (2013) (Breyer, J., dissenting) ("Where the statute contains no clear pre-emption command, courts may infer that the administrative agency has a degree of leeway to determine the extent to which governing statutes, rules, regulations, or other administrative actions have pre-emptive effect." (citing *Medtronic*, 518 U.S. at 505–06)).

113. 518 U.S. 470 (1996).

114. *Id.* at 496 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

115. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000).

116. 529 U.S. 861 (2000).

117. *Id.* at 883–84 (quoting *Medtronic*, 518 U.S. at 496); see also *Williamson v. Mazda Motor of Am., Inc.* 562 U.S. 323, 335–36 (2011) (giving weight to brief expressing agency views of regulation's preemptive effect).

118. 555 U.S. 555 (2009).

consistency, and persuasiveness,”<sup>119</sup> although the Court concluded that the agency’s position in *Wyeth* did not “merit deference” under the *Skidmore* standard.<sup>120</sup>

Professor Kenneth Bamberger has proposed that all the normative canons “should be incorporated into *Chevron*’s second-step analysis of the agency construction’s reasonableness.”<sup>121</sup> Normative canons reflect normative values, and “[t]he decision-making strength of agencies gives them important institutional advantages in weighing the values reflected by the canons as against the policies reflected in a statute.”<sup>122</sup> An agency may have better empirical knowledge about how a particular interpretation would affect the values reflected in the canon.<sup>123</sup> An agency may also have “more access than courts to knowledge about congressional will.”<sup>124</sup> But Bamberger cautions that reasonableness review at *Chevron*’s second step is not a blank check: “[C]ourts should determine whether an agency policy sufficiently reflects the background norm.”<sup>125</sup> If not, courts should “essentially ‘remand’ the issue to the agency to exercise (or not) whatever statutory discretion remained.”<sup>126</sup> Bamberger points out that the prospect of meaningful judicial review “can alter administrative behavior prospectively,”<sup>127</sup> providing “incentives for administrative accommodation of the underlying value in the first instance.”<sup>128</sup> In sum, the strengths of agency decision making support the Supreme Court’s practice of applying at least some normative canons at *Chevron* step two.<sup>129</sup>

---

119. *Id.* at 577 (citing *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001); *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944)).

120. *Id.*

121. Bamberger, *supra* note 31, at 111. Bamberger acknowledges that textual canons should be applied at step one. *See id.* at 76 (“Inquiries into the statute’s text, structure, and purpose, as well as traditional textual construction canons, fit well within that step’s positive inquiry, and their continued application to regulatory statutes is uncontroversial.”).

122. *Id.* at 84.

123. *See id.* at 97 (“Where essentially empirical balancing governs a canon’s application, at least, agency expertise can provide courts with the very type of information a robust analysis of regulation’s impact on canonic norms would require.”).

124. *Id.* at 98.

125. *Id.* at 68.

126. *Id.* at 69.

127. *Id.* at 117.

128. *Id.* at 121.

129. Even if one does not agree with Bamberger that all normative canons should be incorporated at *Chevron* step two, his arguments have particular traction with respect to the presumption against extraterritoriality. *See infra* Part IV.

C. *Canons Foreclosed by Agency Interpretations*

Other canons of statutory interpretation are applied neither at *Chevron* step one nor at step two. Instead, the agency's interpretation is deemed to resolve the statutory ambiguity, making application of the canon unnecessary. The best example of this sort of canon is the rule of lenity.<sup>130</sup>

The rule of lenity has been described as a “venerable rule” vindicating “the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed.”<sup>131</sup> Yet the Supreme Court has repeatedly made clear that the rule of lenity does not apply at *Chevron* step one to clarify statutes and strip administering agencies of their interpretive discretion.<sup>132</sup> Occasionally, the Court has suggested that the rule of lenity might be considered at step two “in determining whether a particular agency interpretation is reasonable.”<sup>133</sup>

Most frequently, though, the Court has concluded that an agency's reasonable interpretation of a statute makes the statute clear enough to preclude applying the rule of lenity.<sup>134</sup> In *Lopez v. Davis*,<sup>135</sup> for example, the Court agreed with the Bureau of Prisons that Congress had not addressed how the bureau was to exercise its discretion under an early release statute and that the bureau's categorical exclusion from early release of felons who possessed a firearm was reasonable.<sup>136</sup> The Court

130. Questions of interpretive deference do not generally arise in criminal cases because of the well-established rule that the prosecution's interpretation of a criminal statute is not entitled to deference. *See* *United States v. Apel*, 134 S. Ct. 1144, 1151 (2014) (“[W]e have never held that the Government's reading of a criminal statute is entitled to any deference.”). *But see generally* Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996) (arguing that courts should give *Chevron* deference to executive branch interpretations of criminal statutes).

131. *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion).

132. In *Solid Waste Agency*, for example, the Court applied the constitutional avoidance and federalism canons at step one, but specifically declined to address the rule of lenity in the same way. *See* *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 & n.8 (2001); *see also infra* notes 134–40 and accompanying text.

133. *Negusie v. Holder*, 555 U.S. 511, 518 (2009).

134. In a statement respecting a denial of certiorari, Justice Scalia argued that considering lenity after deference to administrative agencies “upend[s] ordinary principles of interpretation.” *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (statement of Scalia, J., respecting the denial of certiorari); *see also* *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 736 (6th Cir. 2013) (Sutton, J., concurring) (“Agencies, no less than courts, must honor the rule of lenity.”). But Justice Scalia significantly understated the authority preferring administrative interpretations to lenity. *See* *Whitman*, 135 U.S. at 353 (discussing only *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995), in support of deference).

135. 531 U.S. 230 (2001).

136. *Id.* at 239–40.

refused to apply the rule of lenity at either step one or step two of *Chevron* to limit the bureau's discretion. Because "the statute cannot be read to prohibit the Bureau from exercising its discretion categorically or on the basis of preconviction conduct," the Court wrote, the inmate's "reliance on the rule [of lenity] is unavailing."<sup>137</sup>

In fact, the Supreme Court has treated even *Skidmore* deference as precluding resort to the rule of lenity. Interpreting the anti-retaliation provision of the Fair Labor Standards Act in *Kasten v. Saint-Gobain Performance Plastics Corp.*,<sup>138</sup> the Court concluded that agency interpretations of that provision as covering retaliation against oral as well as written complaints were reasonable, longstanding, and "consequently add force to our conclusion."<sup>139</sup> Only then did the Court turn to lenity, which it rejected on the ground that, "after engaging in traditional methods of statutory interpretation," the statute was not "sufficiently ambiguous to warrant application of the rule of lenity."<sup>140</sup>

Some lower courts have allowed agency interpretations to foreclose the application of other normative canons. The Ninth Circuit has held "that the canon of liberal interpretation in favor of Native Americans must give way to the *Chevron* rule that deference be accorded to an agency's reasonable interpretation of a statute,"<sup>141</sup> though other circuits have disagreed.<sup>142</sup> The Federal Circuit has allowed *Chevron* to trump the

137. *Id.* at 244 n.7 (citing *Caron v. United States*, 524 U.S. 308, 316 (1998)); *see also* *United States v. O'Hagan*, 521 U.S. 642, 679 (1997) (Scalia, J., concurring in part and dissenting in part) (invoking rule of lenity only with respect to questions of interpretation not covered by *Chevron* deference); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704 n.18 (1995) ("We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement."). For lower court decisions, see *Oppedisano v. Holder*, 769 F.3d 147, 153 (2d Cir. 2014); *Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 535 (4th Cir. 2005); *Perez-Olivo v. Chavez*, 394 F.3d 45, 53 (1st Cir. 2005); *Amador-Palomares v. Ashcroft*, 382 F.3d 864, 868 (8th Cir. 2004); *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1272 (9th Cir. 2001).

138. 563 U.S. 1 (2011).

139. *Id.* at 14–16 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (other citations omitted).

140. *Id.* In *Reno v. Koray*, 515 U.S. 50 (1995), the Court also appears to have allowed *Skidmore* deference to preclude application of the rule of lenity. *See id.* at 61, 65. The Court did not specify the level of deference and cited *Chevron*, but it deferred to an agency guideline, which would generally be treated under *Skidmore*. *See id.* at 61. As in *Kasten*, the Court held that lenity would come into play only after other tools of interpretation had been exhausted. *See id.* at 64–65 ("The rule of lenity applies only . . . 'after seizing everything from which aid can be derived[]' . . ." (quoting *Smith v. United States*, 508 U.S. 223, 239 (1993))).

141. *Confederated Salish & Kootenai Tribes v. United States ex rel. Norton*, 343 F.3d 1193, 1198 (9th Cir. 2003) (citing *Williams v. Babbitt*, 115 F.3d 657, 663 n.5 (9th Cir. 1997)).

142. *See Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997).

rule of resolving interpretive doubts in favor of veterans in some cases<sup>143</sup> and has allowed the rule favoring veterans to trump *Chevron* in at least one other.<sup>144</sup>

The D.C. Circuit has more broadly questioned whether courts should employ the normative canons even when evaluating the reasonableness of an agency's interpretation at *Chevron* step two. In *Michigan Citizens for an Independent Press v. Thornburgh*,<sup>145</sup> the court reasoned:

*Chevron* implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable agency interpretations of ambiguous statutes. If a statute is ambiguous, a reviewing court cannot reverse an agency decision merely because it failed to rely on any one of a number of canons of construction that might have shaded the interpretation a few degrees in one direction or another.<sup>146</sup>

How to balance “two legislative policies in tension,” the court reasoned, was “precisely the paradigm situation *Chevron* addressed.”<sup>147</sup>

Professor Adrian Vermeule has argued that courts should allow agency interpretations to foreclose application of canons more generally. “When the statutory text at hand is ambiguous or vague, judges should defer to the interpretations of administrative agencies or executive agents rather than attempting to fill in gaps or ambiguities by reference to other sources,” he writes, including “many of the canons of construction.”<sup>148</sup> Like Bamberger, Vermeule argues that “[a]gencies will often possess far better information about the legislative process that produced the statute, about the specialized policy context surrounding the statute's enactment, and about the resulting legislative deal.”<sup>149</sup> But unlike Bamberger, Vermeule would not ask at *Chevron* step two

143. Nat'l Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs, 809 F.3d 1359, 1363 (Fed. Cir. 2016); Nielson v. Shinseki, 607 F.3d 802, 808 & n.4 (Fed. Cir. 2010).

144. Kirkendall v. Dep't of Army, 479 F.3d 830, 846 (Fed. Cir. 2007).

145. 868 F.2d 1285 (D.C. Cir.), *aff'd by an equally divided court*, 493 U.S. 38 (1989) (mem.).

146. *Id.* at 1292; *see also* Halverson v. Slater, 129 F.3d 180, 184 (D.C. Cir. 1997) (“If . . . the statute is ambiguous, then *Chevron* step two ‘implicitly precludes courts picking and choosing among various canons of construction to reject reasonable agency interpretations.’” (quoting *Mich. Citizens*, 868 F.2d at 1292)).

147. *Mich. Citizens*, 868 F.2d at 1293. In another case, the D.C. Circuit held that normative canons could not be used at step two even to show that the agency's interpretation was reasonable. *See* Ober United Travel Agency, Inc. v. U.S. Dep't of Labor, 135 F.3d 822, 825 (D.C. Cir. 1998).

148. VERMEULE, *supra* note 32, at 183.

149. *Id.* at 209.

whether the agency had sufficiently considered the normative canon or its underlying values.<sup>150</sup>

Reasonable minds may differ about how the strengths of agency decision making should affect the application of normative canons within the *Chevron* framework. But it should at least be clear that there is a range of possibilities. The Supreme Court has clearly held that some normative canons apply at *Chevron* step one, that others apply at *Chevron* step two, and that still others may not apply at all once an agency has interpreted a statute. This Article now considers what the Supreme Court has already said about where the presumption against extraterritoriality falls within this range of possibilities.

### III. THE PRESUMPTION AGAINST EXTRATERRITORIALITY IN THE FRAMEWORK OF DEFERENCE

This Part moves from canons in general to the presumption against extraterritoriality in particular. Contrary to the assumptions of some courts and commentators, the Supreme Court's decisions do not establish that the presumption is a tool of interpretation to be applied at *Chevron* step one. Instead, these decisions suggest that the presumption against extraterritoriality should be applied when a court considers the reasonableness of an agency interpretation at *Chevron* step two.

#### A. *Foley Bros. v. Filardo*

The Supreme Court first considered the relationship between the presumption against extraterritoriality and agency interpretations in *Foley Bros. v. Filardo*.<sup>151</sup> The interpretive question was whether the federal Eight Hour Law mandating overtime pay applied to a contract between the United States and a private contractor to perform construction work in Iran and Iraq.<sup>152</sup> The Court began with the presumption against extraterritoriality—"that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."<sup>153</sup> There was nothing in the text or legislative history of the act, the Court concluded, to rebut this presumption.<sup>154</sup>

---

150. *Id.* at 206 ("[J]udges should defer to agencies' choices about whether, when, and how to employ the traditional tools where a linguistic gap or ambiguity exists in the provision immediately at hand.").

151. 336 U.S. 281 (1949).

152. 40 U.S.C. §§ 321–26 (1946); *Foley Bros.*, 336 U.S. at 282–83.

153. *Foley Bros.*, 336 U.S. at 285 (citing *Blackmer v. United States*, 284 U.S. 421, 437 (1932)).

154. *Id.* at 285–88.

But the Court went on to consider whether “administrative interpretations of the Eight Hour Law” might provide a “touchstone by which its geographic scope can be determined.”<sup>155</sup> First, there was an executive order suspending the law at U.S. military bases leased from Great Britain, which indicated “a conclusion on the part of the President that the statute applied, or might apply, to these bases.”<sup>156</sup> But the order did not speak to “the Act’s applicability to localities unquestionably and completely beyond the direct legislative competence of the United States.”<sup>157</sup> There were also two attorney general’s opinions interpreting the act.<sup>158</sup> But they pointed in different directions, with the 1905 opinion indicating that the law did apply to the construction of public works in the Panama Canal Zone and the 1924 opinion indicating that the law did not apply to English workers remodeling the U.S. Embassy in London.<sup>159</sup> Finally, the Court noted that the Treasury Department did not require use of its standard construction contract with an eight-hour provision in foreign countries and that the State Department did not consider it necessary to include such provisions in contracts to be performed in foreign countries.<sup>160</sup> In the end, the Court concluded “that administrative interpretations of the Act, although not specifically directed at the precise problem before us” tended to support a “restricted geographical scope.”<sup>161</sup>

In *Foley Bros.*, the presumption against extraterritoriality did not make administrative interpretations of the Eight Hour Law irrelevant. *Foley Bros.* was decided long before *Chevron*, but it came just five years after *Skidmore*.<sup>162</sup> Although *Foley Bros.* did not cite *Skidmore*, the Court gave the administrative interpretations of the Eight Hour Law precisely the kind of treatment one would have expected under *Skidmore*, looking in each instance to “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to

---

155. *Id.* at 288.

156. *Id.*; Exec. Order No. 8623, 6 Fed. Reg. 13 (Dec. 31, 1940). The same was true of other executive orders suspending operation of the act in other U.S. possessions. *Foley Bros.*, 336 U.S. at 282–83.

157. *Id.* at 288–89.

158. *Id.* at 289.

159. *Id.*; see Eight Hour Law—Public Works Outside the Territorial Limits of the United States, 34 Op. Att’y Gen. 257 (1924); Eight Hour Law—Panama Canal, 25 Op. Att’y Gen. 441 (1905).

160. *Foley Bros.*, 336 U.S. at 290.

161. *Id.*

162. *Skidmore* was decided in 1944, *Foley Bros.* in 1949, and *Chevron* in 1984. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 837 (1984); *Foley Bros.*, 336 U.S. at 281; *Skidmore v. Swift & Co.*, 323 U.S. 134, 134 (1944).

persuade.”<sup>163</sup> The fact that the question in *Foley Bros.* was one of geographic scope, rather than some other interpretive question, did not change the Court’s approach to administrative interpretations.

B. *K Mart Corp. v. Cartier, Inc.*

*Chevron* was decided in 1984. Four years later, in *K Mart Corp. v. Cartier, Inc.*,<sup>164</sup> the Supreme Court applied *Chevron*’s two-step framework to evaluate an agency’s interpretations of a statute’s geographic scope. To deal with the problem of gray-market goods,<sup>165</sup> Congress passed Tariff Act § 526, prohibiting the importation of “any merchandise of foreign manufacture” that bears a trademark owned by a U.S. national.<sup>166</sup> The Customs Service issued regulations creating two exceptions to the prohibition: (1) a “common-control” exception, permitting importation if the foreign and U.S. trademarks were owned by the same person or by persons subject to common ownership or control;<sup>167</sup> and (2) an “authorized-use” exception, permitting importation if the trademark was applied under authorization of the U.S. owner.<sup>168</sup> The Court splintered on the application of *Chevron*’s two-step analysis, but a majority agreed that *Chevron* provided the proper framework.<sup>169</sup> And although Justice Brennan did not invoke *Chevron* directly,<sup>170</sup> he similarly framed his analysis in terms of the ambiguity of the statute and the reasonableness of the agency’s interpretation.<sup>171</sup>

Applying *Chevron*’s two-step analysis to the common-control exception, Justice Kennedy (joined by Justice White) found the phrase “foreign manufacture” to be ambiguous because it could refer to goods made in a foreign country or to goods made by a foreign company and held that the agency was therefore “entitled to choose any reasonable definition and to interpret the statute to say that goods manufactured by

163. *Skidmore*, 323 U.S. at 140; see *Foley Bros.*, 336 U.S. at 288–90.

164. 486 U.S. 281 (1988).

165. As the Court explained, “[a] gray-market good is a foreign-manufactured good, bearing a valid United States trademark, that is imported without the consent of the United States trademark holder.” *Id.* at 285.

166. Tariff Act of 1930, Pub. L. No. 71-361, § 526, 46 Stat. 741 (codified as amended at 19 U.S.C. § 1526(a) (2012)).

167. 19 C.F.R. § 133.21(c)(1)–(2) (1987).

168. *Id.* § 133.21(c)(3).

169. Justice Kennedy set forth the *Chevron* framework in section II.A of his opinion, *K Mart*, 486 U.S. at 291–92, which Chief Justice Rehnquist, Justice Scalia, Justice Blackmun, and Justice O’Connor joined, see *id.* at 318 (Scalia, J., concurring in part and dissenting in part).

170. Instead, Justice Brennan relied upon *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), a subsequent case applying *Chevron*. See *K Mart*, 486 U.S. at 300, 309 (Brennan, J., concurring in part and dissenting in part) (citing *Cardoza-Fonseca*, 480 U.S. at 445–49).

171. See *infra* notes 173–74, 178 and accompanying text.

a foreign subsidiary or division of a domestic company are not goods ‘of foreign manufacture.’”<sup>172</sup> Justice Brennan (joined by Justices Marshall and Stevens) agreed that “foreign manufacture” was ambiguous<sup>173</sup> and concluded that the Customs Service’s interpretation was “reasonable.”<sup>174</sup> Justice Scalia (joined by Chief Justice Rehnquist and Justices Blackmun and O’Connor), on the other hand, thought “of foreign manufacture” could mean only “manufactured abroad” and so would have invalidated the agency’s regulation at *Chevron* step one.<sup>175</sup> The agency’s authorized-use exception, on the other hand, did not survive *Chevron* step one.<sup>176</sup> A majority of the Court concluded that “[u]nder no reasonable construction of the statutory language can goods made in a foreign country by an independent foreign manufacturer be removed from the purview of the statute.”<sup>177</sup> Justice Brennan disagreed, but again in ways that echoed *Chevron*.<sup>178</sup>

Thus, just four years after *Chevron*, the Supreme Court applied its two-step analysis in the context of extraterritorial regulation. Moreover, the Court specifically deferred to an agency on the geographic scope of a statute, upholding its interpretation of the phrase “of foreign manufacture” to exclude goods manufactured by a foreign affiliate of a U.S. company.<sup>179</sup> *K Mart* does not definitively settle the relationship between *Chevron* and the presumption against extraterritoriality for two reasons—first, because it predates the revival of the presumption in *Argentine Republic v. Amerada Hess Shipping Corp.*<sup>180</sup> and *EEOC v. Arabian American Oil Co (“Aramco”)*,<sup>181</sup> and, second, because the phrase “of foreign manufacture” might have rebutted the presumption even if the Court had thought the presumption applicable. But *K Mart* does provide another example of the Supreme Court applying its standard rules of deference to administrative agencies to questions of geographic scope.

172. *K Mart*, 486 U.S. at 292–93 (Kennedy, J.).

173. *See id.* at 299 (Brennan, J., concurring in part and dissenting in part).

174. *Id.* at 309.

175. *Id.* at 319 (Scalia, J., concurring in part and dissenting in part).

176. *Id.* at 294 (majority opinion).

177. *Id.*; *see also id.* at 323 (Scalia, J., concurring in part and dissenting in part) (“Section 526(a) also unambiguously embraces . . . the situation . . . in which a domestic trademark owner and registrant authorizes a foreign firm to use its United States trademark abroad.”).

178. *Id.* at 316 (Brennan, J., concurring in part and dissenting in part) (“Since I believe that the application of § 526 to [authorized use] is ambiguous, the sole remaining question is whether Treasury’s decision to exclude [authorized use] from § 526’s prohibition is entitled to deference.”).

179. *See supra* notes 172–74 and accompanying text.

180. 488 U.S. 428 (1989).

181. 499 U.S. 244 (1991); *see supra* note 56 and accompanying text.

## C. EEOC v. Arabian American Oil Co.

The presumption against extraterritoriality was reborn in *Aramco*.<sup>182</sup> There, the Supreme Court relied on the presumption to conclude that Title VII of the 1964 Civil Rights Act,<sup>183</sup> which prohibits employment discrimination, did not apply to a U.S. company's employment of a U.S. citizen abroad.<sup>184</sup>

For present purposes, the important part of the *Aramco* Court's analysis is its treatment of the EEOC's 1988 guideline construing Title VII to apply extraterritorially.<sup>185</sup> The Court concluded at *Chevron* step zero that this guideline was not entitled to *Chevron* deference because Congress had not given the EEOC authority to promulgate rules and regulations for Title VII.<sup>186</sup> The Court therefore evaluated the guideline under *Skidmore*, finding that its "persuasive value is limited"<sup>187</sup> because the agency changed its position since Title VII's enactment but "offer[ed] no basis in its experience for the change."<sup>188</sup> Given the limited persuasive value of the guideline under *Skidmore*, the Court concluded, "the EEOC's interpretation is insufficiently weighty to overcome the presumption against extraterritorial application."<sup>189</sup>

Justice Scalia wrote a concurring opinion specifically on the issue of deference. He questioned the Court's conclusion that the EEOC's views were "not entitled to the deference normally accorded administrative agencies under *Chevron*."<sup>190</sup> Instead, Justice Scalia would have rejected the EEOC's interpretation as unreasonable at *Chevron* step two:

[D]eference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ. Given the presumption against extraterritoriality that the Court accurately describes, and the requirement that the intent to overcome it be "clearly expressed," it is in my view not reasonable to give effect to mere implications from the statutory language as the EEOC

182. See *supra* note 56 and accompanying text.

183. Pub. L. No. 88-352, §§ 701-716, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17).

184. *Aramco*, 499 U.S. at 259.

185. See *id.* at 257-58.

186. See *id.* at 257.

187. *Id.* at 258 (footnote omitted).

188. *Id.* at 257; cf. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (noting that a "[s]udden and unexplained change . . . may be 'arbitrary [and] capricious'" (quoting 5 U.S.C. § 706(2)(A)) (citations omitted)).

189. *Aramco*, 499 U.S. at 258.

190. *Id.* at 259 (Scalia, J., concurring in part and concurring in the judgment) (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837 (1984)). Justice Scalia characterized the question as "unsettled." *Id.* at 260.

has done. Cf. Sunstein, *Law and Administration after Chevron*, 90 Colum. L. Rev. 2071, 2114 (1990).<sup>191</sup>

It is notable that both the Court and Justice Scalia viewed questions of geographic scope as subject to the normal rules of deference to administrative agencies under *Skidmore* and *Chevron*. The Court concluded at step zero that the EEOC's interpretation was not entitled to *Chevron* deference because the EEOC had not been delegated authority to issue interpretations with the force of law.<sup>192</sup> The Court also found that the EEOC's interpretation was not persuasive under *Skidmore*.<sup>193</sup> But in concluding that this particular interpretation was "insufficiently weighty to overcome the presumption against extraterritorial application,"<sup>194</sup> the Court left open the possibility that another agency interpretation—even one entitled only to *Skidmore* deference—might be sufficiently weighty to overcome the presumption.

Justice Scalia also thought that the normal rules of deference to administrative agencies applied to questions of geographic scope. He would have rejected the EEOC's interpretation at *Chevron* step two on the ground that it was not "reasonable in light of the principles of construction courts normally employ," specifically the presumption against extraterritoriality.<sup>195</sup> However, he left open the possibility of deference to an agency interpretation that took the presumption against extraterritoriality into account.

Notably, neither the Court nor Justice Scalia took the position in *Aramco* that the presumption against extraterritoriality should be applied at *Chevron* step one to remove all ambiguity and leave nothing for the agency to decide, as Cass Sunstein had done in the 1990 article that Justice Scalia cited.<sup>196</sup> The fact that Sunstein put the step-one option on the table makes the decisions of both the Court and Justice Scalia *not* to endorse that option all the more striking.<sup>197</sup>

---

191. *Id.* at 260.

192. *See id.* at 257 (majority opinion).

193. *Id.* at 258.

194. *Id.*

195. *Id.* at 260 (Scalia, J., concurring in part and concurring in the judgment).

196. Sunstein later changed his position. *See* Posner & Sunstein, *supra* note 23, at 1204; *see also supra* notes 22–23 and accompanying text.

197. Note that Justice Scalia cited Sunstein using a "cf." signal, which means that the cited authority supports a proposition *different from*, but analogous to, the text proposition. *See Aramco*, 499 U.S. at 260 (Scalia, J., concurring in part and concurring in the judgment); *see also* THE SUPREME COURT'S STYLE GUIDE § 11.2(d) (Jack Metzler ed., 2016).

D. *Morrison v. National Australia Bank Ltd.*

In *Morrison v. National Australia Bank Ltd.*,<sup>198</sup> the Supreme Court applied the presumption against extraterritoriality to § 10(b) of the 1934 Securities Exchange Act.<sup>199</sup> The Court rejected the conduct and effects tests developed by the lower courts.<sup>200</sup> Instead, it adopted a “transactional test,”<sup>201</sup> holding that § 10(b) reaches fraud “only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.”<sup>202</sup>

Justice Scalia wrote for the Court in *Morrison* and, near the end of his opinion, he returned to the question of deference to agency interpretations that had prompted his concurrence in *Aramco*. Section 10(b) expressly gives the SEC authority to prescribe rules.<sup>203</sup> SEC Rule 10b-5 implementing this provision had not interpreted its geographic scope,<sup>204</sup> but the SEC had adopted the lower courts’ conduct and effects tests in adjudications under the Exchange Act.<sup>205</sup> As a general matter, SEC adjudications are entitled to *Chevron* deference,<sup>206</sup> and the U.S. Solicitor General argued that the Court should defer to the SEC’s interpretation of § 10(b)’s geographic scope in those adjudications.<sup>207</sup>

The Court declined to defer for two reasons. First, at *Chevron* step zero, Justice Scalia noted that “the Commission did not purport to be providing its own interpretation of the statute, but relied on decisions of federal courts.”<sup>208</sup> This treatment of the SEC’s interpretation echoed the Court’s decision the previous Term in *Negusie v. Holder*, which rejected a Board of Immigration Appeals interpretation because the BIA had

198. 561 U.S. 247 (2010).

199. 15 U.S.C. § 78j(b) (2012) (making it unlawful “[t]o use or employ, in connection with the purchase or sale of any security . . . or any securities-based swap agreement any manipulative or deceptive device or contrivance”).

200. See *Morrison*, 561 U.S. at 256–61 (reviewing lower court decisions).

201. *Id.* at 269.

202. *Id.* at 273.

203. See 15 U.S.C. § 78j(b) (making it unlawful “[t]o use . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors”).

204. See 17 C.F.R. § 240.10b-5 (2016).

205. See *In re U.S. Sec. Clearing Corp.*, 52 S.E.C. 92, 95 n.14, 96 n.16 (1994); *In re Robert F. Lynch*, Exchange Act Release No. 11,737, 8 SEC Docket 75, 78 n. 15 (Oct. 15, 1975).

206. See *SEC v. Zandford*, 535 U.S. 813, 819–20 (2002).

207. *Morrison*, 561 U.S. at 272.

208. *Id.* (citing *In re Robert F. Lynch*, Exchange Act Release No. 11,737, 8 SEC Docket 75, 78 n. 15 (Oct. 15, 1975)).

mistakenly thought its hands tied by a prior judicial decision and thus “ha[d] not exercised its interpretive authority.”<sup>209</sup>

Alternatively, Justice Scalia concluded that the SEC’s interpretation was not reasonable at *Chevron* step two, quoting his own concurring opinion in *Aramco*.<sup>210</sup> Because the SEC’s decisions had ignored the presumption against extraterritoriality, Justice Scalia concluded, “we owe them no deference.”<sup>211</sup> As with *Aramco*, Scalia’s treatment of *Chevron* deference is significant for what it does *not* do—apply the presumption against extraterritoriality at *Chevron* step one to determine that the intent of Congress is clear.<sup>212</sup> It leaves open the possibility that an agency decision exercising the authority delegated by Congress to interpret the geographic scope of a statute it administers would be entitled to *Chevron* deference, at least if the agency considered (rather than ignored) the presumption against extraterritoriality.

That possibility is confirmed by *Morrison*’s discussion in two other places. First, in considering whether there was sufficient evidence in the Securities Exchange Act to rebut the presumption, Justice Scalia discussed with approval § 30(a) of that act, which makes it unlawful for brokers and dealers to carry out any transaction “on an exchange not within or subject to the jurisdiction of the United States” in the securities of a U.S. issuer “in contravention of such rules and regulations as the Commission may prescribe.”<sup>213</sup> Scalia lauded this section for “contain[ing] what § 10(b) lacks: a clear statement of extraterritorial effect.”<sup>214</sup> It is true, of course, that § 30(a) contains language that would rebut the presumption.<sup>215</sup> But it is also true that § 30(a) expressly

209. *Negusie v. Holder*, 555 U.S. 511, 522 (2009).

210. *Morrison*, 561 U.S. at 272 (“We need ‘accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.’” (quoting *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in judgment))).

211. *Id.* at 272–73.

212. Justice Scalia has been critical of expanding step one. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 453–54 (1987) (Scalia, J., concurring in the judgment) (describing the implication “that courts may substitute their interpretation of a statute for that of an agency whenever, ‘[e]mploying traditional tools of statutory construction,’ they are able to reach a conclusion as to the proper interpretation of the statute” as “an evisceration of *Chevron*” (alteration in original) (quoting majority opinion)); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520 (“If *Chevron* is to have any meaning, then, congressional intent must be regarded as ‘ambiguous’ not just when no interpretation is even marginally better than any other, but rather when two or more reasonable, though not necessarily equally valid, interpretations exist.”).

213. *Morrison*, 561 U.S. at 264 (quoting 15 U.S.C. § 78dd(a) (2012)).

214. *Morrison*, 561 U.S. at 265.

215. *See* 15 U.S.C. § 78dd(a) (2012) (referring to exchanges “not within or subject to the jurisdiction of the United States”).

delegates to the SEC the authority to regulate extraterritoriality.<sup>216</sup> If an express delegation of such authority is permissible, then an implicit delegation should be as well, for it is one of the teachings of *Chevron* that Congress may delegate regulatory authority implicitly as well as expressly.<sup>217</sup>

Second, and perhaps more significantly, in discussing the focus of § 10(b), Justice Scalia did rely on a different SEC interpretation of geographic scope. This interpretation, known as Regulation S, construes the registration requirements of the 1933 Securities Act “not to include . . . sales that occur outside the United States.”<sup>218</sup> Scalia used this regulation to show that “[t]he same focus on domestic transactions is evident in the Securities Act” as in the Exchange Act.<sup>219</sup> Of course, Regulation S would only be relevant to show the focus of the Securities Act if it were entitled to deference as the reasonable interpretation of an agency charged with the administration of the act.

In short, not only did *Morrison* avoid holding that the presumption against extraterritoriality applies at *Chevron* step one to remove ambiguities from the statute, it endorsed the notion that Congress may delegate to administrative agencies the authority to regulate extraterritorially, and it actually deferred to an agency regulation defining the geographic scope of a statutory provision.

\* \* \*

What may one conclude from what the Supreme Court has already said about deference to agency interpretations of geographic scope? First, and most broadly, questions of geographic scope are treated no differently from other questions of interpretation. The Court applied the normal rules of *Chevron* deference in *K Mart*, *Aramco*, and *Morrison*, concluding that deference was due in the first case and not in the other two.<sup>220</sup> The Court also applied the normal rules of *Skidmore* deference in *Foley Bros.* and *Aramco*, suggesting in each case that even *Skidmore* deference might be sufficient to overcome the presumption against extraterritoriality.<sup>221</sup>

Second, courts are *not* to apply the presumption against extraterritoriality at *Chevron* step one to remove any ambiguity about

216. *See id.* (prohibiting actions “in contravention of such rules and regulations as the Commission may prescribe”).

217. *See supra* notes 41–42 and accompanying text.

218. *Morrison*, 561 U.S. at 269 (quoting 17 C.F.R. § 230.901 (2016)). For further discussion of Regulation S, see *infra* Section V.C.2.

219. *Morrison*, 561 U.S. at 268 (citation omitted).

220. *See supra* notes 172–74, 186, 208–11 and accompanying text.

221. *See supra* notes 155–63, 187–89 and accompanying text.

geographic scope and leave no discretion to the agency. The Supreme Court has certainly concluded that an agency's interpretation was not entitled to *Chevron* deference at step zero—in *Aramco* because the agency lacked the authority to make binding interpretations<sup>222</sup> and in *Morrison* because it had not exercised that authority.<sup>223</sup> The Supreme Court has also suggested in *Morrison* that an agency's interpretation might not be reasonable if it did not take the presumption against extraterritoriality into account. But the Court has *never* applied the presumption against extraterritoriality at *Chevron* step one, despite having opportunities to do so in both *Aramco* and *Morrison*.

Third, the Supreme Court does sometimes defer to agency interpretations of a statutory provision's geographic scope. It did so in *K Mart*, before the revival of the presumption against extraterritoriality, holding that the agency's interpretation of the phrase "of foreign manufacture" was reasonable.<sup>224</sup> And it did so again in *Morrison* when it leaned on the SEC's Regulation S to show that the focus of the Securities Act was on domestic transactions.<sup>225</sup> Part IV considers whether deferring to agency determinations of geographic scope is warranted.

#### IV. THE CASE FOR STEP TWO

As Part III has shown, the Supreme Court has not treated the presumption against extraterritoriality as a normative canon to be applied at *Chevron* step one. If Congress has delegated interpretive authority to an agency and if the agency has exercised that authority, the Supreme Court has suggested that the presumption should be applied at *Chevron* step two, with courts deferring to reasonable agency interpretations of geographic scope and overturning unreasonable ones.<sup>226</sup> If Congress has not delegated interpretive authority or if the agency has not exercised that authority, the Supreme Court has further suggested that agency interpretations of geographic scope are entitled to *Skidmore* deference based on their power to persuade.<sup>227</sup>

222. See *supra* note 186 and accompanying text.

223. See *supra* notes 208–09 and accompanying text.

224. See *supra* notes 172–74 and accompanying text.

225. See *supra* notes 218–19 and accompanying text.

226. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 272 (2010) ("We need 'accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.' " (quoting *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in judgment))).

227. *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 258 (1991) (majority opinion); *Foley Bros. v. Filardo*, 336 U.S. 281, 288–90 (1990).

This Part asks whether such treatment makes sense. Section IV.A first considers the strengths of agency interpretation in comparison to courts. Agencies are likely to have a better understanding than courts of statutory purposes, regulatory options, and potential conflicts with foreign interests. Agencies can also calibrate extraterritorial regulation far better than courts, maximizing the achievement of statutory purposes while minimizing conflicts with foreign interests. Then, Section IV.B considers the proper role of courts. It distinguishes the presumption against extraterritoriality from the normative canons that are applied at *Chevron* step one, but it also rejects complete deference. Section IV.B concludes that having courts review agency interpretations of geographic scope for reasonableness at *Chevron* step two is the best way to ensure that agencies actually bring their interpretive strengths to bear when they regulate extraterritorially.

A. *The Strengths of Agency Interpretation*

At bottom, the presumption against extraterritoriality serves to balance statutory purposes against potential conflicts with foreign interests.<sup>228</sup> Agencies possess advantages in weighing both. In understanding the purposes of statutory provisions, agencies have access to information that goes beyond the text and legislative history to which courts generally are limited. Agencies also have a better understanding of the full range of regulatory options available to achieve those statutory purposes. In evaluating potential conflicts with foreign interests, agencies may take advantage of their contacts with foreign regulators, while courts consider the possibilities of conflict only in the abstract. Not only are agencies better at evaluating both sides of the equation, they also have the capacity to strike a more finely calibrated balance between them. This Section describes agency advantages with respect to statutory purposes, regulatory options, potential conflicts with foreign interests, and calibration in turn.

Statutory purposes are central to both steps of the framework that the Supreme Court has developed for courts to apply the presumption against extraterritoriality. Courts must look for a clear indication of congressional intent to regulate extraterritorially at *RJR* step one and must determine the focus of congressional concern at *RJR* step two.<sup>229</sup> But as Professor Kevin Stack has noted, “[a]gencies are far better

---

228. See *supra* Section I.B.

229. See *supra* notes 62–81 and accompanying text.

positioned than courts to discern statutory purposes.<sup>230</sup> The evidence to which courts look for a clear indication of extraterritoriality at step one—text, context, structure, legislative history—is equally available to agencies. Agencies also seem capable of performing step two’s focus analysis at least as well as courts.<sup>231</sup> Certainly, *Morrison* expressed confidence that agencies could perform this sort of focus analysis when it relied on the SEC’s Regulation S as evidence that the focus of the Securities Act, like the Exchange Act, was on domestic transactions.<sup>232</sup>

In construing the geographic scope of a statutory provision, however, agencies have access to additional information about statutory purposes that courts lack, including “information about the legislative process that produced the statute, about the specialized policy context surrounding the statute’s enactment, and about the resulting legislative deal.”<sup>233</sup> As Professor Peter Strauss has noted, this makes agencies better readers of legislative history, able to distinguish “the legislative history wheat, from the more manipulative chaff.”<sup>234</sup> Furthermore, agencies continue to receive information about Congress’s preferences after a statute is passed “through both formal means such as agency budgets, oversight hearings, and official confirmation decisions, and through informal means, such as frequent contact with legislators and staff.”<sup>235</sup> In *Chevron*, the Supreme Court noted that it had consistently

230. Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 906 (2015).

231. *See id.* at 907 (“To the extent statutory purpose is discernible from statutory text (including enacted statements of purpose), agencies and courts have equal access to it, and agencies have the advantage of having more than sporadic encounters with the statutes they administer.”).

232. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 268–69 (2010); *see also supra* notes 218–19 and accompanying text.

233. VERMEULE, *supra* note 32, at 209. This is particularly true when an agency has participated extensively in the drafting process. *See* Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 129 (2015) (“If the executive is involved in drafting legislation, then it will have special insight into what the goals and intentions behind the legislation actually were, what the political and practical compromises were, and how [members of Congress] thought about specific problems throughout the legislative process.”).

234. Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 347 (1990); *see also* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1043 (2015) (reporting that agencies distinguish among different kinds of legislative history when interpreting statutes).

235. Bamberger, *supra* note 31, at 98 (footnotes omitted); *see also* Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 512 (2005) (“Agencies are subjected to legislative oversight of their implementing activity. They consult with Congress continuously about proposals relevant to their jurisdictions. They appear before congressional appropriations committees who often have strong views about the directions that agency implementation should take.”).

deferred to administrative interpretations “whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.”<sup>236</sup> That description clearly fits many instances of extraterritorial regulation.

Agencies also have better knowledge of the range of regulatory possibilities and how each of those possibilities might serve the statutory policy.<sup>237</sup> It is for this reason that the Supreme Court has given *Chevron* deference to agency interpretations of geographic scope in a domestic context.<sup>238</sup> Agencies can also use notice-and-comment rulemaking to obtain “input from a wide variety of sources in a way that can facilitate transparent policymaking and reasoned deliberation about the consequences of proposed policies.”<sup>239</sup> As Professor Kenneth Bamberger has summarized, “agencies are more likely than courts to possess the resources needed to engage in interest balancing and to assess the practical impact of normative policy choices.”<sup>240</sup>

Agencies that regulate internationally are generally in contact with their counterparts in other countries.<sup>241</sup> As a result, these agencies are likely to have far better information than courts about the extent to which each regulatory option might conflict with the interests of other countries and the amount of discord such conflict would cause. Courts, by contrast, consider the possibility of conflict with foreign interests only in the abstract. Although preventing “unintended clashes between our laws and those of other nations which could result in international

236. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961)).

237. *See Stack*, *supra* note 230, at 908 (“Agencies are also better equipped than courts at selecting the best means of implementation.”).

238. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985) (“In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.”).

239. *Stack*, *supra* note 230, at 909.

240. *Bamberger*, *supra* note 31, at 67.

241. *See* Administrative Conference of the United States: Adoption of Recommendations, 77 Fed. Reg. 2257, 2260 (Jan. 17, 2016) (highlighting international “coordination in regulatory promulgation, mutual recognition of inspection and certification regimes, and coordination and information sharing in enforcement” by agencies). In 2012, President Obama issued Executive Order 13,609 to promote international regulatory cooperation. Exec. Order No. 13,609, 3 C.F.R. § 13609 (2012); *see also* David Zaring, *Free Trade Through Regulation?*, 89 S. CAL. L. REV. 863, 881–86 (2016) (discussing examples of regulatory cooperation under Executive Order 13,609).

discord” is often cited as one of the reasons for the presumption,<sup>242</sup> the Supreme Court has never required a showing of actual conflict with foreign law.<sup>243</sup>

Finally, agencies are able to calibrate the geographic scope of their regulations in far finer detail than courts. Noting the complexities of regulating employment discrimination abroad in *Aramco*, the Supreme Court observed that Congress could “amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot.”<sup>244</sup> Congress did, in fact, amend Title VII to specify its application to U.S. companies and to foreign companies controlled by U.S. companies in their employment of U.S. citizens abroad and also to create an exception for discrimination required by foreign law.<sup>245</sup> But the EEOC has in turn issued guidance on the interpretation of these provisions that explains their application in greater detail.<sup>246</sup> The regulations discussed in Section V.C—HSR, Regulation S, and the Volcker Rule—provide further examples of calibration that no court would have attempted as a matter of statutory interpretation. Such fine-tuning allows agencies to maximize the achievement of statutory purposes while minimizing conflicts with foreign interests.<sup>247</sup> As Professor Peter Strauss has written, “agencies read their particular statutes with a far richer understanding of context, interrelationship, and impact than courts could hope to achieve.”<sup>248</sup>

While generally arguing for *Chevron* deference on questions of geographic scope, Professor Curtis Bradley has questioned whether such deference is appropriate for agencies that lack foreign affairs expertise and for independent agencies not subject to direct presidential control.<sup>249</sup> But there are good reasons to reject such a qualification. First, many

242. EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20–22 (1963)); see also *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (noting that presumption “serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries” (citations omitted)).

243. Indeed, the Court has repeatedly said that the presumption applies “regardless of whether there is a risk of conflict between the American statute and a foreign law.” *RJR Nabisco*, 136 S. Ct. at 2100 (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010)).

244. *Aramco*, 499 U.S. at 259.

245. See 42 U.S.C. §§ 2000e(f), 2000e-1(b)–(c) (2012).

246. See *Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States*, EEOC (Oct. 20, 1993), <https://www.eeoc.gov/policy/docs/extrateritorial-vii-ada.html> [<https://perma.cc/NKF5-DDE9>].

247. Detailed regulations on geographic scope have the further advantage of providing clear guidance to regulated parties of what is covered by a statutory provision and what is not.

248. Strauss, *supra* note 234, at 352.

249. Bradley, *supra* note 21, at 694–95.

agencies other than the State Department (including independent agencies) do have foreign affairs expertise with respect to the specific questions that fall within their areas of responsibility.<sup>250</sup> Second, as Professor Jody Freeman and Professor Jim Rossi have shown, many tools exist to coordinate rule making among different agencies.<sup>251</sup> The joint rule making with respect to the Volcker Rule shows that such coordination can occur even when independent agencies are involved.<sup>252</sup> Third, to the extent coordination with the United States Department of State or another government agency with expertise in foreign affairs is necessary to make an agency's interpretation of geographic scope reasonable, courts may take such coordination (or the lack thereof) into account at *Chevron* step two.<sup>253</sup> In short, the arguments for *Chevron* deference on questions of geographic scope are not limited to agencies with foreign affairs expertise or to those subject to the direct control of the President.

*B. The Proper Role of Courts*

If there is much to be gained by allowing agencies to interpret the geographic scope of the statutes they administer, is there anything to be lost by limiting the role of courts? Are agencies capable of protecting the normative values reflected in the presumption against extraterritoriality as effectively as courts? After all, the Supreme Court has held that a number of normative canons should be applied at *Chevron* step one.<sup>254</sup>

It may be instructive to compare the presumption against extraterritoriality to some step-one normative canons, like the constitutional avoidance canon, the canon against encroaching on traditional state powers, and the canon against retroactivity. Each of these step-one canons reflects normative values that are constitutionally based. The underlying assumption appears to be that courts are better than agencies at protecting such values. The presumption against extraterritoriality, by contrast, is “not founded on constitutional or other

---

250. Administrative Conference of the United States: Adoption of Recommendations, 77 Fed. Reg. 2257, 2260 (Jan. 17, 2016) (“Many agencies successfully engage in international cooperation through a variety of different methods.”).

251. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1155–81 (2012).

252. See *infra* Section V.C.3 (discussing Volcker Rule).

253. Cf. *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007) (declining to defer to an agency's foreign policy rationale because it had not consulted with the State Department, to which Congress has specifically delegated the formulation of policy).

254. See *supra* Section II.A.

concerns that suggest a need for congressional as opposed to Executive resolution.”<sup>255</sup>

Among the other normative canons, the closest analogue to the presumption against extraterritoriality appears to be the presumption against preemption.<sup>256</sup> It too requires weighing a federal statutory purpose against the possibility of conflict with the laws of other sovereigns. Although the case law is somewhat muddled, the Supreme Court has generally treated the presumption against preemption at *Chevron* step two.<sup>257</sup> But the case for applying the presumption against extraterritoriality at step two is significantly stronger than the case for applying the presumption against preemption there. Some have argued that courts are better equipped to protect state sovereignty within a federal system than administrative agencies.<sup>258</sup> But there is little reason to think that the same is true with respect to the interests of other countries. As others have noted, “the executive branch has much greater expertise and access to information than the courts concerning foreign affairs matters.”<sup>259</sup> Many federal agencies are in close touch with their foreign counterparts,<sup>260</sup> and one in particular—the Department of State—has a strong interest in avoiding unnecessary conflicts with foreign interests.

To suggest that administrative agencies are capable of protecting the interests of other countries is not to say that their interpretations of geographic scope will necessarily be more constrained than those of courts applying the presumption against extraterritoriality. When achieving statutory purposes requires extraterritorial regulation and when conflicts with foreign interests are weak, one may expect agencies to interpret the geographic scope of statutory provisions broadly. What one can expect is that agencies will seek to avoid *unnecessary* conflicts

255. Bradley, *supra* note 21, at 694; *see also* Clopton, *supra* note 21, at 43 (“The presumption against extraterritoriality has a different origin—it is not a constitutionally inspired rule, but instead it is a rule designed to promote policy goals and to approximate legislative intent.”).

256. *See supra* note 109 and accompanying text.

257. *See supra* Section II.B.

258. *See* Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 742 (2004) (“An agency may expertly assess the extent to which a particular state statute interferes with the achievement of a federal goal. Other institutions, however, may better assess issues such as the overall distribution of governmental authority and the intrinsic value of preserving core state regulatory authority.”).

259. Bradley, *supra* note 21, at 664; *see also* Posner & Sunstein, *supra* note 23, at 1207 (noting that “the expertise rationale for deference to the executive is stronger in the foreign relations setting than in the traditional *Chevron* setting”).

260. *See supra* note 241 and accompanying text.

and that they will have a better understanding than courts of when conflict is necessary and when it is not.

If agencies can protect the normative values reflected in the presumption against extraterritoriality, would it make sense to defer completely to their interpretations of geographic scope, foreclosing any application of the presumption? This is what the Supreme Court has done with the rule of lenity,<sup>261</sup> and it is what Professor Adrian Vermeule has suggested for canons of interpretation more generally.<sup>262</sup> This Article rejects complete deference to agency interpretations of geographic scope for two reasons. First, reviewing the reasonableness of an agency's extraterritorial regulation at *Chevron* step two can ensure that the agency has not completely ignored the normative values reflected in the presumption.<sup>263</sup> It provides a backstop to protect against the rare instance in which an agency has interpreted the geographic scope of a statute with no regard for foreign interests. Second, the prospect of reasonableness review "can alter administrative behavior prospectively,"<sup>264</sup> giving agencies greater incentives to take comity values seriously in the first place. Recent empirical work suggests that judicial review does influence the rule-drafting process and that agencies take greater account of canons that courts in fact apply.<sup>265</sup> In summary, as Professor Kenneth Bamberger has written, "the reasonableness analysis provides both incentives for administrative accommodation of the underlying value in the first instance and the opportunity for meaningful judicial review."<sup>266</sup>

Of course, judicial review might take a number of different forms. Judicial review should provide appropriate incentives to agencies and guard against rogue interpretations. It should also take advantage of agency strengths and avoid substituting the court's judgment for the agency's. Part V focuses on the form that reasonableness review should take at *Chevron* step two.

---

261. See *supra* notes 130–40 and accompanying text.

262. See VERMEULE, *supra* note 32, at 183.

263. Cf. Ganesh Sitaraman, *Foreign Hard Look Review*, 66 ADMIN. L. REV. 489, 493–94 (2014) ("As a check on executive power, hard look review prevents arbitrary and capricious actions, actions unsupported by logical reasoning or evidence, and actions that violate procedures or fail to consider relevant alternatives.").

264. Bamberger, *supra* note 31, at 118.

265. See Walker, *supra* note 234, at 1052 ("The overwhelming majority of rule drafters surveyed recognized that judicial review plays a role in their interpretive efforts and that judicial views on the various interpretive tools influence their rule-drafting process. For instance, nearly four in five rule drafters indicated that it matters to their rule-drafting practices whether courts routinely rely on the canons.").

266. Bamberger, *supra* note 31, at 121.

## V. THE PRESUMPTION AT STEP TWO

If the presumption against extraterritoriality is best applied at *Chevron* step two, the question then becomes just how review at step two should operate. Must an agency track what a court would do under the presumption for its interpretation to be considered reasonable? Or should it be sufficient for an agency to consider the normative values that underlie the presumption?

As a preliminary matter, Section V.A considers and rejects the argument that the step-two analysis should vary depending on what the statute says about its geographic scope. *Chevron* itself rejected the distinction between explicit and implicit delegations of interpretive authority.<sup>267</sup> On the one hand, this means that Congress should not have to say expressly that an agency may regulate extraterritorially. On the other hand, it means that agency interpretations of geographic scope should still be evaluated for reasonableness, even if the statute rebuts the presumption against extraterritoriality.

Section V.B outlines four possible models for applying the presumption against extraterritoriality at *Chevron* step two. Under the first model, a court would find the agency's interpretation reasonable only if the agency applied the presumption against extraterritoriality in essentially the same way that a court would. Under the second model, a court would defer to the agency with respect to certain inputs into the extraterritoriality analysis, such as the focus of a statutory provision, but not on the ultimate question of geographic scope. Under the third model, a court would find the agency's interpretation reasonable if the agency applied the presumption against extraterritoriality, even if its application differs from what the court would have done. Under the fourth model, a court would find the agency's interpretation reasonable if it considered the normative values reflected in the presumption, even if the agency did not apply the presumption itself.

Finally, Section V.C considers three significant administrative interpretations of geographic scope: (1) the Federal Trade Commission's ("FTC's") interpretation of HSR in its "foreign commerce" exemptions; (2) the SEC's interpretation of the Securities Act's registration requirements in Regulation S; and (3) the joint agency interpretation of the Dodd-Frank Act's "Volcker Rule" in the recent regulations

---

267. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837, 844 (1984) ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." (citations omitted)).

implementing that rule. This Section argues that each is reasonable and should be given deference at *Chevron* step two, even though each likely differs from the geographic scope that a court would have given these statutory provisions.

A. *The Form of Delegation Should Not Matter*

Before considering how a court might evaluate the reasonableness of an agency's interpretation of a statute's geographic scope, it is worth considering whether the form of Congress's delegation to the agency should make a difference. At least three cases are worth considering: (1) Congress might expressly delegate authority to an agency to determine the geographic scope of a statute or to regulate extraterritorially; (2) Congress might clearly indicate that a statute applies extraterritorially while saying nothing expressly about the agency's authority to define the statute's geographic scope; and (3) Congress might say nothing expressly about either the statute's geographic scope or the agency's authority to interpret that scope.

As an example of the first case, consider § 30(a) of the Securities Exchange Act, which makes it unlawful for brokers and dealers to effectuate "on an exchange not within or subject to the jurisdiction of the United States" transactions in the securities of U.S. issuers "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors or to prevent the evasion of this chapter."<sup>268</sup> One might consider this to be the strongest case for deference on two grounds. First, the express delegation shows that Congress wanted the agency to have extraterritorial regulatory authority. Professor Cass Sunstein has argued that nondelegation canons should prohibit only implicit delegations and "should not be taken to forbid Congress from delegating expressly if it chooses."<sup>269</sup> Thus, even if one considered the presumption to be a nondelegation canon, as Sunstein did when he wrote his article,<sup>270</sup> it should not prevent Congress from adopting a provision like § 30(a). Second, the delegation of extraterritorial regulatory authority might itself be sufficient to rebut the presumption against extraterritoriality. That is what Justice Scalia concluded in *Morrison* when he wrote that "Subsection 30(a) contains what § 10(b) lacks: a clear statement of extraterritorial effect."<sup>271</sup> Once the

---

268. 15 U.S.C. § 78dd(a) (2012).

269. Sunstein, *Nondelegation Canons*, *supra* note 22, at 336.

270. On Sunstein's changed thinking with respect to the presumption against extraterritoriality, see *supra* notes 22–23 and accompanying text.

271. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010).

presumption has been rebutted, one might argue that the presumption against extraterritoriality simply falls away.<sup>272</sup>

The second case is a provision that rebuts the presumption against extraterritoriality but does not expressly give the agency authority to define the provision's geographic scope. An example is the Volcker Rule, discussed below,<sup>273</sup> which prohibits banks from proprietary trading. The Volcker Rule's exception allowing foreign banks to engage in such trading "solely outside of the United States,"<sup>274</sup> almost certainly gives the "clear indication of extraterritoriality" that the presumption requires.<sup>275</sup> On the other hand, in contrast to § 30(a) of the Exchange Act, the Volcker Rule does not contain an express delegation to the agencies with respect to geographic scope, only a more general delegation to "adopt rules to carry out this section."<sup>276</sup> Under *Chevron*, however, this should make no difference. As the Supreme Court has recently made clear, for an agency interpretation to be entitled to deference, a court need not find that "*the particular issue* was committed to agency discretion."<sup>277</sup> It suffices that Congress has vested the agency "with general authority to administer [a statute] through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority."<sup>278</sup>

The third case is a provision that says nothing expressly either about its geographic scope or about an agency's authority to interpret that scope. This describes most statutory schemes with potential extraterritorial application, from HSR and the registration requirements of the Securities Act (both considered below in Section V.C) to § 10(b) of the Securities Exchange Act (which the Court considered in *Morrison*).<sup>279</sup> Statutes in this third category should be treated just like the other two. One of *Chevron*'s central teachings is that implicit delegations of regulatory authority should not be treated differently

272. *But see infra* text following note 284 (arguing that courts should require agencies to consider comity even if the presumption does not apply or has been rebutted).

273. *See infra* Section IV.C.3.

274. 12 U.S.C. § 1851(d)(1)(H) (2012).

275. *Morrison*, 561 U.S. at 265.

276. 12 U.S.C. § 1851(b)(2)(A).

277. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013).

278. *Id.* Geographic scope is not the sort of major question that Congress cannot be presumed to have delegated to agencies implicitly. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000) (holding that the regulation of tobacco was "a decision of such economic and political significance" that Congress could not have intended to delegate it to the FDA implicitly). Questions of geographic scope are common and vary in their economic and political significance. Moreover, as Part IV has argued, agencies are in a better position than courts to weigh the significance of extraterritorial regulation.

279. *See infra* Section VI.B.

from explicit ones: “Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>280</sup> As earlier discussion has shown, even in cases of implicit delegation there are good reasons to prefer that agencies define the geographic scope of statutory provisions rather than courts.<sup>281</sup>

Finally, it is worth adding that the clear indication of extraterritoriality—present in the first two cases, but not in the third—does *not* make the presumption irrelevant to judging whether an agency’s interpretation of the provision’s geographic scope is reasonable. In *RJR Nabisco*, the Supreme Court said that if the presumption against extraterritoriality has been rebutted, “[t]he scope of an extraterritorial statute . . . turns on the limits Congress has (or has not) imposed on the statute’s foreign application.”<sup>282</sup> It goes without saying that an agency may not depart from the unambiguous intent of Congress.<sup>283</sup> But sometimes the limits that Congress has imposed will require interpretation—like “solely outside of the United States” in the Volcker Rule.<sup>284</sup> An agency’s interpretation of such limits must be reasonable to be entitled to deference under *Chevron*, and the values reflected in the presumption are relevant to judging the reasonableness of the agency’s interpretation. Even if Congress has clearly indicated that a provision applies extraterritorially and imposed *no* express limits, it should not be understood to have precluded agencies from doing so unless such an intention is unambiguous. The normative values reflected in the presumption against extraterritoriality—the need to weigh the statutory purpose against international comity—do not evaporate simply because Congress indicates that a provision has extraterritorial application. The presumption against extraterritoriality is not an on-off switch.

In sum, the form in which Congress delegates interpretive authority to an agency should make no difference. The express delegation of extraterritorial regulatory authority that distinguishes case one from

---

280. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (citations omitted).

281. *See supra* Part IV.

282. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016). *RJR Nabisco* involved no question of deference to administrative agencies.

283. *Chevron*, 467 U.S. at 842–43. This is simply *Chevron* step one. *See supra* notes 37–39 and accompanying text (describing step one).

284. 12 U.S.C. § 1851(d)(1)(H) (2012); *see infra* Section V.C.3.

cases two and three makes no difference under *City of Arlington*.<sup>285</sup> And the clear indication of extraterritoriality that distinguishes cases one and two from case three does not make the presumption against extraterritoriality irrelevant.<sup>286</sup> No matter what form the delegation takes, agencies should be deemed to have the same interpretive authority to decide questions of geographic scope as to decide other issues. Moreover, regardless of whether the presumption against extraterritoriality has been rebutted, the normative values reflected in the presumption are relevant in assessing the reasonableness of agency interpretations.

*B. Four Models for Evaluating Reasonableness*

How should the presumption against extraterritoriality be incorporated into *Chevron* step two? At the outset, it is worth recalling what the Supreme Court said about this question in *Morrison*: “We need ‘accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.’ Since the Commission’s interpretations relied on cases we disapprove, which ignored or discarded the presumption against extraterritoriality, we owe them no deference.”<sup>287</sup> This passage might be read strictly to suggest that agencies must apply the presumption exactly the way that courts would in order to be entitled to deference. But it might also be read more generously to foreclose deference only when the presumption had been “ignored or discarded,”<sup>288</sup> a standard that would not necessarily require an agency to apply the presumption in the same way that a court would. It is also worth noting that what the Court said here was dictum—it had already rejected deference at *Chevron* step zero because “the Commission did not purport to be providing its own interpretation of the statute.”<sup>289</sup> Thus, this passage from *Morrison* does not foreclose other possibilities.

Although there is a range of possibilities for incorporating the presumption against extraterritoriality into *Chevron* step two, four models seem particularly worth discussing. Under the first model, a court would find the agency’s interpretation reasonable only if the

---

285. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013); *see also supra* notes 48–49 and accompanying text.

286. *See supra* text following note 284.

287. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 272–73 (2010) (quoting *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment)).

288. *Id.* at 272.

289. *Id.*; *see supra* notes 208–09 and accompanying text.

agency applied the presumption against extraterritoriality in essentially the same way that a court would. It is possible to read *Morrison*'s dictum this way.<sup>290</sup> Indeed, two lower courts have suggested that agency interpretations of geographic scope should be entitled to *Chevron* or *Skidmore* deference only if the agency could point to evidence rebutting the presumption in the statute itself.<sup>291</sup> The problem with this approach is that it turns *Chevron* step two into a version of *Chevron* step one. If a court is going to insist that an agency interpret a statute exactly the way the court would, then the court might as well go ahead and interpret the statute itself. "If *Chevron* is to have any meaning," Justice Scalia once cautioned, "congressional intent must be regarded as 'ambiguous' not just when no interpretation is even marginally better than any other, but rather when two or more reasonable, though not necessarily equally valid, interpretations exist."<sup>292</sup> There are good reasons not to apply the presumption against extraterritoriality at *Chevron* step one,<sup>293</sup> and those same reasons counsel against requiring agencies to apply the presumption exactly as courts would in order to be judged reasonable at step two.

A second model would have courts defer to agencies with respect to certain inputs into the extraterritoriality analysis, such as the focus of a statutory provision, but not on the ultimate question of geographic scope. In *Wyeth v. Levine*,<sup>294</sup> a preemption case involving *Skidmore* deference, the Supreme Court said it might give "some weight" to an agency's views about the impact of tort law on federal objectives," but that it would not defer "to an agency's *conclusion* that state law is preempted."<sup>295</sup> A similar approach to the presumption against extraterritoriality might allow a court to defer at the second step of its framework to an agency's determination of a provision's focus<sup>296</sup> but would reserve the question of whether application of the provision was domestic or extraterritorial to the court. This model would be an improvement over the first because it would harness agency strengths in

---

290. See *supra* text following note 287.

291. See *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 182 (2d Cir. 2014) ("[I]t is far from clear that an agency's assertion that a statute has extraterritorial effect, unmoored from any plausible statutory basis for rebutting the presumption against extraterritoriality, should be given [*Chevron*] deference."); *Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 846 (9th Cir. 2012) ("Because the Director cites no textual evidence of Congress's clear intention to authorize the extraterritorial application of the Act, the Director's interpretation lacks persuasive force [under *Skidmore*].").

292. Scalia, *supra* note 212, at 520.

293. See *supra* Section IV.A.

294. 555 U.S. 555 (2009).

295. *Id.* at 576 (quoting *Geier v. Am. Honda Motor Co.*, 429 U.S. 861, 833 (2000)).

296. See *supra* notes 70–81 and accompanying text.

determining statutory purposes, but this second model still fails to take advantage of a significant amount of agency expertise. While it is true that agencies would be at least as good as courts at determining a provision's focus for purposes of the presumption,<sup>297</sup> their real strength lies in evaluating different regulatory possibilities and making the tradeoff between statutory purpose and international comity.<sup>298</sup> Because this approach leaves the ultimate question of extraterritoriality to the court, it fails to harness those agency strengths.

Under a third model, a court would find the agency's interpretation reasonable even if the agency's application of the presumption against extraterritoriality differed from what the court would have done. In other words, the court would defer so long as the agency had not "ignored or discarded" the presumption.<sup>299</sup> As Professor Kenneth Bamberger notes approvingly, "agencies might arrive at conclusions that would depart from independent judicial canon application."<sup>300</sup> The real question is whether courts should require agencies to use the same two-step framework that courts use for the presumption against extraterritoriality,<sup>301</sup> even if courts defer to agencies with respect to outcomes. In my view, this would be unduly constraining. The presumption's two-step framework was developed for courts, not agencies. It simplifies questions of geographic scope for courts that lack an agency's expertise, ability to balance different values, and authority to regulate in fine detail. But forcing agencies to act like courts prevents them from bringing all of their advantages to bear.

Under the fourth model, a court would find the agency's interpretation reasonable if it considered the normative values reflected in the presumption, even if the agency did not apply the presumption itself. As Bamberger puts it, "courts should determine whether an agency policy sufficiently reflects the background norm."<sup>302</sup> If so, it should uphold the agency's interpretation as reasonable. If not, the court should "essentially 'remand' the issue to the agency to exercise (or not)

297. See *supra* notes 229–36 and accompanying text.

298. See *supra* notes 237–48 and accompanying text.

299. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 272 (2010); see also *Validus Reinsurance, Ltd. v. United States*, 786 F.3d 1039, 1049 (D.C. Cir. 2015) ("To accord deference requires some indication that the agency has considered the effect of the presumption against extraterritoriality . . .").

300. Bamberger, *supra* note 31, at 120; see also Mashaw, *supra* note 235, at 521 ("[I]t seems fair to conclude that judges and administrators interpret—indeed should interpret—within divergent normative contexts.").

301. See *supra* Section I.B.

302. Bamberger, *supra* note 31, at 68.

whatever statutory discretion remain[s].”<sup>303</sup> This model allows agencies to make full use of their strengths. They can assess the strength of the statutory policy reflected in the provision, review the range of regulatory options for effectuating that policy, evaluate the conflict with foreign interests that each option would create, consider the amount of international discord that would be caused by such conflicts, and finally adopt a fine-grained regulation to carry out the statutory policy while accommodating the interests of other countries to the greatest extent possible.

Of these four models for evaluating whether an agency’s interpretation of geographic scope is reasonable, the fourth is clearly superior. The first model harnesses none of an agency’s strengths, requiring it to interpret a statutory provision just as a court would. The second model takes advantage of agency strengths in evaluating certain inputs, like the focus of a statutory provision, but by reserving the ultimate question of geographic scope to the court, this model ignores the agency’s ability to consider regulatory alternatives and make tradeoffs between statutory purposes and international comity. The third model—deferring to an agency’s application of the presumption’s two-step framework even if the result differs from what a court would have done—allows an agency to bring all of its interpretive strengths to bear. But it forces agencies into an analytical framework that the Supreme Court developed with the weaknesses of courts, rather than the strengths of agencies, in mind. By freeing agencies from that analytical framework and deferring to their interpretations of geographic scope so long as they considered the normative values reflected in the presumption, the fourth model gives full effect to the interpretive strengths that agencies enjoy. As the next Section illustrates, this is what agencies have already been doing in defining the geographic scope of statutes they administer.

### C. *Three Examples*

This Article turns now to consider in detail three examples of extraterritorial regulation by administrative agencies, each of which is of great practical importance: HSR’s “foreign commerce” exemptions;<sup>304</sup> Regulation S under the Securities Act;<sup>305</sup> and new regulations implementing the Volcker Rule under the Dodd-Frank Act.<sup>306</sup>

---

303. *Id.* at 69.

304. *See* 16 C.F.R. §§ 802.50–.52 (2016).

305. *See* 17 C.F.R. §§ 230.901–.905 (2016).

306. *See* 12 C.F.R. §§ 44.6(e)(3) (2016).

## 1. Hart-Scott-Rodino

The FTC's regulations implementing HSR<sup>307</sup> provide a good example of an agency using general rulemaking authority to define the geographic scope of a statute. HSR prohibits mergers and acquisitions that exceed certain thresholds, unless notification is given to the Department of Justice and the FTC and a waiting period has expired.<sup>308</sup> The aim is to give these agencies the chance to review large mergers and acquisitions before they occur in order to determine whether they would violate the Clayton Act<sup>309</sup> or the FTC Act.<sup>310</sup> HSR's text does not define its geographic scope, instead speaking broadly of persons "engaged in commerce or in any activity affecting commerce."<sup>311</sup> As the FTC acknowledged when it issued its first regulations under HSR, the Act "contains no special provision for transactions having foreign aspects."<sup>312</sup>

HSR expressly gives the FTC, with the concurrence of the Justice Department, rulemaking authority to implement the Act.<sup>313</sup> This authority includes the power to "define the terms used in this section,"<sup>314</sup> to "exempt, from the requirements of this section, classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws;"<sup>315</sup> and to "prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section."<sup>316</sup> Beyond the authority contained in these grants, there is no express delegation to the FTC of authority to define the geographic scope of HSR.

---

307. 15 U.S.C. § 18a (2012).

308. *Id.*

309. *Id.* § 18 (prohibiting acquisitions that might "substantially . . . lessen competition, or . . . tend to create a monopoly").

310. *Id.* § 45(a) (prohibiting "[u]nfair methods of competition" and "unfair or deceptive acts or practices in or affecting commerce"). If the Department of Justice or FTC concludes that an acquisition would violate the Clayton or FTC Acts, it may seek to enjoin the acquisition. *Id.* § 18a(f).

311. *Id.* § 18a(a)(1). "Commerce" is defined in general terms as "trade or commerce among the several States and with foreign nations." *Id.* § 12(a).

312. Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. 33,450, 33,461 (July 31, 1978).

313. 15 U.S.C. § 18a(d). Such delegations are rare in antitrust law, although one author has argued for greater deference to administrative agencies in the antitrust context. *See generally* Justin (Gus) Hurwitz, *Administrative Antitrust*, 21 GEO. MASON L. REV. 1191 (2014) (arguing that the Supreme Court is moving towards bringing antitrust law within normal administrative law jurisprudence).

314. 15 U.S.C. § 18a(d)(2)(A).

315. *Id.* § 18a(d)(2)(B).

316. *Id.* § 18a(d)(2)(C).

The FTC issued its first regulations implementing HSR in 1978.<sup>317</sup> From the start it used its rulemaking authority to define the Act's geographic scope.<sup>318</sup> It defined "commerce" to have the same meaning as in the Clayton and FTC Acts.<sup>319</sup> The FTC explained in the Federal Register that because HSR's commerce criterion "requires only that either the acquiring or the acquired person be engaged in commerce or in any activity affecting commerce," HSR "permits coverage of a great many transactions that have some or even predominant foreign aspects."<sup>320</sup> To avoid HSR's application to foreign transactions "with only a minimal impact on United States commerce,"<sup>321</sup> the FTC created three foreign commerce exemptions: one for the acquisition of foreign assets;<sup>322</sup> a second for the acquisition of voting securities of a foreign issuer;<sup>323</sup> and a third for acquisitions by or from foreign government entities.<sup>324</sup>

Although these regulations are phrased as exemptions, their practical effect is actually to subject many acquisitions of assets outside the United States and many acquisitions of securities in foreign companies to the requirements of HSR. The foreign assets exemption, for example, provides that HSR shall not apply to the acquisition of "assets located outside the United States . . . unless the foreign assets the acquiring person would hold as a result of the acquisition generated sales in or into the U.S. exceeding \$50 million (as adjusted) during the acquired person's most recent fiscal year."<sup>325</sup> In other words, the FTC's regulation provides that HSR *does apply* to assets located in foreign countries if those assets generated U.S. sales above a certain threshold. This interpretation holds even when both the buyer and the seller are foreign.<sup>326</sup> The foreign securities exemption similarly provides that HSR

317. See generally Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. 33,450 (July 31, 1978) (implementing HSR).

318. Congress amended HSR's thresholds in 2001, and the FTC adopted new regulations to implement these changes. Pub L. No. 106-552, § 630(a), 114 Stat. 2762, 2762A-51 (2000) (codified as amended at 15 U.S.C. § 18a(a) (2012)). The new regulations did not change the FTC's basic interpretation of HSR's geographic scope, however, maintaining each of the three foreign commerce exemptions adopted in 1978.

319. 16 C.F.R. § 801.1(l) (2016).

320. Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. 33,450, 33,497 (July 31, 1978).

321. *Id.*

322. 16 C.F.R. § 802.50.

323. *Id.* § 802.51.

324. *Id.* § 802.52.

325. *Id.* § 802.50(a).

326. This is confirmed by a further rule exempting transactions between foreign parties that meet certain additional criteria. Specifically, (1) both parties must be foreign; (2) the aggregate sales of both parties into the United States must be less than \$110 million (as

*does apply* to the acquisition of securities in foreign issuers whose U.S. assets or U.S. sales exceed certain thresholds whether the buyer is a U.S. person<sup>327</sup> or a foreign person.<sup>328</sup>

It seems doubtful that a court asked to determine the geographic scope of HSR without the benefit of the FTC's guidance would have landed in exactly the same place. But it also seems doubtful that a court would cast aside the FTC's guidance and seek to determine the geographic scope of HSR for itself, whether by applying the presumption against extraterritoriality or otherwise.<sup>329</sup> As a general matter, FTC regulations implementing HSR are evaluated for reasonableness at *Chevron* step two.<sup>330</sup> The D.C. Circuit has noted that HSR gives the FTC "great discretion to define statutory terms and to promulgate rules to facilitate Government identification of mergers and acquisitions likely to violate federal antitrust laws."<sup>331</sup>

In determining the geographic scope of HSR, the FTC did not apply the presumption against extraterritoriality.<sup>332</sup> But the FTC did consider both the "impact on United States commerce" and "considerations of

---

adjusted); (3) the aggregate assets of both parties in the United States must be less than \$110 million (as adjusted); and (4) after the transaction, the acquiring person must not hold more than \$200 million (as adjusted) of the voting securities and assets of the acquired person. *Id.* § 802.50(b).

327. *Id.* § 802.51(a).

328. *Id.* § 802.51(b). As with the foreign assets exemption, *see supra* notes 325–26, there is a further exception if both parties are foreign and the transaction meets additional criteria. 16 C.F.R. § 802.51(c).

329. Historically, the Supreme Court has not applied the presumption against extraterritoriality to antitrust statutes. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798–99 (1993); *see also id.* at 814 (Scalia, J., dissenting) ("We have, however, found the presumption to be overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially." (citations omitted)). On the other hand, *Morrison* stated that the presumption applies "in all cases." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 261 (2010). It is possible to reconcile the antitrust cases with *Morrison* by noting that the focus of U.S. antitrust laws is on preventing anticompetitive effects in the United States. *See F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 165 (2004) (stating that antitrust laws "reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused" (citations omitted)). Under *RJR Nabisco*, if whatever is the focus of the provision occurs in the United States, applying the provision is considered domestic and permissible. *See RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016); *supra* notes 70–81 and accompanying text.

330. *See Pharm. Research & Mfrs. of Am. v. FTC*, 790 F.3d 198, 207–09 (D.C. Cir. 2015) (reviewing FTC regulation concerning patent rights).

331. *Id.* at 205.

332. In 1978, the presumption had fallen out of use. *See Paul B. Stephan, Private Litigation as a Foreign Relations Problem*, 110 AJIL UNBOUND 40, 40 n.3 (2016) (noting that the presumption "seemed to pass into desuetude" between *Foley Bros.* in 1949 and *Aramco* in 1991). Even after the presumption's revival in 1991, its application to antitrust law remained uncertain. *See Hartford*, 509 U.S. at 798–99 (failing to apply the presumption to the Sherman Act).

comity” when it decided to exempt “some acquisitions whose principal impact is foreign.”<sup>333</sup> In other words, the FTC’s regulations implementing HSR reflect the same values—domestic conditions and comity—that lie behind the presumption against extraterritoriality. Under the fourth model for evaluating reasonableness discussed above,<sup>334</sup> the fact that the agency took into account the normative values underlying the presumption should be sufficient to find its regulations reasonable at *Chevron* step two.

## 2. Regulation S

Another example of an agency using general rulemaking authority to define the geographic scope of a statute is Regulation S,<sup>335</sup> which the SEC first issued in 1990 to exempt certain transactions outside the United States from the registration requirements of the 1933 Securities Act.<sup>336</sup>

Section 5 of the Securities Act makes it unlawful to sell a security unless a registration statement is in effect.<sup>337</sup> Section 5 does not define its geographic scope, requiring only that a person have used “any means or instruments of transportation or communication in interstate commerce” or “the mails.”<sup>338</sup> Section 19 of the Act gives the SEC broad authority to “make . . . such rules and regulations as may be necessary to carry out the provisions of this subchapter, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical, and trade terms used in this subchapter.”<sup>339</sup> But § 19 does not expressly give the SEC authority to define the geographic scope of the registration requirements.<sup>340</sup>

In 1990, the SEC issued Regulation S, interpreting the registration requirements not to apply to “offers and sales that occur outside the United States.”<sup>341</sup> The SEC explained in the Federal Register that

333. Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. 33,450, 33,497 (July 31, 1978).

334. See *supra* notes 302–03 and accompanying text.

335. 17 C.F.R. §§ 230.901–905 (2016).

336. 15 U.S.C. § 77e (2012).

337. *Id.* § 77e(a).

338. *Id.* § 77e(a)(1). Section 5 also prohibits the delivery of unregistered securities through the mails or any means of transportation in interstate commerce. See *id.* § 77e(a)(2).

339. *Id.* § 77s(a).

340. See *id.* § 77s.

341. 17 C.F.R. § 230.901 (2016). The SEC had previously stated that it would not take enforcement action for failure to register securities of U.S. corporations distributed abroad to foreign nationals if the distribution would not result in the securities flowing back into the United States. Registration of Foreign Offerings by Domestic Issuers; Registration of

[t]he registration of securities is intended to protect the U.S. capital markets and investors purchasing in the U.S. market, whether U.S. or foreign nationals. Principles of comity and the reasonable expectations of participants in the global markets justify reliance on laws applicable in jurisdictions outside the United States to define requirements for transactions effected offshore.<sup>342</sup>

In addition to its general statement, Regulation S creates two safe harbors: (1) an issuer safe harbor for issuers, distributors, and their affiliates;<sup>343</sup> and (2) a resale safe harbor for others who purchase the unregistered securities and the resell them.<sup>344</sup> Each of these safe harbors contains two basic requirements: (1) that the offer or sale be made in an “offshore transaction;” and (2) that there be no “directed selling efforts” in the United States.<sup>345</sup>

An “offshore transaction” is one in which no offer is made to a person in the United States and either the buyer is outside the United States or the transaction is executed on a foreign exchange.<sup>346</sup> Whether a buyer is outside the United States typically depends on the buyer’s physical location.<sup>347</sup> But Regulation S makes clear that offers and sales “specifically targeted at identifiable groups of U.S. citizens abroad, such as members of the U.S. armed forces serving overseas” do not count as offshore transactions,<sup>348</sup> while offers and sales to certain non-U.S. persons in the United States do count as offshore transactions.<sup>349</sup>

As for the second requirement, “[d]irected selling efforts” are any activities that may “condition[] the market in the United States for any of the securities being offered in reliance on this Regulation S.”<sup>350</sup> Some

---

Underwriters as Broker-Dealers, Securities Act Release No. 33-4708, 29 Fed. Reg. 9828, 9828 (July 9, 1964).

342. Offshore Offers and Sales, Securities Act Release No. 6863, Exchange Release No. 27,942; Investment Company Act Release No. 17,458, 55 Fed. Reg. 18,306, 18,308 (April 24, 1990).

343. 17 C.F.R. § 230.903 (2016).

344. *Id.* § 230.904.

345. *Id.* §§ 230.903–904. Both safe harbors contain additional conditions for certain categories of securities—known as Category 2 and Category 3—in which there may be substantial U.S. market interest. *Id.* § 230.903(b)(2)–(3); *id.* § 230.904(b)(1).

346. *Id.* § 230.902(h)(1).

347. *Id.* § 230.902(h)(1)(i).

348. *Id.* § 230.902(h)(2).

349. *Id.* § 230.902(h)(3). Specifically permitted are offers and sales to discretionary accounts held for the benefit of non-U.S. persons by fiduciaries in the United States, *see id.* § 230.902(k)(2)(i), and offers and sales to international organizations, like the IMF, World Bank, and United Nations, and their agencies, affiliates, and pensions plans, *see id.* § 230.902(k)(2)(vi).

350. *Id.* § 230.902(c)(1).

are territorial—like placing an advertisement in a publication with a general circulation in the United States,<sup>351</sup> but others are extraterritorial—like making offers to members of the U.S. armed forces overseas.<sup>352</sup> Furthermore, “to ameliorate the effect of the Regulation on a foreign publication’s advertising practices where the United States accounts for a limited portion of its circulation,”<sup>353</sup> Regulation S specifically exempts from the definition of directed selling efforts “tombstone” advertisements in publications with less than twenty percent of their circulations in the United States.<sup>354</sup>

Regulation S further extends the registration requirements of the Securities Act extraterritorially by expressly providing that resales “by the offshore purchaser” must also be made in compliance with Regulation S.<sup>355</sup> As mentioned above, Regulation S contains a resale safe harbor that contains the same requirements of an offshore transactions and no directed selling efforts in the United States.<sup>356</sup>

In sum, Regulation S defines the geographic scope of the Securities Act’s registration requirements in great detail, and in ways that do not always turn on physical location. It considers some sales in the United States to be “offshore” and some sales abroad not to be. It exempts some advertisements in the United States from the definition of “directed selling efforts” but includes other activities outside the United States. And it expressly extends the geographic scope of the registration requirements to offshore purchasers who resell Regulation S securities.

It seems unlikely that a U.S. court asked to determine the geographic scope of the Securities Act for itself would have arrived at the same detailed scheme for its registration requirements, but the Second Circuit has held that Regulation S is entitled to deference under *Chevron* as the “reasonable interpretation of a statute that Congress has entrusted the agency to administer.”<sup>357</sup> Furthermore, in *Morrison*,

351. *Id.*

352. Offshore Offers and Sales, Securities Act Release No. 6863, Exchange Release No. 27,942; Investment Company Act Release No. 17,458, 55 Fed. Reg. 18,306, 18,309 n.35 (April 24, 1990) (“Such targeted offerings also will be deemed to constitute directed selling efforts in the United States.”).

353. *Id.* at 18,311.

354. 17 C.F.R. § 230.902(c)(3)(iii).

355. *Id.* § 230.905.

356. *Id.* § 230.904.

357. *See* *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 123 & n.3 (2d Cir. 1998), *abrogated on other grounds* by *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

Justice Scalia relied on Regulation S to determine the focus of the Securities Act and, by extension, the Exchange Act.<sup>358</sup>

It is worth noting that the SEC did not apply the presumption against extraterritoriality in developing Regulation S,<sup>359</sup> but the SEC did consider the intent of the statute “to protect the U.S. capital markets and investors purchasing in the U.S. market” as well as “[p]rinciples of comity and the reasonable expectations of participants in the global markets.”<sup>360</sup> The consideration of international comity appears to have been genuine, for the SEC noted that the primary change it made in response to comments was to give “further recognition to the doctrine of comity” by reducing the restrictions applicable to foreign issuers relying on the safe harbors.<sup>361</sup> Under the fourth model for evaluating reasonableness discussed above,<sup>362</sup> a court should find Regulation S reasonable at *Chevron* step two because the agency took into account the normative values underlying the presumption against extraterritoriality.

### 3. Volcker Rule

A final example concerns the geographic scope of the so-called Volcker Rule contained in the Dodd-Frank Act.<sup>363</sup> Much of Dodd-Frank applies extraterritorially.<sup>364</sup> Among other reasons, this was necessary because of the mobility of major financial institutions and because it is often necessary to regulate not just financial institutions but their counterparties in order to address systemic risk.<sup>365</sup>

Section 13 of the Bank Holding Company Act—colloquially known as the Volcker Rule—broadly prohibits banking entities from engaging in proprietary trading.<sup>366</sup> To avoid regulating the foreign operations of

358. See *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 268–69 (2010) (quoting 15 U.S.C. § 77e(a)(1) (2012)).

359. Regulation S was first issued in 1990, a year before the revival of the presumption in *Aramco*. See *supra* note 56 and accompanying text.

360. Offshore Offers and Sales, Securities Act Release No. 6863, Exchange Release No. 27,942; Investment Company Act Release No. 17,458, 55 Fed. Reg. 18,306, 18,308 (April 24, 1990).

361. *Id.* at 18,307.

362. See *supra* notes 302–03 and accompanying text.

363. Pub. L. No. 111-203, § 619, 124 Stat. 1376, 1620–31 (2010).

364. John C. Coffee, Jr., *Extraterritorial Financial Regulation: Why E.T. Can’t Come Home*, 99 CORNELL L. REV. 1259, 1263 (2014) (“Congress opted for an extraterritorial reach for much of the Dodd-Frank Act.”); Michael Greenberger, *The Extraterritorial Provisions of the Dodd-Frank Act Protects U.S. Taxpayers from Worldwide Bailouts*, 80 UMKC L. REV. 965, 965 (2012) (noting the “significant extraterritorial scope of the derivatives regulation” in Dodd-Frank).

365. Coffee, *supra* note 364, at 1260.

366. 12 U.S.C. § 1851 (2012) (codifying Dodd-Frank Act § 619).

foreign banks, however, the Volcker Rule included an exception to permit banking entities “not directly or indirectly controlled” by U.S. banking entities to engage in proprietary trading “provided that the trading occurs solely outside of the United States.”<sup>367</sup> Congress gave federal banking agencies, the SEC, and the Commodity Futures Trading Commission authority to “adopt rules to carry out this section.”<sup>368</sup>

In December 2013, the Office of the Comptroller of the Currency, the Federal Reserve, the Federal Deposit Insurance Corporation, and the SEC issued a Joint Final Rule to implement the Volcker Rule.<sup>369</sup> This regulation interprets the geographic scope of the Volcker Rule in great detail, providing that it does not apply to foreign banking entities (i.e., those not directly or indirectly controlled by U.S. banking entities) so long as: (i) the banking entity purchasing or selling (including its relevant personnel) is not located in the United States or organized under U.S. law; (ii) the banking entity (including its relevant personnel) making the decision to purchase or sell is not located in the United States or organized under U.S. law; (iii) the purchase or sale is not accounted for by a branch or affiliate located in the United States or organized under U.S. law; (iv) no financing is provided by a branch or affiliate located in the United States or organized under U.S. law; and (v) the purchase or sale is not conducted through any U.S. entity (with limited exceptions).<sup>370</sup>

Congress provided no direct guidance on what it meant by “solely outside of the United States.”<sup>371</sup> Accordingly, the agencies considered the purpose of the Volcker Rule as a whole “to limit risks that proprietary trading poses to the U.S. financial system”<sup>372</sup> and the purpose of the exception “to limit the extraterritorial application of section 13 as it applies to foreign banking entities.”<sup>373</sup> The agencies

367. *Id.* § 1851(d)(1)(H).

368. *Id.* § 1851(b)(2)(A). Congress also provided for the coordination of rulemaking by different agencies. *See id.* § 1851(b)(2)(B). For a discussion of multiple-agency delegation and *Chevron*, see generally William Weaver, Note, *Multiple-Agency Delegations & One-Agency Chevron*, 67 VAND. L. REV. 275 (2014).

369. Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5536, 5536 (Jan. 31, 2014).

370. 12 C.F.R. § 44.6(e)(3) (2016).

371. 12 U.S.C. § 1851(d)(1)(h); Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 79 Fed. Reg. at 5652 (“The statute does not define when a foreign banking entity’s trading occurs solely outside of the United States.”).

372. Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 79 Fed. Reg. at 5654–55.

373. *Id.* at 5655.

identified these purposes by examining both the text of the statute and its legislative history.<sup>374</sup> The agencies also considered the extensive comments they received on their proposed rule<sup>375</sup> and substantially modified their approach in response to those comments.<sup>376</sup> No court has yet reviewed the agencies' interpretation of the Volcker Rule's geographic scope under *Chevron*, but it seems inconceivable that a court would upset these regulations by applying the presumption against extraterritoriality at *Chevron* step one or by finding the agencies' interpretation unreasonable at *Chevron* step two. Certainly, under the fourth model for evaluating reasonableness discussed above,<sup>377</sup> these regulations would be entitled to deference.

\* \* \*

These three examples illustrate a number of important things about extraterritorial regulation by agencies. First, such regulation typically rests on a general grant of rulemaking authority rather than on a specific grant of authority to define the geographic scope of a provision or to regulate extraterritorially. Second, such regulation sometimes involves provisions that expressly apply extraterritorially (like the Volcker Rule) but often involves provisions that do not (like HSR and § 5 of the Securities Act). When the presumption has been rebutted, agencies may need to interpret the limitations on extraterritorial application that Congress has imposed. When the presumption has not been rebutted, regulation of foreign conduct may still be permissible if application of the provision can still in some sense be considered "domestic." Third, agencies typically do not apply the presumption against extraterritoriality in deciding how to regulate activity abroad, but agencies do consider the normative values reflected in the presumption. More specifically, agencies look carefully at the statutory policy, the regulatory options available, and the ways to avoid unnecessary conflict with other nations. Fourth, agencies are able to fashion fine-grained regulatory schemes to accommodate both statutory purposes and international comity in ways that courts could never duplicate.

If courts were to review these regulatory schemes by applying the presumption against extraterritoriality at *Chevron* step one, it seems doubtful that any would survive. With respect to HSR, a court might conclude that because the focus of antitrust laws is injury in the United

374. See *id.* at 5655 n.1517 (citing 12 U.S.C. § 1851(b)(1)); *id.* at 5655 n.1518 (citing 156 CONG. REC. S5897 (daily ed. July 15, 2010) (statement of Sen. Merkley)).

375. See *id.* at 5652–58 (responding to comments on proposed rule).

376. See *id.* at 5654 ("The Agencies have carefully considered these comments and have determined to modify the approach in the final rule.").

377. See *supra* notes 302–03 and accompanying text.

States,<sup>378</sup> regulation of foreign transactions is permitted. But the particular thresholds the FTC has chosen would be hard to justify under the presumption alone. With respect to the Securities Act, a court applying the presumption against extraterritoriality would almost certainly conclude (as *Morrison* did<sup>379</sup>) that the focus of § 5 is transactions in the United States, effectively precluding regulation of resales or directed selling efforts outside the United States. With respect to the Volcker Rule, a court would likely conclude that the presumption was rebutted, but would be hard pressed to duplicate the agencies' fine-grained interpretation of "solely outside of the United States" without some measure of deference.<sup>380</sup>

The fact that each of these regulations would almost certainly be struck down if the presumption against extraterritoriality were applied at *Chevron* step one demonstrates the practical need for courts to evaluate the reasonableness of agency interpretations of geographic scope at *Chevron* step two. As this Article has argued, the question should not be whether the agency reached the same result a court applying the presumption against extraterritoriality would, or even whether the agency applied the presumption in reaching a different conclusion. The question should be whether the agency's interpretation adequately considered the normative values underlying the presumption. HSR's exemptions, Regulation S, and the regulations implementing the Volcker Rule all meet that test and should be upheld as reasonable at *Chevron* step two.

## VI. CHANGING INTERPRETATIONS

Having argued thus far that courts should defer to an agency's reasonable interpretation of a statute's geographic scope, this Article now turns briefly to consider two implications of its argument for changing the extraterritorial reach of statutory provisions. Section VI.A argues that agencies are free to change their own interpretations of a statutory provision's geographic scope, just as they are free to change their statutory interpretations in other respects. Section VI.B argues that agencies are also free to interpret the geographic scope of statutory provisions differently than courts have done. Under existing doctrine, this is certainly true with respect to the interpretations of lower federal

---

378. See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) (stating that antitrust laws "reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused" (citations omitted)).

379. See *supra* Section III.D.

380. 12 U.S.C. § 1851(d)(1)(H) (2012).

courts, and quite possibly with respect to interpretations of the Supreme Court as well.

#### A. *Changing Agency Interpretations*

May an agency that has interpreted the geographic scope of a statutory provision change its interpretation and thereby expand or contract that provision's extraterritorial reach? As a general matter, a revised agency interpretation is entitled to no less deference under *Chevron* than an original interpretation.<sup>381</sup> *Chevron* itself involved a revised interpretation of a statute.<sup>382</sup> Of course, an unexplained change might make an interpretation "arbitrary and capricious."<sup>383</sup> It might also weaken the persuasive value of an agency interpretation under *Skidmore*.<sup>384</sup> But "if the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'"<sup>385</sup> Indeed, *Chevron* suggests that agencies have an affirmative duty to reconsider and revise their statutory interpretations.<sup>386</sup>

381. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework."); *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 742 (1996) ("[T]he mere fact that an agency interpretation contradicts a prior agency position is not fatal."); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984) ("An initial agency interpretation is not instantly carved in stone."). See generally David M. Gossett, Comment, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681 (1997) (discussing deference to revised agency interpretations). Only occasionally has the Supreme Court suggested that inconsistency itself might be a reason for less deference. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)) (citing *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976))). For an argument that agencies should be required to adhere to their previous interpretations, see Harold M. Greenberg, *Why Agency Interpretations of Ambiguous Statutes Should Be Subject to Stare Decisis*, 79 TENN. L. REV. 573, 580–611 (2012).

382. See *Chevron*, 467 U.S. at 863 (noting that the agency had changed its interpretation of the word "source").

383. See *Brand X*, 545 U.S. at 981 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46–57 (1983)); *Smiley*, 517 U.S. at 742.

384. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."); see also *United States v. Mead Corp.*, 533 U.S. 218, 219 (2001) (quoting this passage from *Skidmore*).

385. *Brand X*, 545 U.S. at 981 (quoting *Smiley*, 517 U.S. at 742).

386. See *Chevron*, 467 U.S. at 863–64 ("On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.").

What is true for agency interpretations in general should also be true for agency interpretations of geographic scope. In *Aramco*, the Supreme Court applied the normal rules on revised agency interpretations to the EEOC's interpretation of Title VII's geographic scope. Admittedly, the Court found that the EEOC's revised interpretation was *not* entitled to *Skidmore* deference, but that was because—consistent with the normal rules<sup>387</sup>—the agency “offer[ed] no basis in its experience for the change.”<sup>388</sup> Nowhere did the Court suggest that it was treating the revised interpretation less deferentially because it had changed the statute's geographic scope specifically.

Certainly, an agency may decide not to change its interpretation of a statutory provision's geographic scope over time. HSR's “foreign commerce” exemptions have remained substantively the same since 1978, even as Congress amended the act's statutory thresholds.<sup>389</sup> On the other hand, the geographic scope that the SEC has given to the registration requirements of the Securities Act has evolved. Some of that evolution occurred prior to Regulation S, in no-action letters issued under Securities Act Release No. 4708.<sup>390</sup> But Regulation S made further changes in existing SEC practice.<sup>391</sup> As a reason for adopting the revised regulation, the SEC cited changes in international securities markets such as “the significant increase in offshore offerings of securities, as well as the significant participation by U.S. investors in foreign markets.”<sup>392</sup> Looking to the future, it is certainly possible that the geographic scope of the Volcker Rule might be revisited, assuming that Congress does not decide to repeal the rule completely.<sup>393</sup> Revised interpretations of geographic scope must, of course, be reasonable. They

---

387. See *supra* note 384 and accompanying text.

388. *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 257 (1991).

389. See *supra* notes 317–24 and accompanying text.

390. Registration of Foreign Offerings by Domestic Issuers; Registration of Underwriters as Broker-Dealers, Securities Act Release No. 4708, 29 Fed. Reg. 9828, 9828 (July 9, 1964); see Offshore Offers and Sales, Securities Act Release No. 6863, Exchange Release No. 27,942; Investment Company Act Release No. 17,458, 55 Fed. Reg. 18,306, 18,308 (April 24, 1990) (describing application of Release 4708 in no-action letters).

391. See Offshore Offers and Sales, 55 Fed. Reg. at 18,316 (“Unlike no-action letters pursuant to Release 4708, U.S. residency rather than U.S. citizenship is the principal factor in the test of a natural person's status as a U.S. person under Regulation S.”); *id.* at 18,318 (“The offering restrictions . . . have been modified from those developed in no-action letters under Release 4708.”).

392. See *id.* at 18,308.

393. See Gina Chon, *Dodd-Frank Rollback May Fall Short of G.O.P. Hopes*, N.Y. TIMES (Feb. 7, 2017), <https://www.nytimes.com/2017/02/07/business/dealbook/dodd-frank-rollback-may-fall-short-of-gop-hopes.html> (predicting that “the rewrite of Dodd-Frank will probably be less than sweeping,” but noting that the Volcker Rule “could be softened or abandoned”).

should also be explained.<sup>394</sup> But so long as these requirements are met, agencies are free to expand or contract the geographic scope of a statutory provision by changing their interpretations.

### B. *Changing Court Interpretations*

Agencies are free not only to change their own interpretations of a statutory provision's geographic scope but also to depart from the interpretations that federal courts applying the presumption against extraterritoriality have made. In *Brand X*, the Supreme Court held that *Chevron's* application "does not depend on the order in which the judicial and administrative constructions occur."<sup>395</sup> The Court explained that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."<sup>396</sup> If *Brand X* applies to Supreme Court decisions,<sup>397</sup> and if the presumption against extraterritoriality properly applies at *Chevron* step two, then it seems clear that the SEC could interpret the geographic scope of § 10(b) differently than *Morrison* did, so long as the SEC's interpretation were reasonable.<sup>398</sup> The SEC could, for example, simply by adopting a regulation, reinstate the conduct and effects tests for securities fraud that the Supreme Court discarded in *Morrison*.<sup>399</sup>

*Morrison* did not hold that Congress had unambiguously addressed the geographic scope of § 10(b). To the contrary, *Morrison* held that Congress had *not* unambiguously addressed the geographic scope of § 10(b),<sup>400</sup> which in turn made it necessary for the Court to determine the

394. See *supra* notes 383–84 and accompanying text.

395. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005).

396. *Id.* at 982.

397. See *infra* note 407 and accompanying text.

398. For discussion of different ways in which courts might address the reasonableness question, see *supra* Section V.B.

399. In Dodd-Frank, Congress attempted to reverse *Morrison* and reinstate the conduct and effects tests with respect to government enforcement actions by amending § 27 of the Securities Exchange Act. See 15 U.S.C. § 78aa(b) (2012). One court has questioned whether this amendment was effective because Congress amended the Exchange Act's jurisdictional provision rather than § 10(b) itself. See SEC v. Chi. Convention Ctr., LLC, 961 F. Supp. 2d 905, 909–17 (N.D. Ill. 2013). Of course, the SEC might read Congress's decision not to reinstate the conduct and effects tests with respect to private enforcement actions as a signal that it should not do so by regulation.

400. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010) (concluding "there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially").

focus of the statute.<sup>401</sup> Section 10(b) expressly gives the SEC authority to prescribe “rules and regulations . . . necessary or appropriate in the public interest or for the protection of investors,”<sup>402</sup> and the Court has held that SEC interpretations of this provision are entitled to deference at *Chevron* step two if they are reasonable.<sup>403</sup> It is true that the Court did not defer to the SEC’s interpretation of § 10(b)’s geographic scope in *Morrison*, but that was because “the Commission did not purport to be providing its own interpretation of the statute, but relied on decisions of federal courts,”<sup>404</sup> disqualifying its interpretation from deference at *Chevron* step zero.<sup>405</sup> If the SEC were to exercise its delegated authority and issue regulations providing that § 10(b) applies whenever there is significant conduct in the United States or substantial effects in the United States,<sup>406</sup> those regulations should be entitled to *Chevron* deference so long as they were reasonable.

Of course, whether the SEC could depart from *Morrison*’s interpretation depends on whether *Brand X* applies to Supreme Court decisions, a question that the Supreme Court has yet to decide. *Brand X* involved judicial construction by a lower court, and Justice Stevens cautioned that the Court’s reasoning “would not necessarily be applicable” to a decision by the Supreme Court.<sup>407</sup> But whatever the Court eventually decides with respect to its own decisions, *Brand X* clearly establishes that administrative agencies are free to interpret the geographic scope of statutes they administer in ways that diverge from the interpretations of lower federal courts.

---

401. *Id.* at 266 (“[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.”).

402. 15 U.S.C. § 78j(b).

403. *SEC v. Zandford*, 535 U.S. 813, 819–20 (2002).

404. *Morrison*, 561 U.S. at 272 (citing *In re U.S. Sec. Clearing Corp.*, 52 S.E.C. 92, 95 n.14, 96 n.16 (1994); *In re Robert F. Lynch*, Exchange Act Release No. 11,737, 8 SEC Docket 75, 78 n. 15 (Oct. 15, 1975)).

405. *See Negusie v. Holder*, 555 U.S. 511, 521–22 (2009) (declining to defer to agency interpretation when agency mistakenly considered itself bound by judicial precedent).

406. These are essentially the tests that Congress tried to adopt after *Morrison* for government enforcement actions. *See supra* note 399. If the SEC were to adopt these tests by regulation, it could similarly limit them to government enforcement actions or could expand them to suits by private parties, since the regulations would rest not on any delegation in the Dodd-Frank Act but on the original delegation of rulemaking authority in § 10(b).

407. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1003 (2005) (Stevens, J., concurring). The Court had an opportunity to resolve this question in *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2012), but the plurality concluded that the Court’s pre-*Chevron* interpretation of the statute had removed the ambiguity, *id.* at 1843 (plurality opinion), while the dissenters thought that Congress’s subsequent amendment of the statute had created a gap for the agency to fill, *id.* at 1852 (Kennedy, J., dissenting).

## CONCLUSION

Sometimes, courts have no choice but to interpret the geographic scope of federal statutes for themselves. The presumption against extraterritoriality gives courts a tool to avoid unnecessary conflict with foreign interests, while considering the focus of congressional concern. The Supreme Court's two-step framework provides significant guidance to courts on how to apply the presumption.

But courts need not always go it alone. Many statutes with potential extraterritorial applications are administered by federal agencies. These agencies bring expertise to questions of geographic scope that courts lack. Agencies are better at understanding the purposes of the statute, the range of regulatory options available to effectuate those purposes, and the potential conflicts with other nations that each of these options presents. Moreover, agencies may adopt more fine-grained regulatory schemes that maximize the achievement of statutory purposes while minimizing conflicts with other nations. HSR, Regulation S, and the Volcker Rule offer just three examples of detailed regulatory schemes that courts would never have attempted to fashion on their own.

Of course, the fact that an agency has interpreted the geographic scope of a statute does not mean that courts have no role to play. A court must review an agency's interpretation to make sure that it is reasonable under *Chevron* or persuasive under *Skidmore*. In doing so, a court should not require that the agency itself apply the presumption against extraterritoriality as a court would do. But a court should require that the agency consider the normative values that underlie the presumption, particularly the need to avoid unnecessary conflicts with foreign nations, taking into account both the statutory purposes and the regulatory options. Courts should consider whether an agency's interpretation of a provision's geographic scope is reasonable even if the statute contains a clear indication of extraterritoriality.

Extraterritorial regulation is often complex and sensitive. Courts should not give agencies a blank check. But courts should also not presume that they are better positioned than agencies to make the many complex judgments that extraterritorial regulation requires. Appropriate deference to administrative agencies may well require courts to accept interpretations of geographic scope that depart from those a court would reach—or has already reached—by applying the presumption against extraterritoriality.

