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Morrison's Flawed "Focus" Test and the Transnational Application of the (Misinterpreted) Wire Fraud Statute

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MORRISON'S FLAWED "FOCUS" TEST AND THE TRANSNATIONAL APPLICATION OF THE (MISINTERPRETED) WIRE FRAUD STATUTE

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ABSTRACT

Federal prosecutors' mantra is "when in doubt, charge wire fraud." Section 1343 can be applied to any scheme to defraud—a capacious term that encompasses everything from computer scams to bribery and smuggling—in which a wiring (by phone, text, internet communication, or the like) can be identified. Given the explosion of transborder criminality—especially that conducted by wire—the geographic scope of the statute is of great practical importance. This Article resolves a circuit split by applying the Supreme Court's presumption against extraterritoriality and concluding that nothing in § 1343 rebuts that presumption. It then attempts to answer the critical question of what constitutes an acceptably "domestic" case as opposed to a forbidden "extraterritorial" one. For example, consider the FIFA corruption case in which foreign entities allegedly bribed foreign soccer officials to secure foreign broadcasting rights to foreign soccer matches. Will the fact that the bribes were wired from a New York bank account suffice to make this an acceptably domestic prosecution? According to the Supreme Court, one resolves such questions by identifying if there is conduct occurring within U.S. territory that is the "focus" of the statute. The lower courts have largely identified the "focus" of the statute to be the wiring element, such that regardless of the location of perpetrators, the victims, or the fraudulent conduct, the fact that a wiring crosses a U.S. border means that federal prosecutors can pursue the case. The answer, then, in the FIFA corruption cases was "yes," but should it have been?

Given that the overwhelming majority of federal criminal statutes do not speak to their geographic scope and the strength of the Court's presumption against extraterritoriality, the applicability of most federal criminal statutes to transborder conduct will turn on what courts determine the statutes' focus to be. The literature is filled with critiques of the Court's presumption, but almost no attention has been paid to the "focus" test. This Article, then, fills a serious gap in the literature by scrutinizing the Court's novel "focus" test and demonstrating not only that the test ignores the common-law approach and the Court's own traditional elements-based analysis but also that it is fatally subjective, unworkable, and arbitrary in its results. The lower courts' analysis of the statutory focus is often cursory and reliant on inapposite caselaw. This Article addresses this

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analytical deficiency by identifying a taxonomy of criteria that ought to be applied to federal statutes to determine their focus and illustrating how these criteria are applied by reference to the wire fraud statute.

Finally, this Article makes the case that the reason the courts have thus far failed to identify a textually sound and practically sensible "focus" for § 1343 lies not only in the flawed "focus" test but also in the incoherency of the wire fraud offense resulting from the Supreme Court's disregard of the statutory text. This Article critiques the Court's rewriting of § 1343 to eliminate both the mens rea *mandated by Congress and the statute's requirement that the wiring have a close nexus to the furthering of the fraud, a change that applies to all wire fraud cases, not just transnational prosecutions. This Article demonstrates, by reference to criminal law theory, that § 1343 is not a crime at all, at least measured by traditional requirements. To return to the "focus" test, it is the Supreme Court's misinterpretation of the statute that requires the lower courts' nonsensical conclusion that the "focus" of a criminal prohibition is an unknowing, unintentional act that is innocent on its face and has no necessary connection to the execution of the culpable scheme.*

INTRODUCTION

Were one to read the United States Code, one might not be tempted to dog-ear Sections 1341 (mail fraud)[1] and 1343 (wire fraud).[2] In fact, however, as Judge Jed Rakoff famously described § 1341:

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1. 18 U.S.C. § 1341. The mail fraud statute provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

Id.

2. 18 U.S.C. § 1343. The wire fraud statute states, in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

> To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law "darling," but we always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity. It understands us and, like many a foolish spouse, we like to think we understand it.[3]

Others less enamored of the scope of the statute have referred to it as federal prosecutors' "Uzi."[4]

Because consumers have swapped "snail mail" for communications through a variety of electronic media, mail fraud no longer holds the same allure. The wire fraud statute now reigns supreme as § 1343 can cover telephonic communications, faxes, emails, text communications, messaging apps, virtually any use of the internet, and radio and television broadcasts. Although precise statistics regarding its frequency of use are not available, it is fair to say that wire fraud is now one of the most frequently charged federal crimes.[5] The modern prosecutorial maxim is "when in doubt, charge wire fraud."

The wire fraud statute has taken on added importance as technological advances have vastly increased the ability of fraudsters to bilk victims on a global scale. Fraudulent schemes commonly use email, text, and other "wire" mediums of communication, finance and commerce, and the World Wide Web has proved a playground for the unscrupulous looking for a quick buck. Cybercriminals and others may exploit national boundaries to shield themselves from prosecution in their home countries by externalizing risk; taking advantage of regulatory deficiencies abroad; leveraging different national corporate and legal structures; hiding their conduct and ill-gotten gains; and minimizing enforcement risks.[6] It is not uncommon, then, for "flim-flams" to cross borders, with fraudsters and their victims hailing from different national jurisdictions.

This Article focuses on the new prosecutorial all-star, wire fraud, and specifically on its application to transborder criminality. Its ambition is to address the legal ramifications of this new transnational reality and, in so doing, to reveal the deficiencies of both the Supreme Court's analysis for determining when federal criminal legislation may be applied to transnational crimes and the complications arising from the Supreme Court's consistent disregard of the mail and wire fraud statutes' statutory language.

Id.

3. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980) (footnotes omitted).

4. Ellen S. Podgor, *Mail Fraud: Redefining the Boundaries*, 10 ST. THOMAS L. REV. 557, 558 (1998).

5. Yakov Malkiel, *The Wire Fraud Boom*, 75 OKLA. L. REV. 531, 532 n.5 (2023).

6. *See* Nicholas Lord, Yongyu Zeng & Aleksandra Jordanoska, *White-Collar Crimes Beyond the Nation-State*, OXFORD RSCH. ENCYCLOPEDIA OF CRIMINOLOGY & CRIM. JUST. (Oct. 27, 2020), https://oxfordre.com/criminology/display/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-575.

The challenge of determining the geographic reach of the wire fraud statute stems in part from the seemingly endless variety of transnational criminal conduct to which it is applied. There is, in short, no paradigmatic conduct that can be identified as the gravamen of the offense. The mail and wire fraud statutes' "applications, too numerous to catalog, cover not only the full range of consumer frauds, stock frauds, land frauds, bank frauds, insurance frauds, and commodity frauds, but have extended even to such areas as blackmail, counterfeiting, election fraud, and bribery."[7] Notably, mail and wire fraud serve as a "first line of defense. When a 'new' fraud develops—as constantly happens—the mail [and wire] fraud statute[s] become[] . . . stopgap device[s] to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil."[8] Even if Congress passes specific legislation to deal with new evils, prosecutors continue to charge mail and wire fraud because of the statutes' simplicity and familiarity—and to avoid the strictures of more specific statutes.[9]

The wire fraud statute is also the subject of a great deal of civil litigation. It is commonly charged as the predicate act underlying a popular method for securing treble damages in federal court for what are essentially business disputes: civil Racketeer Influenced and Corrupt Organizations Act ("RICO") actions.[10] The Supreme Court has determined that the RICO statute applies extraterritorially if the predicate acts upon which it is based can be applied extraterritorially.[11] Much of the litigation in which courts are struggling to identify the geographic scope of the wire fraud statute involves RICO cases built on allegations of wire fraud—making the extraterritoriality of the case turn on the geographic scope of § 1343.[12]

The breadth of the potential targets of wire-fraud prosecutions and civil RICO suits is due to the protean nature of the offense. The Supreme Court has decreed that mail and wire fraud have only two elements: (1) a scheme to defraud, and (2)

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7. Rakoff, *supra* note 3, at 772.

8. United States v. Maze, 414 U.S. 395, 405–06 (1974) (Burger, C.J., dissenting).

9. *See* Randall D. Eliason, *Surgery with a Meat Axe: Using Honest Services Fraud to Prosecute Federal Corruption*, 99 J. CRIM. L. & CRIMINOLOGY 929, 933 ("Prosecutors freed of the more rigorous proof requirements of the bribery and gratuities law may, as one federal judge cautioned, use the 'free swinging club of mail fraud.'" (quoting United States v. Margiotta, 688 F.2d 108, 143 (2d Cir. 1981) (Winters, J., dissenting))).

10. *See* U.S. Dep't of Just., Crim. Res. Manual § 955; *see also* Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1278 (7th Cir. 1989) (noting that mail and wire fraud can be easily charged and serve as the predicates for RICO civil suits and that "[t]his encourages bootstrapping ordinary civil fraud cases into RICO suits"); *infra* notes 98–99 and accompanying text (describing practice of using wire fraud as a predicate act to bootstrap business disputes into civil RICO cases).

11. *See* RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 339 (2016).

12. *See, e.g.*, Bascuñán v. Elsaca, 927 F.3d 108, 115–16 (2d Cir. 2019); Petróleos Mexicanos v. SK Eng'g & Const. Co., 572 F. App'x 60, 61 (2d Cir. 2014); Sonterra Cap. Master Fund, Ltd. v. Barclays Bank PLC, 366 F. Supp. 3d 516, 555–57 (S.D.N.Y. 2018); Sonterra Cap. Master Fund Ltd. v. Credit Suisse Grp. AG, 277 F. Supp. 3d 521, 577–80 (S.D.N.Y. 2017); FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A., 16 Civ. 5263, 2017 WL 3600425, at *14 (S.D.N.Y. Aug. 18, 2017); Elsevier, Inc. v. Grossman, 199 F. Supp. 3d 768, 783 (S.D.N.Y. 2016); Laydon v. Mizuho Bank, Ltd., 12 Civ. 3419, 2015 WL 1515487, at *8–9 (S.D.N.Y. Mar. 31, 2015).

for mail fraud, the use of the mails or, for wire fraud, a wiring in interstate or foreign commerce for the purpose of executing the scheme.[13]

The "scheme to defraud" element is capacious in its coverage. First, these statutes prohibit merely "devis[ing]" or "*intending* to devise" a fraudulent scheme and thus apply to schemes that have not necessarily come to fruition or caused any loss.[14] Second, the term "scheme to defraud" is measured by a "nontechnical standard. It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society."[15] The amorphous nature of this "definition" has moved commentators to charge that the mail and wire fraud statutes have:

> [L]ong served . . . as a charter of authority for courts to decide, retroactively, what forms of unfair or questionable conduct in commercial, public and even private life should be deemed criminal. In so doing, this phrase has provided more expansive interpretations from prosecutors and judges than probably any other phrase in the federal criminal law.[16]

The Supreme Court has defined the words "to defraud" to "commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'"[17] Thus, one category of wire-fraud cases concerns schemes to defraud that target money or property, including intangible property such as confidential business information ("money or property cases").[18] In the transnational sphere, such money and property cases often involve securities,[19] commodities,[20] and

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13. *See* Pereira v. United States, 347 U.S. 1, 8 (1954); Pasquantino v. United States, 544 U.S. 349, 371–72 (2005). The only distinction courts draw between the two statutes in terms of their construction draws its source from the Article I power upon which Congress relied in enacting them. The wire fraud statute was passed pursuant to Congress' Commerce Clause power, and thus, prosecutors must prove that the wiring was interstate in character. Because the mail fraud statute was originally founded on Congress' Postal Power, no interstate mailing generally need be shown. Most of the caselaw concerns the meaning and applicability of the "scheme to defraud" element of these statutes, and courts have uniformly given this language the same construction in applying both the mail and wire fraud statutes. *See, e.g.*, United States v. Neder, 527 U.S. 1, 20, 22–23, 25 (1999); United States v. Coburn, 439 F. Supp. 3d 361, 376 (D.N.J. 2020).

14. *See Neder*, 527 U.S. at 24–25 (emphasis added); United States v. Trapilo, 130 F.3d 547, 551–52 (2d Cir. 1997).

15. Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958); *see also Trapilo*, 130 F.3d at 550 n.3 ("Because the act of smuggling violates fundamental notions of honesty, fair play and right dealing, it is an act within the meaning of a 'scheme to defraud.'").

16. John C. Coffee, Jr. & Charles K. Whitehead, *The Federalization of Fraud: Mail and Wire Fraud Statutes*, *in* 1 OTTO G. OBERMAIER & ROBERT G. MORVILLO, WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES 9-3 (Robert J. Anello, Barry Bohrer & Betsy H. Turner eds., 2008); *see also* United States v. Czubinski, 106 F.3d 1069, 1079 (1st Cir. 1997) (noting that the mail and wire fraud statutes may "be used to prosecute kinds of behavior that, albeit offensive to the morals or aesthetics of federal prosecutors, cannot reasonably be expected by the instigators to form the basis of a federal felony").

17. McNally v. United States, 483 U.S. 350, 358 (1987) (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)).

18. *See* Carpenter v. United States, 484 U.S. 19, 25, 27 (1987).

19. United States v. Cornelson, 609 F. Supp. 3d 258, 262–64 (S.D.N.Y. 2022).

20. Loginovskaya v. Batratchenko, 764 F.3d 266, 268 (2d Cir. 2014).

bank[21] fraud. Other, perhaps less obvious money and property cases have involved conduct such as the manipulation of foreign benchmark interest rates[22] and smuggling.[23] Certainly, money or property are often the focus of cybercrimes like the "creation of . . . 'botnet[s]' to further . . . 'click fraud[s]' perpetrated against advertising companies"[24] and the use of phishing and key-loggers to spoof email and bilk millions from unknowing victims.[25]

The other category of schemes to defraud under the wire fraud statute have as their object the right to "honest services" ("honest-services cases"). This category was born of federal prosecutors' successful efforts to stretch the concept of a "scheme to defraud" to cover state and local public corruption at a time when the federal criminal code had no discrete section addressing such misconduct.[26] Under this theory, the public has a right to the "honest services" of their public officials, and a breach of that right through the undisclosed taking of bribes or kickbacks constitutes fraud.[27] This theory has been stretched to the private sector such that an employee's deprivation of an employer's right to her "honest services" may result in a federal felony conviction.[28] In the transnational sphere, prosecutors have attempted to use the "honest services" theory of wire fraud to indict allegedly corrupt FIFA soccer potentates,[29] U.N. employees,[30] and senior officials in the governments of Ukraine and Kazakhstan.[31]

With respect to the second element, the transmission of a wiring in interstate or foreign commerce is the *actus reus*, or culpable act, proscribed by statute. The statutory language requires that the wiring be done for the "purpose" of executing the

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21. *See* Press Release, U.S. Dep't of Just., Huawei CFO Wanzhou Meng Admits to Misleading Global Financial Institution (Sept. 24, 2021), https://www.justice.gov/opa/pr/huawei-cfo-wanzhou-meng-admits-misleading-global-financial-institution.

22. *See, e.g.*, Sonterra Cap. Master Fund, Ltd. v. Barclays Bank PLC, 366 F. Supp. 3d 516, 517–18 (S.D.N.Y. 2018); Sonterra Cap. Master Fund Ltd. v. Credit Suisse Grp. AG, 277 F. Supp. 3d 521, 535 (S.D.N.Y. 2017); FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A., 16 Civ. 5263, 2017 WL 3600425, at *1 (S.D.N.Y. Aug. 18, 2017); United States v. Hayes, 99 F. Supp. 3d 409, 411–12 (S.D.N.Y. 2015); Laydon v. Mizuho Bank, Ltd., 12 Civ. 3419, 2015 WL 1515487, at *1 (S.D.N.Y. Mar. 31, 2015).

23. *See* Pasquantino v. United States, 544 U.S. 349, 353 (2005).

24. *See, e.g.*, United States v. Gasperini, 16-CR-441, 2017 WL 2399693, at *1 (E.D.N.Y. June 1, 2017).

25. *See, e.g.*, Press Release, U.S. Att'y's Off., W. Dist. of N.Y., Buffalo Man Charged with International Email Scam Targeting Businesses and Defrauding Victims out of Hundreds of Thousands of Dollars (Oct. 5, 2021), https://www.justice.gov/usao-wdny/pr/buffalo-man-charged-international-email-scam-targeting-businesses-and-defrauding.

26. Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 661 (2006) ("Prosecutors sought to push beyond this traditional understanding of fraud because there was . . . no generally-applicable federal statute available to prosecute state and local political corruption.").

27. *See* Skilling v. United States, 561 U.S. 358, 401 (2010).

28. *See id.*

29. United States v. Napout, 963 F.3d 163, 168 (2d Cir. 2020).

30. United States v. Sidorenko, 102 F. Supp. 3d 1124, 1126 (N.D. Cal. 2015); United States v. Bahel, 662 F.3d 610, 617 (2d Cir. 2011).

31. United States v. Lazarenko, No. CR 00-0284, 2004 WL 7334086, at *1 (N.D. Cal. May 7, 2004); United States v. Giffen, 326 F. Supp. 2d 497, 499–500 (S.D.N.Y. 2004).

scheme to defraud, meaning that it must be the defendant's "conscious object" that the wiring effectuate the scheme.[32] The Supreme Court has, however, read this *mens rea* right out of the statute. Under the Court's precedents, the *actus reus* of the statute—the wiring—need not itself contain false or fraudulent communications and need not be knowing or intentional, much less made for the purpose of effectuating the scheme; in short, there is no requirement that the act be done with a criminally culpable state of mind.[33] The statute permits conviction when the defendant "causes" an interstate wiring to be made by another for the purpose of executing the scheme.[34] But the Court says that the defendant need not know or intend that the other make the wiring; it need only be reasonably foreseeable that the wires will be used.[35]

The statutory text also requires a demonstrably close nexus between the wiring and the fraud: the wiring must be done for the purpose of "executing" the scheme, meaning that it must be the defendant's conscious object that the wiring "carry out fully" or "put completely into effect" the criminal scheme.[36] If this requirement were taken seriously, even a facially innocent wiring could be deemed culpable because of its role in bringing the fraudulent scheme to fruition. But it is not taken seriously. The Supreme Court, again ignoring the plain meaning of the statutory text, requires that the wiring need only be "incidental" to the scheme, not integral or essential to it.[37]

It is this rewriting of the statute that has made it a prosecutorial go-to because if prosecutors can identify some sort of "fraud"—as broadly defined by courts—it is virtually inevitable in today's world that they can identify some cognizably attendant use of a phone or computer. This is especially true because the wiring can be entirely innocent in content, need not be made by the defendant and or known or intended by him if it is reasonably foreseeable in the circumstances, and need only be "incidental" to the scheme.[38] Prosecutors must prove that the wire communication, in fact, traveled "in interstate or foreign commerce," even if the defendant does not know, intend, or foresee that circumstance.[39] But, given the ubiquity of wire traffic for all manner of communications and commercial and financial transactions, if prosecutors cannot find a qualifying wire, they are not looking very hard.

All of this brings us to the question of the applicability of the statute where, as is increasingly common, the criminal conduct involved crosses national borders. For example, does a corporation domiciled in the Bahamas, which maintains its sales

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32. *See* MODEL PENAL CODE § 2.02(2)(a)(i) (AM. L. INST. 1962).

33. *See infra* notes 356–84 and accompanying text.

34. *See* Pereira v. United States, 347 U.S. 1, 8 (1954); *see also* Pasquantino v. United States, 544 U.S. 349 (2005).

35. *See Pereira*, 347 U.S. 1, 8–9 (1954).

36. *Execute*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 436 (11th ed. 2003).

37. *See infra* notes 374–84 and accompanying text.

38. *See infra* notes 356–84 and accompanying text.

39. *See, e.g.*, United States v. Lindemann, 85 F.3d 1232, 1240–41 (7th Cir. 1996); United States v. Bryant, 766 F.2d 370, 375 (8th Cir. 1985).

offices in Canada and solicits and sells partnerships in a bogus oil investment only to Canadian investors, commit a domestic "money or property" wire fraud by virtue of wirings between Canada and the United States?[40] Is the "honest services" theory of wire fraud appropriately applied to "police the relationship between a Paraguayan employee and his Paraguayan employer, and an alleged [bribery] scheme involving South Americans that took place almost entirely in South America" because those bribed received their ill-gotten gains in dollars and thus the money was wired from New York bank accounts?[41] Such questions regarding the transnational application of the statute arise daily. But federal courts have struggled to supply answers, and their answers may not always comport with one's intuition regarding what Congress intended in enacting the statute and where scarce prosecutorial resources should be focused (e.g., both of the above questions were answered in the affirmative by the Sixth and Second Circuits, respectively).[42]

The first contribution of this Article, then, is to resolve two increasingly critical questions in federal practice about which there is substantial confusion in the caselaw: Does the wire fraud statute apply extraterritorially? And if not, what constitutes a "domestic" as opposed to an "extraterritorial" case? In the Supreme Court's 2010 blockbuster extraterritoriality decision, *Morrison v. National Australia Bank*,[43] and its follow-up decisions in *RJR Nabisco, Inc. v. European Community*[44] and *Abitron Austria GmbH v. Hetronic International, Inc.*,[45] the Court instructed lower courts to apply a strong presumption against extraterritorial application of geo-ambiguous federal statutes and set forth a two-step analysis:

> At step one, we determine whether a provision is extraterritorial, and that determination turns on whether "Congress has affirmatively and unmistakably instructed that" the provision at issue should "apply to foreign conduct." If Congress has provided an unmistakable instruction that the provision is extraterritorial, then claims alleging exclusively foreign conduct may proceed, subject to "the limits Congress has (or has not) imposed on the statute's foreign application."
>
> If a provision is not extraterritorial, we move to step two, which resolves whether the suit seeks a (permissible) domestic or (impermissible) foreign application of the provision. To make that determination, courts must start by identifying the "'"focus" of congressional concern'" underlying the provision at issue. "The focus of a statute is 'the object of its solicitude,' which can include the conduct it 'seeks to "regulate,"' as well as the parties and interests it 'seeks to "protect"' or vindicate."[46]

40. *See* United States v. Coffman, 574 F. App'x 541, 557 (6th Cir. 2014).
41. United States v. Napout, 963 F.3d 163, 168 (2d Cir. 2020).
42. *See id.*; Coffman, 574 F. App'x 541.
43. 561 U.S. 247, 261 (2010).
44. 579 U.S. 325, 335 (2016).
45. 600 U.S. 412, 417–18 (2023).
46. *Id.* (footnote omitted) (citations omitted) (first quoting *RJR Nabisco*, 579 U.S. at 335–38; and then quoting WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2136 (2018)).

In 2023, the Court made explicit that which may have been implicit in *Morrison*—its rejection of "effects" as the basis for territorial jurisdiction. In *Abitron*, the Court made clear that the focus inquiry must be centered on identifying *conduct* occurring on U.S. territory. Thus, it is only:

> "'[I]f the conduct relevant to the statute's focus occurred in the United States, [that] the case involves a permissible domestic application' of the statute, 'even if other conduct occurred abroad.'" And "if the relevant conduct occurred in another country, 'then the case involves an impermissible extra-territorial application regardless of any other conduct that occurred in U. S. territory.'"[47]

This Article follows this two-step framework, first evaluating whether the wire fraud statute applies extraterritorially, a question upon which the circuits are split (Part I).[48] Because nothing in the statute rebuts the Court's presumption against extraterritoriality, it is necessary to proceed to the second step: applying the "focus" test to determine when a wire-fraud offense is committed and, thus, when a given case constitutes a permissible domestic use of the statute versus a prohibited extraterritorial application of its terms.

Morrison's presumption against extraterritoriality has been extensively studied in scholarly literature.[49] But much less attention has been given to the "focus" test despite the fact that, in Justice Stevens' terms, it is the "real motor" of the *Morrison* Court's analysis.[50] The overwhelming majority of federal statutes were enacted before the boom in transnational crime. Congress did not think to address their geographic scope, and given the lack of an express provision, *Morrison*'s strong presumption against extraterritoriality will likely prevail. In the majority of federal cases, then, the applicability of federal statutes to transnational conduct will turn on the outcome of the "focus" test, which determines what is an acceptable domestic application of a statute as opposed to a forbidden extraterritorial application.

This Article's second contribution is to fill this gap in the literature by scrutinizing the Court's novel "focus" test—a contribution that is not confined to the wire-fraud context (Part II).[51] This Article demonstrates not only that the test ignores the common-law approach and the Court's own traditional elements-based analysis but also that it is fatally subjective, unworkable, and arbitrary in its results.

Despite this critique, this Article accepts the reality that *Morrison* controls and thus that the "focus" of the wire fraud statute must be identified. The Court has not applied its "focus" test to examine the scope of a statute in a criminal case, but this

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47. *Id*. at 419 (citation omitted) (quoting *WesternGeco LLC*, 138 S. Ct. at 2137).

48. *See infra* Part I; *see also infra* notes 77–82.

49. *See, e.g.*, Julie Rose O'Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 GEO. L.J. 1021 (2018).

50. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 284 (2010) (Stevens, J., concurring in the judgment).

51. *See infra* Part II.

analysis rests on the foundational assumption, which I view as entirely incontrovertible, that the "focus" of a criminal statute must be *criminally culpable conduct*. Stated in the traditional language of the criminal law, an *actus reus* (guilty act) must be actuated by a *mens rea* (guilty mind). With that understanding, we are left with a question that has generated judicial confusion: Is the "focus" of the wire fraud statute the wiring or the scheme to defraud?[52]

Most of the lower courts hold that the statutory focus is simply a wiring that crosses a U.S. border or U.S. state boundaries (Part III).[53] This "focus" determination threatens to make a federal crime of any criminal scheme—no matter how predominantly foreign in conduct and effect—in which an email passes through a U.S. server, or a wire transfer happens to briefly touch a U.S. bank account. This troubling conclusion rests on problematic analyses, largely dependent on cherry-picked dicta and inapposite caselaw.

The third contribution of this Article addresses the analytical deficiency revealed in the caselaw by identifying a taxonomy of criteria that ought to be applied to determine a statute's "focus" (Part IV).[54] This taxonomy will be of use when examining the "focus" of every federal statute, not simply § 1343. Applying this taxonomy reveals that § 1343's "focus" ought to be, to paraphrase Justice Scalia, *wire fraud*, not simply *wire* and *fraud*[55]—or, in the statutory language, a wiring in interstate or foreign commerce for the *purpose* of *executing* a scheme to defraud.

The final, and perhaps most consequential, contribution of this Article is to demonstrate that § 1343, as currently construed, does not state a crime in any traditional sense—in domestic or transnational cases. If the mail fraud statute was prosecutors' Stradivarius, the wire fraud statute is their Swiss Army knife: useful in almost any case. The Court has given federal prosecutors this tool, but only by rewriting the statute in a way that fails to meet the fundamental requirements of criminal law. The reason the courts have thus far failed to identify a textually sound and practically sensible "focus" lies not only in the flawed "focus" test but also in the incoherency of the wire-fraud offense resulting from the Supreme Court's disregard of its statutory text.

The lower courts are not wrong to rely on the only act proscribed by the statute—the transmission of a wiring in interstate or foreign commerce—as the singular conduct regulated by statute. The problem lies in the Supreme Court precedents reading the "for the purpose of executing" language right out of the statute, thereby stripping the wiring element of any *mens rea* or any requirement that it have a nexus to a culpable criminal scheme. It is these precedents that require the nonsensical conclusion that the "focus" of a *criminal* prohibition can

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52. *See, e.g.*, United States v. Gasperini, 16-CR-441, 2017 WL 2399693, at *7 (E.D.N.Y. June 1, 2017) (explaining that the opinions attempting to discern the focus of the wire fraud statute "generally break into two camps: those emphasizing the 'wires' and those looking to the 'fraud'").

53. *See infra* Part III; *see also infra* notes 249–59 and accompanying text.

54. *See infra* Part IV.

55. *See infra* note 470 and accompanying text.

be an unknowing, unintentional act that is innocent on its face and has no necessary connection to the execution of the culpable scheme.

Such a reading contravenes basic tenets of criminal law. Were one to identify the wiring alone as the "focus" of the statute, one would have an act without a necessarily criminally culpable state of mind. This runs afoul of one such tenet: that there must be a concurrence between the wrongful act and a culpable state of mind. Expressed in the phrase "*actus non facit reum, nisi mens sit rea*" ("[a]n act does not make [a person] guilty, unless the mind be guilty"),[56] this concurrence requisite has deep roots in American criminal law.[57] Were one to identify the fraud as the "focus" of the statute, however, one would have a culpable mental state without any necessary act, as the scheme need not come to fruition or even be manifested in conduct. Such a result is inconsistent with another of American criminal law's imperatives: "*cogitationis poenam nemo patitur*" or "nobody suffers punishment for (mere) thinking."[58]

It is only by honoring the plain language of the statute and being willing to entertain a "focus" that recognizes the required relationship between the wiring and the fraud that one reaches a result that is defensible as a matter of criminal law and statutory text. It is also the only way to ensure that the scope of the wire fraud statute is neither excessive nor arbitrary. The statute's plain language, and cardinal principles of criminal law, require a conclusion that the "focus" of the statute is neither a wiring *simpliciter* nor fraud *simpliciter*, but a melding of the two. A wire-fraud case is cognizably domestic, then, only when (1) the government can charge wirings in interstate or foreign commerce that are done knowingly and with the *purpose*—that is, the conscious object—of executing a scheme to defraud; (2) where a defendant is charged with "causing" the wiring rather than initiating it himself, the fraudster must knowingly and willfully cause the wiring to be done (i.e., reasonable foreseeability is not enough); and (3) the wiring must be done with the purpose of *executing* the scheme, meaning that it must be integral to carrying out the scheme rather than simply incidental to it.

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56. *See Actus non facit reum, nisi mens sit rea*, BLACK'S LAW DICTIONARY (2d ed. 1910) ("An act does not make [the doer of it] guilty, unless the mind be guilty; that is, unless the intention be criminal. The intent and the act must both concur to constitute the crime." (citations omitted)).

57. *See* Morissette v. United States, 342 U.S. 246, 251–52 (1952) ("Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil."); *see also* JENS DAVID OHLIN, 1 WHARTON'S CRIMINAL LAW § 5:1 (16th ed.). As Jens David Ohlin explains:

> In the ordinary case, an evil deed, without more, does not constitute a crime; a crime is committed only if the evil doer acted with a culpable mental state. This idea is traditionally expressed in the maxim, "actus non facit reum, nisi mens sit rea." Reducing it to its simplest terms, a crime consists in the concurrence of prohibited conduct and a culpable mental state.

Id. (footnotes omitted).

58. Translation courtesy of Daniel Atticus O'Sullivan.

I. THE WIRE FRAUD STATUTE DOES NOT APPLY EXTRATERRITORIALLY

A. The Presumption Against Extraterritoriality

It is Congress' responsibility to determine what statutes might have extraterritorial application and in what circumstances. Because many statutes were enacted long before transnational criminal activity was common, however, most federal statutes do not speak to the issue. To deal with such geo-ambiguous statutes, the Supreme Court, in *Morrison v. National Australia Bank*, overturned decades of uniform courts of appeals' extraterritoriality analysis to introduce a strong presumption against extraterritorial application of federal statutes.[59] The *Morrison* plaintiffs were seeking damages for fraud, which they alleged occurred in part in the United States, that adversely affected the prices of shares in an Australian bank that the plaintiffs had purchased on a foreign exchange.[60] In determining whether the civil-fraud damages remedy provided in § 10(b) of the Securities and Exchange Act of 1934[61] covered such a suit, the *Morrison* Court first took a presumption against the extraterritorial application of federal statutes that had been articulated in an earlier case, *EEOC v. Arabian American Oil Co.* (*Aramco*),[62] but never consistently applied,[63] and elevated it to a near-determinative way of discerning the scope of geo-ambiguous statutes. In the most notable recent cases in which the Court applied the presumption—*Morrison v. National Australia Bank* (2010),[64] *Kiobel v. Royal Dutch Petroleum Co.* (2013),[65] *RJR Nabisco, Inc. v. European Community* (2016),[66] and *Abitron Austria GmbH v. Hetronic International, Inc.* (2023)[67]—it has emphasized the strength of this canon of construction. Indeed, the presumption can be said to be a clear-statement rule (although the Court disclaims this reality)[68]: "When a statute gives no clear indication of an extraterritorial application, it has none."[69]

Finally, as the Court recently made clear in *Abitron Austria GmbH v. Hetronic International, Inc.*, the presumption against extraterritoriality means that the Court assumes that Congress intends its statutes to apply only to *conduct* within the *territory of the United States* unless it clearly states otherwise.[70]

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59. 561 U.S. 247, 260–61 (2010).
60. *See id.* at 252–53.
61. 15 U.S.C. §§ 78j(b), 78t(a).
62. 499 U.S. 244, 248 (1991).
63. *See* O'Sullivan, *supra* note 49, at 1050–56.
64. 561 U.S. 247, 255 (2010).
65. 569 U.S. 108, 115–17 (2013).
66. 579 U.S. 325, 335–36 (2016).
67. 600 U.S. 412, 417 (2023).
68. *See Morrison*, 561 U.S. at 265 ("[W]e do not say, as the concurrence seems to think, that the presumption against extraterritoriality is a 'clear statement rule,' if by that is meant a requirement that a statute say 'this law applies abroad.' Assuredly context can be consulted as well. But whatever sources of statutory meaning one consults to give 'the most faithful reading' of the text, there is no clear indication of extraterritoriality here." (citations omitted)).
69. *Id.* at 255.
70. 600 U.S. at 418–19.

There is a question whether the presumption ought to apply in criminal cases.[71] The presumption has been employed to construe the reach of hybrid statutes—that is, statutes that can be applied civilly or criminally, such as the securities fraud statutes[72] and the Racketeer Influenced and Corrupt Organizations Act ("RICO").[73] But, the issue of the extraterritoriality of those statutes came to the Court in civil cases. And, from the Founding to the present, the Supreme Court has never applied a presumption against extraterritorial application of a statute in a criminal case despite many opportunities, pre-*Morrison*, to do so.[74] That said, as I have argued at length previously, the presumption makes much more sense in criminal cases than in civil, and ought to be applied to serve the principle of legality.[75]

If, as seems correct, the presumption against extraterritoriality applies in criminal cases, the presumption ought to prevail when analyzing § 1343 as there is no "affirmative intention of the Congress clearly expressed" to give the wire fraud statute extraterritorial force.[76] On this basis, the Second, Fourth, and Eleventh Circuits have held that the wire fraud statute does not apply extraterritorially.[77] Only one circuit—the Third—has squarely held that the wire fraud statute applies extraterritorially.[78] One panel of the First Circuit ruled that an analogous statute,

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71. *See, e.g.*, O'Sullivan, *supra* note 49, at 1088–94.

72. *Morrison*, 561 U.S. at 260–62.

73. RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 338, 346 (2016).

74. *See, e.g.*, O'Sullivan, *supra* note 49, at 1042–48 ("[I]n all fifteen criminal cases decided since 1818 in which the criminal conduct did not occur within U.S. territory or territorial waters, the Court did not apply a presumption against extraterritoriality. No presumption was applied in an additional five cases that questioned the scope or meaning of federal statutes where the crime occurred in United States waters or at least partially in the United States." (footnotes omitted)).

75. *See id.* at 1088–91.

76. *See Morrison*, 561 U.S. at 255 (quoting EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991)).

77. United States v. Elbaz, 52 F.4th 593, 602 (4th Cir. 2022) (en banc) (finding that the wire fraud "statute does not apply to extraterritorial conduct"), *cert. denied*, 144 S. Ct. 278 (2023); Skillern v. United States, No. 20-13380-H, 2021 WL 3047004, at *8 (11th Cir. Apr. 16, 2021) ("[A]s to the mail and wire fraud charges . . . the relevant statutes are silent as to their extraterritorial application and, thus, are not extraterritorial . . . ."); Bascuñán v. Elsaca, 927 F.3d 108, 121 (2d Cir. 2019) ("The mail and wire fraud statutes do not indicate an extraterritorial reach." (citing Eur. Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 141 (2d Cir. 2014), *rev'd on other grounds*, 579 U.S. 325 (2016))); *see also* United States v. All Assets Held at Bank Julius, 251 F. Supp. 3d 82, 101–02 (D.D.C. 2017) ("The Court agrees that nothing in the text, legislative history, or context of the wire fraud statute expressly rebuts the presumption against extraterritoriality."); United States v. Hussain, No. 16-cr-00462-1, 2017 WL 4865562, at *2 (N.D. Cal. Oct. 27, 2017) ("As applied to this case, Morisson's [sic] first step is straightforward: § 1343 does not apply extraterritorially."), *aff'd on other grounds*, 972 F.3d 1138 (9th Cir. 2020); Elsevier, Inc. v. Grossman, 199 F. Supp. 3d 768, 783 (S.D.N.Y. 2016) (noting that "the mail fraud statute only applies domestically"); United States v. Sidorenko, 102 F. Supp. 3d 1124, 1132 (N.D. Cal. 2015); United States v. Hayes, 99 F. Supp. 3d 409, 419–20 (S.D.N.Y. 2015).

78. *See* United States v. Georgiou, 777 F.3d 125, 137 (3d Cir. 2015) ("Section 1343 applies extraterritorially."). It may be worth noting, however, that in a later opinion concerning Georgiou's challenge to an order of restitution imposed in the case, the Third Circuit characterized its previous ruling as holding that Georgiou's "fraud occurred in the United States." United States v. Georgiou, 800 F. App'x 136, 139 (3d Cir.

the Wire Act, applies extraterritorially,[79] but a more recent First Circuit panel declined to decide whether § 1343 applies extraterritorially—reflecting a belief that this was an open question—because it found that the case presented a domestic application of the statute.[80]

The paucity of appellate caselaw on the subject—despite the popularity of the wire fraud statute—may flow from the fact that although the *RJR Nabisco* Court instructed courts to address the extraterritoriality issue first, it conceded that courts may wish to skip the first step and proceed directly to querying whether a given case presents a domestic application of the statute.[81] In some wire-fraud cases, circuit courts, including the Ninth and the First Circuits, have accepted this invitation.[82]

Three arguments have been made in support of the position that § 1343 applies extraterritorially: the statute's reference to wire transmissions in "interstate or *foreign commerce*"[83] rebuts the presumption; the Supreme Court ruled that the statute had extraterritorial effect in *Pasquantino v. United States*;[84] and an exception to the presumption ought to be made based on the Supreme Court's 1922 decision in *United States v. Bowman*.[85] As I will show, none of these contentions bear close analysis.

2020); *cf.* United States v. Hijazi, 845 F. Supp. 2d 874, 887 (C.D. Ill. 2011) (holding that the wire fraud statute applies extraterritorially when the fraud victimizes the United States government).

79. United States v. Lyons, 740 F.3d 702, 718 (1st Cir. 2014) ("'[T]he wire fraud statute punishes frauds executed in "interstate or foreign commerce,"' and therefore can be applied extraterritorially because Congress did not have 'only "domestic concerns in mind."'") (quoting Small v. United States, 544 U.S. 385, 388 (2005)); *see also* Drummond Co. v. Collingsworth, No. 15-cv-506, 2017 WL 3268907, at *17 (N.D. Ala. Aug. 1, 2017) (relying on *Georgiou* and *Lyons*).

80. *See* United States v. McLellan, 959 F.3d 442, 467 (1st Cir. 2020) ("We need not decide whether § 1343 applies extraterritorially because the facts underlying McLellan's conviction suffice to establish a domestic application of § 1343 inasmuch as he committed each required element of wire fraud from the United States through domestic wires.").

81. *See* RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 338 n.5 (2016) ("Because a finding of extraterritoriality at step one will obviate step two's 'focus' inquiry, it will usually be preferable for courts to proceed in the sequence that we have set forth. But we do not mean to preclude courts from starting at step two in appropriate cases."); *see also* WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2136–37 (2018) ("One reason to exercise that discretion is if addressing step one would require resolving 'difficult questions' that do not change 'the outcome of the case,' but could have far-reaching effects in future cases." (quoting Pearson v. Callahan, 555 U.S. 223, 236–37 (2009))).

82. *See, e.g.*, United States v. Hussain, 972 F.3d 1138, 1142–43 (9th Cir. 2020) ("[T]he focus of the wire fraud statute is the use of the wires in furtherance of a scheme to defraud, which here occurred domestically. We therefore need not and do not decide whether § 1343 applies extraterritorially."); *McLellan*, 959 F.3d at 467 ("We need not decide whether § 1343 applies extraterritorially because the facts underlying McLellan's conviction suffice to establish a domestic application of § 1343 inasmuch as he committed each required element of wire fraud from the United States through domestic wires.").

83. 18 U.S.C. § 1343 (emphasis added).

84. 544 U.S. 349, 371–72 (2005).

85. 260 U.S. 94 (1922).

B. The Wire Fraud Statute's Reference to "Foreign Commerce" Does Not Rebut the Presumption Against Extraterritorial Application

The Third Circuit has ruled that the wire fraud statute has extraterritorial application in part in reliance on the fact that the statute applies to "wire, radio, or television communication in interstate *or foreign commerce*."[86] But the Supreme Court has made clear that "even statutes that contain broad language in their definitions of 'commerce' . . . do not apply abroad."[87] The *Morrison* Court instructed that "[t]he general reference to foreign commerce in the definition of 'interstate commerce' does not defeat the presumption against extraterritoriality."[88] In *RJR Nabisco*, the Court stressed the strength of its view in this regard: "we have emphatically rejected reliance on such language, holding that 'even statutes . . . that expressly refer to "*foreign* commerce" do not apply abroad.'"[89] And last term, in *Abitron*, the Court cited this rule as controlling. At issue in that case were sections of the Lanham Act that proscribed the unauthorized use "in commerce" of protected marks where such use is likely to cause confusion.[90] The Lanham Act defines "commerce" to mean "all commerce which may lawfully be regulated by Congress," presumably including that which is regulable under the Foreign Commerce Clause.[91] The Court unanimously held that this language was insufficient to rebut the presumption against extraterritoriality, which controlled in the case.[92] The majority emphasized that an argument founded on the "commerce" language was "doom[ed]" by the Court's earlier conclusions in *Morrison* and *RJR Nabisco* that references to foreign commerce do not render a statute extraterritorial.[93]

In short, the premise of this argument—that the foreign-commerce element is itself conclusive evidence of a congressional intent that the statute apply extraterritorially—cannot be reconciled with precedent, as many lower courts have recognized in finding the wire fraud statute strictly territorial in scope.[94] Given the

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86. 18 U.S.C. § 1343 (emphasis added); *see* United States v. Georgiou, 777 F.3d 125, 137–38 (3d Cir. 2015); *see also* United States v. Lyons, 740 F.3d 702, 718 (1st Cir. 2014) (holding that the Wire Act, 18 U.S.C. § 1084, applies extraterritorially).

87. EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 251 (1991); *see also* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 262–63 (2010) (quoting *Aramco* language).

88. *Morrison*, 561 U.S. at 263.

89. RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 353 (2016) (quoting *Morrison*, 561 U.S. at 262–63); *see also Pasquantino*, 544 U.S. at 378 n.7 (Ginsburg, J., dissenting) ("I do not read into § 1343's coverage of frauds executed 'in interstate or foreign commerce,' congressional intent to give § 1343 extraterritorial effect. A statute's express application to acts committed in foreign commerce, the Court has repeatedly held, does not in itself indicate a congressional design to give the statute extraterritorial effect." (citation omitted)).

90. *See* Abitron Austria GmbH v. Hetronic Int'l, Inc., 600 U.S. 412, 415–16 (2023); 15 U.S.C. §§ 1114(1)(a), 1125(a)(1).

91. 15 U.S.C. § 1127; U.S. CONST. art. I, § 8, cl. 3.

92. *See Abitron*, 600 U.S. at 419–21; *see also id.* at 435–36 (Sotomayor, J., concurring in the judgment).

93. *Id.* at 420–21.

94. *See, e.g.*, United States v. Elbaz, 52 F.4th 593, 602 (4th Cir. 2022) ("There is one reference to 'foreign commerce,' but it is not enough to rebut the presumption."), *cert. denied*, 144 S. Ct. 278 (2023); Eur. Cmty. v. RJR

composition of the Court, this is unlikely to change. The conservative members of the Court are particularly enamored of the presumption against extraterritoriality, which harkens back to traditional notions of strict territorial sovereignty. Were the Court to change its view and accept that mere reference to foreign commerce rebutted the presumption, it would green-light an expansive application of federal criminal jurisdiction; the federal criminal code is rife with provisions that employ the foreign-commerce clause as a jurisdictional hook.[95]

One might argue that the Court would be less concerned with extensive extraterritorial criminal jurisdiction than it is with the expansive reach of civil remedies, given that all its recent decisions narrowing the scope of federal statutes have been civil cases. Justice Scalia, who penned *Morrison*, was obviously hostile to an expansive reading of civil damages remedies in federal securities-fraud cases.[96] Justice Alito's opinion in *RJR Nabisco* similarly read the scope of the civil RICO treble-damages liability narrowly.[97] But it is worth noting in this regard that some of these statutes serve as predicates for RICO liability. As the Second Circuit has noted:

> Though there are a few reported cases where RICO has been used against reputed mobsters or at least against organized criminals, it is being far more frequently used for purposes totally unrelated to its expressed purpose. It has become a standard practice, for example, to insert a RICO [civil] claim in litigation involving tender offers. It has become commonly used . . . in typical business fraud cases, in so-called "garden variety" securities fraud cases, and in bank fraud cases.[98]

The principal reason ordinary business disputes can be bootstrapped into civil RICO cases is Congress' decision to include mail and wire fraud as RICO

Nabisco, Inc., 764 F.3d 129, 141 (2d Cir. 2014) (holding that these exhortations "bar reading these statutes literally to cover wholly foreign travel or communication," and concluding that "references to foreign commerce . . . deriv[ed] from the Commerce Clause's specification of Congress's authority to regulate, do[es] not indicate a congressional intent that the statutes apply extraterritorially"), *rev'd on other grounds*, 579 U.S. 325 (2016); United States v. Lyons, 740 F.3d 702, 718 (1st Cir. 2014); United States v. Bondarenko, No. 17-CR-306, 2019 WL 2450923, at *8 (D. Nev. June 12, 2019); United States v. Hussain, No. 16-cr-00462, 2017 WL 4865562, at *2 (N.D. Cal. Oct. 27, 2017); United States v. Sidorenko, 102 F. Supp. 3d 1124, 1129 (N.D. Cal. 2015); United States v. Hayes, 99 F. Supp. 3d 409, 419–20 (S.D.N.Y. 2015).

95. *See, e.g.*, 18 U.S.C. §§ 1029, 2314, 2315.

96. *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 270 (2010) ("While there is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign securities markets, some fear that it has become the Shangri–La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.").

97. RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 346–55 (2016) (holding that the presumption should be applied to the code section that provides a civil damages remedy, 18 U.S.C. § 1964(c), in addition to the substantive RICO provisions themselves).

98. Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 487–88 (2d Cir. 1984) (footnotes omitted), *rev'd on other grounds*, 473 U.S. 479 (1985).

predicates.[99] There is little reason to believe that conservative members of the Court would view the extensive use of civil RICO—founded on wire-fraud predicates—to seek damages in transnational business litigation with equanimity.

C. The Legislative History Underlying the "Foreign Commerce" Amendment Does Not Support Extraterritorial Application

Courts have not relied upon the legislative history of the amendment that added the "foreign commerce" language to the wire fraud statute to support a conclusion that Congress intended the statute to have extraterritorial application; indeed, this history is largely ignored by the courts and the parties.[100] Presumably, they believe that—given the Supreme Court's instruction that inclusion of this term is insufficient to rebut the presumption against extraterritoriality—an amendment that does nothing more than add "foreign commerce" to the statute can be disregarded. I provide the following history in the interest of completeness because I believe that, given the reason for the amendment, a plausible argument can be made that this legislative history should be considered. On balance, however, the amendment does not support the view that Congress wished to make the statute extraterritorial in application.

In 1956, four years after the wire fraud statute became law, it was amended to change the language "interstate wire, radio, or television communication in interstate commerce" to "wire, radio, or television communication in interstate or *foreign commerce*."[101] The Department of Justice requested this amendment after a district judge ruled that a telephone call from Mexico to Los Angeles was "foreign"

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99. *See* Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1278 (7th Cir. 1989) (footnote omitted) (citations omitted). As the Seventh Circuit has explained:

> RICO includes as "racketeering activity" any act indictable under the mail and wire fraud statutes. In mail and wire fraud, each mailing or interstate communication is a separate indictable offense, even if each relates to the same scheme to defraud, and even if the defendant did not control the number of mailings or communications. Thus, the number of offenses is only tangentially related to the underlying fraud, and can be a matter of happenstance . . . .

Id. Because of this peculiarity, when the crimes of mail and wire fraud are alleged as RICO predicate acts, any fraud which generates mailings or wire communications involves as many acts of "racketeering activity" as mailings or communications which further the scheme. This encourages bootstrapping ordinary civil fraud cases into RICO suits. *Id.*

100. *See, e.g.*, United States v. Hijazi, 845 F. Supp. 2d 874, 887 (C.D. Ill. 2011) ("The text of the statute itself does not mention the extraterritorial reach of the act nor is there any relevant legislative history that would shed light on its reach."); United States v. Sidorenko, 102 F. Supp. 3d 1124, 1129 n.7 (N.D. Cal. 2015) ("The government also fails to provide any authority that other sources of statutory meaning, such as legislative history, provide any context demonstrating that the bribery and wire fraud statutes here apply abroad. Although the government claimed for the first time at the motion hearing that legislative history supported its position, it failed to specify any."). In the one case to address this history, a district court in the Southern District of New York did not find that the legislative history of the amendment rebutted the presumption. *See* United States v. Hayes, 99 F. Supp. 3d 409, 419–20 (S.D.N.Y. 2015).

101. Act of July 11, 1956, Pub. L. No. 84-688, 70 Stat. 523 (emphasis added) (codified as amended at 18 U.S.C. § 1343); H.R. REP. NO. 84-2385, at 3092–93 (1956).

and not "interstate" and, therefore, was outside the scope of the wire fraud statute.[102] Although the referenced case was not cited and appears to be unpublished, the method of analysis was likely similar to that employed in the contemporaneous case of *Wentz v. United States*.[103] Wentz was charged with wire fraud based on a telegram sent from Los Angeles to Mexico City in furtherance of a "flim-flam."[104] The indictment identified the actual path of the Western Union telegram from Los Angeles to Dallas, "thence to San Antonio" and "thence to Mexico."[105] Because the transmission in the case proceeded in stages, two of which were between cities in the United States, and the message was "received and reduced to tangible form" at each station along the path, the Ninth Circuit held that the interstate-commerce requirement was satisfied: "[W]hen the message ceased to be an electric signal at Dallas and took on tangible form for retransmission it would appear that the corpus delicti of the crime was complete."[106] The *Wentz* court believed, however, that, prior to the 1956 amendment, had the message gone directly from Los Angeles to Mexico, it would have been a "foreign communication" that did not fall within the original scope of § 1343.[107] Congress clearly wished to correct this particular deficiency; the House of Representatives Report on the amendment stated that "to meet this kind of defense, the present bill proposes to revise the section so as to make punishable any transmission 'in interstate or foreign commerce.'"[108]

There is nothing in the extremely sparse legislative history of this amendment to suggest that Congress intended the change to render the wire fraud statute applicable to all frauds, the world over, in which a wiring crossed a U.S. border. In other words, this was not conceived of as making the statute extraterritorial in character. The fact that one element of the crime may occur in a foreign state—for example, in *Morrison*, part of the alleged fraud—is insufficient grounds to assume a statute applies extraterritorially.[109] That is why the Court created the "focus" test: to distinguish between domestic and extraterritorial applications where the elements of the crime may occur in different places.

More importantly, before and contemporaneously with this amendment, very few statutes applied extraterritorially, and those that did generally expressly stated the terms upon which the statute could be applied outside the United States.[110] Although a number of attempts have been made, no definitive count of

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102. *See* H.R. REP. NO. 84-2385, at 3092–93 (letter from the Attorney General to the Speaker of the House of Representatives, Mar. 30, 1956).

103. 244 F.2d 172 (9th Cir. 1957).

104. *Id.* at 173.

105. *Id.*

106. *Id.* at 173–75.

107. *Id.* at 175.

108. H.R. REP. NO. 84-2385, at 3092 (1956).

109. *See* Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 266 (2010).

110. Five statutes do not expressly discuss the terms of any extraterritorial application but may have had some applicability overseas due to their subject-matter under *Bowman*. *See infra* Section I.E. The statutes concerned protection of facilities associated with the national defense of the United States but did not specify the bases upon which jurisdiction could be exercised, see 18 U.S.C. §§ 2152 (fortifications, harbor defenses, or defensive sea

federal criminal statutes exists, so a comprehensive survey of all possible provisions with extraterritorial effect is virtually impossible. That said, by my count (with the patient assistance of our library),[111] at or around the time of the amendment: three statutes were enacted to implement treaty-related obligations and specified the applicable jurisdictional grounds (e.g., territoriality, nationality, and passive personality jurisdiction);[112] five statutes also specified the particular criteria for extraterritorial application (nationality);[113] fourteen statutes stated that they applied within the special maritime and territorial jurisdiction of the United States;[114] nineteen applied within the admiralty and maritime jurisdiction of the United States or on the high seas;[115] five required that the crime be committed overseas or that one particular element take place abroad;[116] and two specified conduct prohibited regardless of whether the act took place "within the United States or elsewhere."[117]

In short, Congress was exceedingly sparing in addressing extraterritoriality. But, when it did so, it knew how to be specific regarding the circumstances in which a statute applied to conduct outside the United States. As the Supreme Court's case-law affirms, a general reference to "foreign commerce" of the sort contained in this amendment to the wire fraud statute was not the way that Congress, at that time, chose to express its permission to apply a statute overseas. Following the 1956 amendment, § 1343 was not amended again for more than thirty years.[118] Starting in 1989, the statute was amended repeatedly to increase its penalties in response to events of the day, including the savings-and-loan crisis, the Enron implosion, and the aftermath of Hurricane Katrina.[119] These amendments, however, did not address the jurisdictional reach of the statute.

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areas), 2153 (destruction of war material, war premises, or war utilities), 2154 (production of defective war material, war premises or war utilities), 2155 (destruction of national-defense materials, national-defense premises or national-defense utilities), 2156 (production of defective national-defense materials, national-defense premises or national-defense utilities).

111. Huge thanks to Thanh Nguyen, Head of Library Research Services, Georgetown Law Library, and to the students who helped him.

112. *See* 18 U.S.C. §§ 32(b), 112(e), 1201(e).

113. *See* 18 U.S.C. §§ 1201(e), 1585, 1586, 1652, 1654.

114. *See* 15 U.S.C. §§ 1175(a), 1243; 18 U.S.C. §§ 81, 113(a), 114, 661, 662, 1025, 1111(b), 1112(b), 1113, 1363, 2111, 2422(b). For the definition of special maritime and territorial jurisdiction, see 18 U.S.C. § 7.

115. *See* 18 U.S.C. §§ 1082(a), (c); 1083(a), 1587, 1651, 1652, 1653, 1656, 1658(a), 1659, 2191, 2192, 2193, 2194, 2271, 2388(d); 19 U.S.C. § 2272; 20 U.S.C. § 2273; 22 U.S.C. § 2275; 23 U.S.C. § 2276.

116. *See* 18 U.S.C. §§ 546 (smuggling goods into a foreign country), 877 (mailing threatening communications from a foreign country), 956(a)–(b) (conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country), 1083(a) (transport to a foreign gambling ship), 2195 (abandonment of sailors in foreign port).

117. 18 U.S.C. § 2381 (treason); *see also id.* § 2199 (stowaways on vessels or aircraft).

118. *18 U.S.C. § 1343*, LEGAL INFO. INST., https://www.law.cornell.edu/uscode/text/18/1343.

119. *See* Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, Pub. L. No. 110-179, § 2(a), 121 Stat. 2556, 2556 (2008) (raising the maximum penalty for acts related to presidentially-declared major disasters and emergencies to a $1,000,000 fine and 30 years in prison) (codified as amended in various sections of U.S.C.); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 903, 116 Stat. 745, 805 (increasing the

D. The Court in United States v. Pasquantino *Held that the Wire Fraud at Issue Was Territorial and Did Not Decide on the Extraterritoriality of the Wire Fraud Statute*

The First and Third Circuits have relied primarily on a misreading of *Pasquantino v. United States*[120] to undergird their rulings that wire fraud is extraterritorial in application. *Pasquantino* was decided after the Supreme Court introduced the presumption against extraterritoriality in 1991's *EEOC v. Arabian American Oil Co.* (*Aramco*).[121] But it was handed down five years before *Morrison*, in which the Court highlighted the importance and strength of the presumption and for the first time articulated its "focus" test for determining whether a given case is domestic or extraterritorial.[122]

In *Pasquantino*, the defendants were indicted for wire fraud for carrying out a scheme to smuggle large quantities of liquor from the United States into Canada, thereby depriving Canada of excise taxes on imported alcohol. The primary issue in the case was whether the common law's revenue rule—which precludes enforcement of tax liabilities of one sovereign in the courts of another—applied to bar the prosecution; the Court held that it did not.[123] The question whether this was an extraterritorial application of the wire fraud statute was not pressed or passed upon below and was "raised only as an afterthought in petitioners' reply brief."[124] The Court added a brief discussion, in dicta, regarding extraterritoriality in response to Justice Ginsburg's dissent, in which she contended that the case concerned an "extension of the 'wire fraud' statute to a scenario extraterritorial in significant part."[125] The majority rejected Justice Ginsburg's claim that its ruling approved extraterritorial application of the wire fraud statute, stating that "our interpretation of the wire fraud statute does not give it 'extraterritorial effect.'"[126] Instead, the Court applied an elements test to determine that the case constituted a domestic application of the statute, making the question whether the statute applied extraterritorially moot.[127]

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maximum sentence for acts not involving a financial institution from 5 years in prison to 20 years in prison) (codified as amended at 18 U.S.C. §§ 1341, 1343); Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322, § 330016, 108 Stat. 1796, 2147 (raising the maximum fine for acts not involving a financial institution from $1,000 to a set of much higher fines laid out in 18 U.S.C. § 3571) (codified in scattered sections of 18 U.S.C.); Crime Control Act of 1990, Pub. L. No. 101-647, § 2504, 104 Stat. 4789, 4861 (raising the maximum sentence for acts involving a financial institution to 30 years in prison) (codified as amended in scattered sections of 18 U.S.C.); Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 961, 103 Stat. 183, 499–501 (raising the maximum penalty for acts involving a financial institution to a $1,000,000 fine and 20 years in prison) (codified in scattered sections of 18 U.S.C.).

120. 544 U.S. 349 (2005).

121. 499 U.S. 244, 248 (1991).

122. 561 U.S. 247, 255, 266–69 (2010).

123. 544 U.S. 349, 355–70 (2005).

124. *Id.* at 371 n.12.

125. *Id.* at 372 (Ginsburg, J., dissenting) (citation omitted).

126. *Id.* at 371.

127. *Id.*

As we know, according to the Supreme Court, there are two elements to a wire-fraud count: a scheme to defraud and an interstate wiring in furtherance thereof.[128] The *Pasquantino* scheme was apparently spawned in the United States. The Court stated that the offense "was complete the moment [the defendants] executed the scheme inside the United States" through the defendants' domestic, interstate use of the wires—that is, their use of the telephone in New York to place orders with liquor stores in Maryland.[129] In short, the Court focused on where the elements of the crime happened, deeming all of them (i.e., execution of a scheme to defraud and interstate phone calls in furtherance thereof) to have been satisfied in the United States.[130] Where all the elements of an offense take place in the United States, courts have long held that that is a domestic application of the statute, requiring no inquiry into the extraterritorial reach of the statute.[131]

The fly in the ointment is a throwaway sentence at the opinion's end: "In any event, the wire fraud statute punishes frauds executed 'in interstate or foreign commerce,' 18 U.S.C. § 1343, so this is surely not a statute in which Congress had only 'domestic concerns in mind.'"[132] The modern Court justifies its presumption against extraterritoriality in part by contending that Congress "is primarily concerned with domestic conditions."[133] The First and Third Circuits have relied on this throwaway sentence to hold that the mail and the wire fraud statutes, respectively, apply extraterritorially.[134]

Such a reading is insupportable. The wire fraud statute is among the most potent threats in the federal arsenal, so its geographic scope is of more than passing interest. The issue of the wire fraud statute's extraterritorial reach was not even fully briefed, much less the subject of a decision below. And the Court clearly did not believe that the case presented an issue of the extraterritorial application of the statute: "This is a criminal prosecution brought by the United States in its sovereign capacity to punish *domestic* criminal conduct."[135] The language relied upon by the First and Third Circuits, then, is the most *obiter* of *dicta*. Most significantly, the

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128. *See id.* at 355; Pereira v. United States, 347 U.S. 1, 8 (1954).

129. 544 U.S. at 353, 371.

130. *Id.*

131. *See, e.g.*, Eur. Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 142 (2d Cir. 2014) ("If domestic conduct satisfies every essential element to prove a violation of a United States statute that does not apply extraterritorially, that statute is violated even if some further conduct contributing to the violation occurred outside the United States."), *rev'd on other grounds*, 579 U.S. 325 (2016); *see also* Republic of the Philippines v. Marcos, 862 F.2d 1355 (9th Cir. 1988) (foregoing extraterritoriality inquiry where alleged RICO predicate acts occurred in the United States).

132. 544 U.S. at 371–72 (citation omitted) (quoting Small v. United States, 544 U.S. 385, 388 (2005)).

133. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) (quoting EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991)); *see also* RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 336 (2016); Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454–55 (2007); Smith v. United States, 507 U.S. 197, 204 n.5 (1993); Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949).

134. *See* United States v. Georgiou, 777 F.3d 125, 137–38 (3d Cir. 2015); *cf.* United States v. Lyons, 740 F.3d 702, 718 (1st Cir. 2014) (holding that the Wire Act, 18 U.S.C. § 1084, applies extraterritorially).

135. *Pasquantino*, 544 U.S. at 362 (emphasis added).

presumption against extraterritoriality, which is so prominent in the Court's recent cases, was not even mentioned, much less distinguished, by the majority. And, as was discussed above, this dictum fails to take account of the Court's own treatment of the relevance of references to "foreign commerce" in past cases.

The Court's language was prompted by Justice Ginsburg's dissent. It appears from her discussion that she believed the case to be extraterritorial in nature because the victim of the fraud was the Canadian government, and the "culminati [on]" of the scheme was the evasion of "Canada's hefty tax on imported alcohol."[136] Justice Ginsburg's emphasis on the nature of the victim was consistent with the issue of the revenue rule's applicability, but it had no obvious relevance to the question of where the crime occurred.[137]

The best reading of *Pasquantino*, then, is that this throwaway dictum ought to be disregarded; it is probative only of the Court's wisdom in generally restricting its opinions to the resolution of issues squarely raised, briefed, and argued. To the extent that *Pasquantino* is notable, it is because the Court employed a traditional elements-based analysis to determine where the crime occurred. As one court characterized it, "*Pasquantino* considered only whether the fact that the ultimate victim of a fraudulent scheme rendered the application of the wire fraud statute impermissibl[y] extraterritorial, even though the underlying scheme was otherwise entirely carried out in the United States."[138] The Court's answer, obviously, was no.[139]

E. United States v. Bowman is Inapplicable to Wire Fraud

Before *Morrison* (and, to some extent, even afterward), lower courts generally found that federal criminal statutes did have extraterritorial purchase,[140] largely relying on the Court's 1922 decision in *United States v. Bowman*.[141] *Bowman* involved a fraud hatched on the high seas and abroad that had as its victim a U.S. government-owned corporation. The Supreme Court acknowledged that the general rule was that the power to punish crimes against private persons or their property "must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it."[142] It went on, however, to articulate the following caveat:

> [T]he same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the

136. *Id.* at 372–73 (Ginsburg, J., dissenting).

137. Under either *Pasquantino*'s elements-based approach or the *Morrison* focus test, Justice Ginsburg's argument fails because the "identity and location of the victim, and the success of the scheme, are irrelevant" for liability under the wire fraud statute. *See, e.g.*, United States v. Trapilo, 130 F.3d 547, 551–52 (2d Cir. 1997); *see also* United States v. Mandell, 752 F.3d 544, 549 (2d Cir. 2014).

138. United States v. Gasperini, 16-CR-441, 2017 WL 2399693, at *8 (E.D.N.Y. June 1, 2017).

139. *Id.*

140. *See, e.g.*, O'Sullivan, *supra* note 49, at 1069–73 & nn.285, 289–94.

141. 260 U.S. 94 (1922).

142. *Id.* at 98.

> government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction . . . of the government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.[143]

Those convicted in the case were Americans; another defendant, who was a national of Great Britain, had not been apprehended, and the Court stated that "it will be time enough to consider what, if any, jurisdiction the District Court . . . has to punish him when he is brought to trial."[144] As the Supreme Court later summarized its *Bowman* holding in *Skiriotes v. Florida*:

> [A] criminal statute dealing with acts that are directly injurious to the government, and are capable of perpetration without regard to particular locality is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect.[145]

Pre-*Morrison*, lower federal courts regularly read *Bowman* extremely broadly to justify the extraterritorial application of criminal statutes that bear no resemblance to the *Skiriotes* description.[146] Some have continued to resist applying *Morrison*'s strong presumption against extraterritoriality in criminal cases by contending that *Bowman* is good law until expressly overruled.[147] The Second Circuit has twice asserted that the presumption against extraterritoriality does not apply in criminal cases, citing *Bowman*,[148] although a subsequent panel of the court attempted to

143. *Id.*

144. *Id.* at 102–03.

145. 313 U.S. 69, 73–74 (1941).

146. *See* O'Sullivan, *supra* note 49, at 1070–73 and accompanying footnotes.

147. *See, e.g.*, United States v. Leija-Sanchez, 820 F.3d 899, 900–01 (7th Cir. 2016); United States v. Weingarten, 632 F.3d 60, 66–67 (2d Cir. 2011); United States v. Leija-Sanchez, 602 F.3d 797, 799 (7th Cir. 2010) ("Whether or not *Aramco* and other post–1922 decisions are in tension with *Bowman*, we must apply *Bowman* until the Justices themselves overrule it."); United States v. Campbell, 798 F. Supp. 2d 293, 303 (D.D.C. 2011) ("Despite the emphasis of *Morrison* that the presumption against extraterritoriality applies 'in all cases,' recent Supreme Court jurisprudence has developed with nary a mention of *Bowman* and has predominately involved civil statutes." (citation omitted) (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 261 (2010))); United States v. Carson, No. SACR 09–00077, 2011 WL 7416975, at *6–8 (C.D. Cal. Sept. 20, 2011) ("*Morrison* does not mention *Bowman*, nor does it explicitly overrule it.").

148. *See* United States v. Siddiqui, 699 F.3d 690, 700 (2d Cir. 2012) ("The ordinary presumption that laws do not apply extraterritorially has no application to criminal statutes."); United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011) ("The presumption that ordinary acts of Congress do not apply extraterritorially does not apply to criminal statutes." (citation omitted)).

walk back that assertion.[149] Not surprisingly, then, in some wire-fraud prosecutions, the government has argued that "the presumption against extra-territoriality in *Morrison* is applicable only to civil cases, citing *United States v. Bowman*."[150]

Courts rely extensively on *Bowman* at their peril.[151] If *Bowman* remains good law, it may be possible for the government to argue that the mail fraud statute generally ought to fall within *Bowman*'s rule, but there is no justification for applying it to the wire fraud statute.

The history of the mail fraud statute, first enacted in 1872,[152] reveals that the prohibition was aimed at protecting the postal service not just from being misused in service of frauds but also from the very real consequences to the service itself from such abuses. Professor Norman Abrams' research reveals that the original statute "had its origin in concerns about mass-mailings-to-the-public-lottery-frauds and other similar mass-mailing swindles."[153] These schemes involved mailing large quantities of circulars to individuals promising them a prize or gift if they purchased a lottery ticket. Part of the schemes involved scapegoating the Postal Service: "[T]he defrauders falsely plac[ed] the blame on the Post Office Department for the alleged failure to deliver prizes [assertedly sent] through the mail, or making similar false claims that they never received the victim's application and money that were sent through the mails."[154] This had predictably negative effects on the reputation of the Postal Service and public confidence in it. The use of false names to hide the schemes also burdened postal inspectors investigating the schemes, as did the "multiplicity of complaints from the victims."[155]

Commentators have argued that over time—and particularly in light of the congressional expansion of § 1341 to fraud conducted through private and commercial

149. *See* United States v. Vilar, 729 F.3d 62, 72 (2d Cir. 2013) (noting that "no plausible interpretation of *Bowman*" supports the government's assertion that the presumption does not apply in criminal cases and "fairly read, *Bowman* stands for quite the opposite").

150. United States v. Coffman, 574 F. App'x 541, 557 (6th Cir. 2014); *see also* United States v. Sidorenko, 102 F. Supp. 3d 1124, 1129–32 (N.D. Cal. 2015) (rejecting government's attempt to rely on *Bowman* to support extraterritorial application of the wire fraud statute).

151. *See* O'Sullivan, *supra* note 49, at 1069–73.

152. Norman Abrams, *Uncovering the Legislative Histories of the Early Mail Fraud Statutes: The Origin of Federal Auxiliary Crimes Jurisdiction*, 2021 UTAH L. REV. 1079, 1079.

153. *Id*. at 1088.

154. *Id*. at 1092.

155. *Id*. at 1093.

interstate carriers[156]—that the "gist" of the statute is no longer primarily the protection of the Postal Service but rather simply protection of all victims whose cases fortuitously feature the jurisdictional hook of a mailing.[157] As Professor Peter Henning has noted, in light of this amendment, "[m]aybe [i]t [s]hould [j]ust [b]e [c]alled [f]ederal [f]raud."[158] At least at its beginning, however, the mail fraud statute could be justified as the type of offense *Bowman* contemplated: "enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated."[159]

The same is not true of the wire fraud statute. From its inception, § 1343 was the kind of federal criminal statute that scholars identify as an auxiliary offense: that is, a "crime[] whose primary purpose was *not* federal self-defensive criminal jurisdiction (i.e., protection of federal money, property, personnel, or other direct federal interests)."[160] Wire fraud is typical of such auxiliary offenses in that it involves enlisting federal power in the battle against conduct typically prosecuted under state law.[161] As discussed at greater length below, the legislative history reveals that the aim of the first iteration of the wire fraud statute, enacted in 1952, was to prevent the victimization of members of the general public by the transmission of fraudulent radio advertising. The perpetrators of such frauds and their victims were private citizens, and, in contrast to the mail-fraud context, the radio stations that provided the medium for the fraudulent communications were private entities. The "wires" identified in modern wire-fraud cases—those facilitating email and text communications and associated with use of internet—are generally not owned or provided through the federal government. There is, in short, no case to be made that the wire fraud statute is the type of "federal self-defense offense"[162] to which *Bowman* speaks.

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156. To combat telemarketing fraud, Congress expanded the application of the mail fraud statute to mailings through private or commercial interstate carriers like Federal Express and United Parcel Service pursuant to its Commerce Clause power. *See* Senior Citizens Against Marketing Scams Act of 1994, Pub. L. No. 103-322, Title XXV, § 250006, and Title XXXIII, § 330016(1)(H), 108 Stat. 2087, 2147 (enacted as part of the Violent Crime Control and Law Enforcement Act of 1994); *see also* 103 CONG. REC. 4459 (1993) (statement of Sen. Orrin Hatch), 18057–58 (July 30, 1993) (statement of Sen. Orrin Hatch). Thus, if a case is founded on such mailings, proof that the private carrier operates in interstate commerce is necessary. *See generally* Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 473–77 (1995) ("The large delivery service companies, such as Federal Express and United Parcel Service, are clearly interstate carriers, but small entities, such as local messenger services, are not as easily categorized.").

157. *See, e.g.*, C.J. Williams, *What is the Gist of the Mail Fraud Statute?*, 66 OKLA. L. REV. 287, 303 (2014).

158. Henning, *supra* note 156, at 435.

159. United States v. Bowman, 260 U.S. 94, 98 (1922).

160. Abrams, *supra* note 152, at 1079.

161. *Id.* at 1079–80 (citing L.B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 L. & CONTEMP. PROBS. 64, 70 (1948)).

162. *Id.* at 1082.

II. THE COURT'S NOVEL "FOCUS" TEST FOR SEPARATING DOMESTIC FROM EXTRATERRITORIAL CASES IS FLAWED

Part I demonstrates that the wire fraud statute should not have extraterritorial application. In light of this conclusion, the law is clear: If a statute does not have extraterritorial application, courts facing the question whether a statute covers a case with transnational elements must "determine whether the case involves a domestic application of the statute."[163]

The *Morrison* plaintiffs, having failed to persuade the Court that the securities fraud statutes applied extraterritorially, attempted to avoid dismissal by contending that they were seeking a domestic, not extraterritorial, application of the statute because the conduct of the underlying fraud occurred, in part, in Florida.[164] The Court, facing the question of where a transnational securities-fraud claim was committed for these purposes, for the first time articulated a "focus" test for discerning when a claim should be deemed acceptably domestic, and thus cognizable under the statute, as opposed to impermissibly extraterritorial in nature. "The focus of a statute is 'the object of its solicitude,' which can include the conduct it 'seeks to "regulate,"' as well as the parties and interests it 'seeks to "protect"' or vindicate."[165]

The *Morrison* Court reasoned that § 10(b) does not "punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'"[166] Thus, the Court concluded, the "focus" of § 10(b) was "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[167] In other words, unless there is a domestic securities transaction, the case constitutes a forbidden extraterritorial application of the statute. (Note that Congress has overruled the Court's conclusion in this respect in government-initiated civil and criminal cases.)[168] Although the fraudulent activity is an element of the cause of action, the *Morrison* Court ruled that the site of the fraud is irrelevant to determining whether a given claim is territorial or extraterritorial in nature.[169] In *RJR Nabisco*, the Court further instructed that:

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163. RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 337 (2016).

164. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2010).

165. Abitron Austria GmbH v. Hetronic Int'l, Inc., 600 U.S. 412, 418 (2023) (quoting WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2136 (2018)).

166. *Morrison*, 561 U.S. at 266 (quoting 15 U.S.C. § 78j(b)).

167. *Id.* at 267, 273.

168. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1865 (2010) (codified at 15 U.S.C. § 78aa). Although there is controversy concerning the effectiveness of this legislation, the better view is that Congress was successful in its efforts to ensure that government-initiated transnational suits be judged under the "conduct-and-effects" test used by courts of appeal prior to *Morrison*. *See* J.R. O'Sullivan, *The Government's Power To Bring Securities Fraudsters to Account: Dodd-Frank Rendered* Morrison *Irrelevant*, 59 AM. CRIM. L. REV. 231 (2022).

169. *Morrison*, 561 U.S. at 268–71.

> If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.[170]

This section outlines how the Court's novel "focus" test departs from traditional methods of determining whether a given criminal violation is cognizably "domestic" as opposed to impermissibly "extraterritorial." It will then demonstrate the shortcomings of the test: it is not, as the Supreme Court assumed, easily administrable and often yields arbitrary results. I will conclude by questioning whether the "focus" test, which requires identification of conduct occurring in a single jurisdiction, makes sense in the context of wire fraud.

A. The "Focus" Test Has No Basis in History or Precedent

For much of early U.S. history, where a crime took place was not much of an issue: criminal jurisdiction was deemed predominantly territorial, and only the exceptional case crossed borders. Virtually the only transnational crimes concerned incidents between ships, which are considered the floating sovereign territory of the country whose flag the ship flies. If a sailor on a U.S. ship shot and killed a sailor on a British ship, then one might have an issue of whether the murder could be prosecuted in U.S. courts. Such cases were, for most of U.S. history, resolved by reference to an elements test founded on the international-law principles controlling the limits of national legislative, or "prescriptive," jurisdiction.[171]

The most traditional basis for prescriptive jurisdiction is territorial. Until 2018 and the publication of the *Restatement (Fourth) of the Foreign Relations Law of the United States*, there were two varieties of territorial jurisdiction. One, subjective territorial jurisdiction, is bedrock: it provides that a State has jurisdiction to prescribe criminal law controlling "*conduct* that, wholly or in substantial part, takes place [within] its territory." [172] Thus, "[i]t [wa]s universally recognized that States are competent, in general, to punish all crimes committed within their territory."[173] The Supreme Court's modern presumption against extraterritoriality is keyed to this subjective territoriality principle—that is, to *conduct* occurring on U.S. soil.[174]

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170. RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 337 (2016).

171. *See* O'Sullivan, *supra* note 49, at 1037–48.

172. RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 402(1)(a) (AM. L. INST. 1987) (emphasis added).

173. *Codification of International Law: Part II Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 480 (1935) [hereinafter *Draft Convention*]; *see* Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812); Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234 (1804); The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824).

174. *See* Abitron Austria GmbH v. Hetronic Int'l, Inc., 600 U.S. 412, 418–19 (2023); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2010); *RJR Nabisco*, 579 U.S. at 337.

The second species of territorial jurisdiction, termed "objective" territorial or "effects" jurisdiction, developed later but came to be widely accepted in the twentieth century.[175] It gave a State the power to legislate with respect to "conduct outside its territory that has or is intended to have *substantial effect* within its territory."[176] To cite one commonly used example: assume that, in a duel, Smith, standing in Mexico, shoots with intent to kill Jones, who is on the U.S. side of the border. Jones expires in the United States. In this case, one element of the crime—firing the fatal shot—happened in Mexico, but another element—the death of the victim—occurred in the United States.[177] The "effect" is an element of the crime and, therefore, suffices to give the United States territorial jurisdiction concurrent with that of Mexico.

The highly influential *Draft Convention on Jurisdiction with Respect to Crime*, published in 1935, discussed objective territoriality in just such terms: a State has territorial jurisdiction over crimes commenced abroad but completed or consummated within the State's territory.[178] Critically, the crime, according to the convention, occurs "in part" in the State claiming objective territorial jurisdiction because an "essential constituent element [wa]s consummated there."[179]

The *Model Penal Code* ("MPC") of 1962 also relied on an elements test in its territorial jurisdiction section. The MPC provided that, absent an express statutory provision stating that the offense prohibits conduct outside the State:

> [A] person may be convicted under the law of th[e] State of an offense committed by his own conduct or the conduct of another for which he is legally accountable if . . . either the conduct that is an element of the offense or the result that is such an element occurs within th[e] State.[180]

Finally, the *Restatement (Second) of the Foreign Relations Law of the United States* adopted this elements-based analysis in 1965. It explained that:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory if . . . the conduct and its effect are generally recognized as constituent elements of a crime . . . under the law of states that have reasonably developed legal systems . . . .[181]

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175. *See, e.g.*, O'Sullivan, *supra* note 49, at 1030.

176. RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 402(1)(c) (AM. L. INST. 1987) (emphasis added).

177. *See, e.g.*, Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 987 (2d Cir. 1975).

178. *Draft Convention*, *supra* note 173, at 487–88.

179. *Id.* at 495.

180. MODEL PENAL CODE § 1.03(1)(a) (AM. L. INST. 1962).

181. RESTATEMENT (SECOND) OF THE FOREIGN RELS. L. OF THE U.S. § 18(a) (AM. L. INST. 1965); *see also id.* at cmt. e. The Second Restatement further explained that if the crime at issue is not one that is "generally recognized," the conduct and effects must be "constituent elements" and the effect must be both substantial and the direct and foreseeable result of the conduct. *Id.* at cmt. f.

Importantly, as the customary international law of prescriptive jurisdiction evolved, it expanded its reach such that objective territorial jurisdiction could be based on pernicious effects experienced in U.S. territory, even if they *did not constitute an element of the crime or cause of action*. Effects jurisdiction, as reflected in the *Restatement (Third) of the Foreign Relations Law of the United States*, did not require that a "constituent element" of the crime, or that conduct consummating the crime, occur in the prosecuting State.[182] Federal courts found territorial jurisdiction to be present when conduct abroad had sufficiently adverse effects on American markets or American citizens, even if no element of the crime occurred in the United States.[183]

For decades, U.S. courts used the principles of territorial prescriptive jurisdiction, as they had evolved, to determine whether a case was cognizably domestic or was impermissibly extraterritorial in nature.[184] They deemed a case to be territorial if either qualifying conduct or effects occurred on the territory of the United States pursuant to what came to be termed the "conduct-and-effects" test.[185] In doing so, they implicitly read the congressional intent underlying geo-ambiguous statutes to extend territorial jurisdiction to the limits recognized under the international law of prescriptive jurisdiction.[186] The *Morrison* Court apparently believed that the lower courts were using the "conduct-and-effects" test to determine the extraterritorial reach of a statute, as at least one early Second Circuit decision indicated.[187] But subsequent caselaw revealed that the lower courts were not, in fact, using this test to determine whether a statute had an extraterritorial effect; they assumed that statutes did not. Courts used the test only to determine whether a transnational case was cognizably domestic because of territorial conduct or effects, as opposed to impermissibly extraterritorial.[188]

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182. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. §§ 415(2) (Jurisdiction to Regulate Anti-Competitive Activities), 416(1)(c) (Jurisdiction to Regulate Activities Related to Securities) (AM. L. INST. 1987). For example, courts have upheld jurisdiction to prescribe based on intended effects, even if no effects were actually felt. *See, e.g.*, United States v. Yousef, 327 F.3d 56, 96–97 (2d Cir. 2003); United States v. Wright-Barker, 784 F.2d 161, 168–69 (3d Cir. 1986); United States v. Ricardo, 619 F.2d 1124, 1129 (5th Cir. 1980); RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 201 reporters' note 6 (AM. L. INST., Tentative Draft No. 2, 2016).

183. *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 257–58 (2010).

184. *See* O'Sullivan, *supra* note 49, at 1056–59.

185. *See id.*

186. *See id.*

187. *See* Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968) (discussing the extraterritorial application of the Securities and Exchange Act where fraudulent acts were committed outside the United States based on "effects" jurisdiction).

188. *See, e.g.*, United States v. Philip Morris USA Inc., 566 F.3d 1095, 1130 (D.C. Cir. 2009); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 923 (D.C. Cir. 1984). The Eighth Circuit instructed that, when dealing with cases involving transnational securities claims, "courts have employed only the territorial principle," referencing territoriality's subjective and objective "variations of this principle." Cont'l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc., 592 F.2d 409, 416 (8th Cir. 1979) (quoting Judson J. Wambold, Note, *Extraterritorial Application of the Antifraud Provisions of the Securities Acts*, 11 CORNELL INT'L L.J. 137, 139 & nn.12–16 (1978)). And as the D.C. Circuit explained in *United States v. Philip Morris USA Inc.*:

The "conduct-and-effects" test was often criticized, as the *Morrison* Court noted, as "unpredictable and inconsistent" in application.[189] In cases in which the targeted conduct crossed borders, courts struggled to identify what types of conduct, and how much conduct, must occur in a territorial jurisdiction to satisfy the test.[190] Questions also arose as to what types of effects, and of what magnitude, sufficed.[191] Courts often looked to the totality of the circumstances, asking whether a combination of conduct and effects were of sufficient connection to the United States to warrant the exercise of jurisdiction.[192] This case-by-case method yielded few bright lines and little direction for future courts.[193]

The *Morrison* Court rejected the "conduct-and-effects" test as both difficult to administer and irreconcilable with the presumption against extraterritoriality. The Court determined that a case is territorial in nature only if qualifying *conduct* occurs on U.S. territory.[194] Consistent with this narrowing of the notion of territoriality, the Fourth Restatement now describes effects jurisdiction as a discrete jurisdictional basis rather than as a subset of territorial jurisdiction.[195]

The Court's rejection of the "conduct-and-effects" test meant that it had to articulate a test for determining where an offense is committed—that is, what conduct must occur in a State for the crime to be considered domestic. The Court could have returned to the aforementioned traditional elements approach reflected in the 1935 Harvard Research Study, the MPC, and the Second Restatement and that it employed itself five years before in *Pasquantino v. United States*.[196] However, the *Morrison* Court did not reference the traditional approach reflected in the elements analysis in *Pasquantino*. Instead, it crafted an entirely new test for determining what conduct qualified a case as territorial in nature. It did so by creating a "focus" test: "The focus of a statute is 'the object of its solicitude,' which can include the conduct it 'seeks to "regulate,"' as well as the parties and interests it 'seeks to "protect"' or vindicate."[197] It is clear that this constituted a novel approach: The two cases the Court cited in support of the test, *EEOC v. Arabian American Oil Co.*

> Because conduct with substantial domestic effects implicates a state's legitimate interest in protecting its citizens within its borders, Congress's regulation of foreign conduct meeting this "effects" test is "*not* an *extraterritorial* assertion of jurisdiction." Thus, when a statute is applied to conduct meeting the effects test, the presumption against extraterritoriality does not apply.

566 F.3d at 1130 (citation omitted) (quoting *Laker Airways*, 731 F.3d at 923).

189. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 260 (2010).

190. *Id.* at 256–61.

191. *Id.* at 257–61.

192. *Id.*

193. *Id.* at 260–61.

194. *See* Abitron Austria GmbH v. Hetronic Int'l, Inc., 600 U.S. 412, 418–19 (2023).

195. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 201(1)(b), cmt. f (AM. L. INST., Tentative Draft No. 2, 2016).

196. 544 U.S. 349 (2005).

197. *Abitron*, 600 U.S. at 418 (quoting WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2136 (2018)); *see also Morrison*, 561 U.S. at 266–67.

(*Aramco*)[198] and *Foley Bros. v. Filardo*,[199] were inapposite because in neither case did the Court even address the issue of what would constitute a domestic, as opposed to an extraterritorial, application of the statutes at issue.[200]

Morrison's "focus" test is still a species of an "elements" test in that it seems to demand that courts look to the conduct relevant to the elements of the statutory offense, but it requires courts to designate only one such element as the "focus" of the legislation. This approach is more stringent than the elements-based approach discussed above because it privileges the "focus" element and ignores other elements of the offense. It also disregards "effects" entirely, even if such effects are elements of the offense or cause of action, as in civil securities-fraud cases. As the *RJR Nabisco* Court put it, "[i]f the *conduct* relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application" of the statute.[201]

What appeared to be driving this one-element test was simple administrability. The *Morrison* Court condemned the "conduct-and-effects" test's indeterminacy and inconsistency at some length.[202] Further, it noted that other nations complained of the interference with foreign securities regulation that occurred by virtue of extraterritorial application of U.S. standards.[203] These foreign amici "urge[d] the adoption of a clear test that will avoid that consequence."[204] The Court said that the results of its "focus" test—the supposedly bright-line inquiry into the locus of the securities transaction—"me[t] that requirement."[205] The principal problems with the Court's "focus" test are that it is, in fact, not easily administrable, and it often yields arbitrary results.

B. The "Focus" Test Is Not Easily Administrable

To the extent the "focus" test was designed to promote predictability and clear jurisdictional line-drawing, it does not serve those ends.

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198. 499 U.S. 244 (1991).

199. 336 U.S. 281 (1949).

200. *Aramco* concerned Title VII's regulation of employment practices overseas. 499 U.S. at 247. It was argued on the assumption that this constituted an extraterritorial application of the statute despite the fact that the regulations applied to United States employers employing United States citizens. *Id.* at 255. The *Aramco* Court's discussion of the domestic "focus" of the act, then, simply was used to bolster the presumption against extraterritoriality and rebut textual arguments against its application. *Id.* Similarly, in *Foley Bros. v. Filardo*, the statute required contractors working pursuant to a government contract to limit workers' hours to eight hours per day. 336 U.S. at 282. The issue was whether the statute applied to contracts for work abroad. *Id.* The employee seeking overtime pay in the case was an American citizen, but the Court again assumed that this was an extraterritorial application of the statute. *Id.* at 283, 284–86. It applied the presumption against extraterritoriality and augmented the presumption with a discussion of the statute's focus based on its language and history. *Id.* at 281–88.

201. RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 337 (2016) (emphasis added).

202. *Morrison*, 561 U.S. at 255–61.

203. *Id.* at 269.

204. *Id.*

205. *Id.* at 269–70.

1. We Do Not Know What Is Meant by Statutory "Focus"

Congress does not normally identify a statutory "focus" when it enacts legislation.[206] Commentators are rightly concerned that the test is, therefore, manipulable and subjective.[207] Members of the Court have echoed these concerns. In the oral argument in *Abitron Austria GmbH v. Hetronic International Inc.*, Justice Gorsuch called the search for a statutory "focus" a "metaphysical question" that seemed to call for "a legislative séance."[208] To the extent that "focus" translates to legislative "purpose," it invites the kind of inquiry into collective legislative intention that modern adherents of textualism (like the test's author, Justice Scalia) abhor.[209] But if it does not mean "purpose," what does it mean? Predictably, the test has generated circuit splits on how it ought to be applied to various federal statutes, including the wire fraud statute.[210] Last term, the Court muddied the waters still more in *Abitron*, demonstrating that justices do not have a consistent view on how to analyze a statute's "focus."

In *Abitron*, a unanimous Court held that the Lanham Act sections prohibiting the unauthorized use in commerce of a protected trademark when likely to cause confusion do not apply extraterritorially.[211] It then wrestled with the far more difficult question of the "focus" of those sections. Petitioners argued that the focus of the statute was the use of the mark in commerce, while the government and the respondent argued that the focus was the effects of such use, not the use itself.[212] Respondent argued that the Act's focus was protecting mark owners from reputational damage and protecting consumers from confusion, while the government

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206. *See, e.g.*, Lea Brilmayer, *The New Extraterritoriality:* Morrison v. National Australia Bank*, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. L. REV. 655, 663–65, 667–68 (2011); John H. Knox, *The Unpredictable Presumption Against Extraterritoriality*, 40 SW. L. REV. 635, 643–45 (2011); Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 NOTRE DAME L. REV. 1673, 1699–700 (2012).

207. *See, e.g.*, Richard A. Grossman, *The Trouble with Dicta:* Morrison v. National Australia Bank *and the Securities Act*, 41 SEC. REG. L.J. 1 (2013).

208. Transcript of Oral Argument at 56, Abitron Austria GmbH v. Hetronic Int'l Inc., 600 U.S. 412 (2023) (No. 21-1043).

209. *See* Carlos M. Vázquez & Russell C. Bogue, Choice of Law as Statutory Interpretation: The Rise and Decline of Governmental Interest Analysis 52–53 (Sept. 7, 2023) (unpublished manuscript).

210. *See, e.g.*, *infra* Section III.A. (discussing conflict in locating the focus of the wire fraud statute); *see also* Melvin L. Otey, *Why RICO's Extraterritorial Reach Is Properly Coextensive with the Reach of Its Predicates*, 14 J. INT'L BUS. & L. 33, 53–54 (2015) (discussing split regarding focus of RICO statute).

211. *Abitron*, 600 U.S. at 428. In the context of the case, potential liability was founded on the following two provisions: 15 U.S.C. § 1114(1)(a), which authorizes civil liability where "[a]ny person who shall, without the consent of the registrant . . . use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark . . . in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive"; and 15 U.S.C. § 1125(a)(1)(A), which authorizes civil liability where "[a]ny person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person."

212. *Abitron*, 600 U.S. at 421; *see also id.* at 434 (Sotomayor, J., concurring in the judgment).

emphasized only the latter effect.[213] The majority opinion ruled for petitioners, adopting a two-step focus test that centers entirely on conduct occurring within the United States.[214]

According to the Court, one must first inquire into the statutory "focus" and then further ask "whether the *conduct relevant to that focus* occurred in United States territory."[215] Oddly, however, the majority never attempted to discern what Congress was trying to achieve—that is, its legislative focus—in the Lanham Act. This is probably because that would have required the Court to acknowledge that Congress sought to prevent the effects that respondent isolated.[216] Rather, the majority skipped right to determining what conduct was covered by the Act, concluding that "the conduct relevant to any focus the parties have proffered is infringing use in commerce."[217] The element of confusion, according to the Court, is "not a separate requirement; rather, it is simply a necessary characteristic of an offending use."[218] The majority concluded that "[b]ecause Congress premised liability on a specific action (a particular sort of use in commerce), that specific action would be the conduct relevant to any focus on offer today."[219]

Justice Sotomayor, joined by Chief Justice Roberts and Justices Kagan and Barrett, concurred in the judgment but adopted the government's position that the statutory focus was protecting customers from confusion due to trademark misuse. Apparently equating "focus" with "purpose," in Sotomayor's view "prohibiting the use in commerce is 'merely the means by which the statute achieves its end'" of protecting consumers against confusion.[220] Sotomayor correctly noted that the majority had failed to even inquire into the objects of Congress' solicitude or the reasons for its regulation—that is, to inquire into what has traditionally been viewed as the statutory focus—instead "transform[ing] the Court's extraterritoriality framework into a myopic conduct-only test."[221] Under her reading, a "focus on consumer confusion in the United States . . . properly cabins the Act's reach to foreign conduct that results in infringing products causing consumer confusion domestically while 'leaving to foreign jurisdictions the authority to remedy confusion within their territories.'"[222]

It is difficult to forecast the continuing significance of the *Abitron* Court's take on the "focus" test. I believe the majority was disinclined to look at "the parties

213. *Id.* at 421; *see also id.* at 436–37 (Sotomayor, J., concurring in the judgment).
214. *Id.* at 418–19.
215. *Id.* at 418; *see also id.* at 421.
216. *See id.* at 422–23; *see also id.* at 439 (Sotomayor, J., concurring in the judgment).
217. *Id.* at 422.
218. *Id.* at 423.
219. *Id.*
220. *Id.* at 437 (Sotomayor, J., concurring in the judgment) (quoting WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2137 (2018)).
221. *Id.* at 439.
222. *Id.* at 444.

and interests [Congress] 'seeks to "protec[t]"' or vindicate,"[223] as precedent required, because it wished to avoid recognizing foci that turn solely on "effects." The traditional inquiry into the objects of the statute's "solicitude," given this particular cause of action, would have required attempting to see whether "effects" (on mark owners' reputations or consumer confusion) in the United States were sufficient to ground a cause of action. This likely conjured up visions of the "effects test" that was previously used by the lower courts to justify expansive jurisdiction over foreign conduct and was expressly rejected in *Morrison* for its indeterminacy.

The majority was clearly concerned that separating domestic from extraterritorial applications of a statute in this manner would make the test even harder to administer and would render the presumption toothless. The majority noted that, if the "focus" is defined as extending to "interests" or "effects" that Congress sought to regulate, rather than conduct, "almost any claim involving exclusively foreign conduct could be repackaged as a 'domestic application.'"[224] It was also worried that allowing cases to proceed based only on a "*likelihood* of an effect in this country" would create substantial international discord.[225] It is worth noting, however, that at least four justices appear to believe that the statutory "focus" is determined by reference to congressional purpose and, where that purpose involves preventing pernicious "effects" in the United States, those "effects" can serve to make a case domestic in origin.

It is also unclear from the opinion just how courts are to determine the "conduct" that is relevant to the focus. The *Abitron* majority seems to suggest that one look to the central conduct element—in criminal terms, the *actus reus* of the crime—but the Court declined to do just that in *Morrison*. Were the *Morrison* Court to have adopted a primary conduct test for determining the focus of section 10(b), the proscribed conduct, and thus the statutory focus, would have been "us[ing] or employ[ing] . . . any manipulative or deceptive device or contrivance"[226]—that is, the fraud. The statutory requirement that this fraud be done "in connection with the purchase or sale of any security,"[227] would not, in the *Abitron* Court's terms, be "a separate requirement" but "simply a necessary characteristic of an offending use."[228] Instead of focusing on the principal conduct element of the offense, however, the *Morrison* Court looked to what it thought Congress sought to achieve. It concluded that the "purchase-and-sale transactions are the objects of the statute's solicitude. It is those transactions that the statute seeks to 'regulate'; it is parties or prospective parties to those transactions that the statute seeks to

223. *WesternGeco*, 138 S. Ct. at 2137 (alteration in original) (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 267 (2010)).

224. *Abitron*, 600 U.S. at 425.

225. *Id.* at 425–26 (emphasis omitted).

226. 15 U.S.C. § 78j(b).

227. *Id.*

228. *Abitron*, 600 U.S. at 423.

'protec[t].'"[229] Accordingly, the *Morrison* Court ruled that the statutory focus was "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[230]

The cynical among us may view this new conduct-focused approach as simply a convenient means of limiting the potentially sweeping scope of infringement actions—suits that the Court thought could cause serious conflict in the international sphere. If this was what was driving *Abitron*, the Court's disinclination to look at what Congress was trying to achieve and its directive to look only to a conduct element of a claim may not apply where the *Abitron* test yields expansive jurisdiction over largely foreign activities. In the wire-fraud context, for example, looking only to the sole conduct requirement—a qualifying wiring—without any inquiry into the locations of the fraudulent activity (or adopting my proposed approach) would not only approve wire-fraud prosecutions based on predominantly foreign frauds but also open up the floodgates for additional treble-damages in civil RICO suits built upon wire-fraud predicates. It is unlikely that the Court would countenance this. In the end, *Abitron* establishes only that the focus test is far from clear in its content or application.

2. The Locus of the Conduct Relevant to the "Focus" May Be Difficult to Identify

Even when the Court identifies a "focus," as in the securities-fraud context, the locus of that element may be difficult to pin down. For example, the *Morrison* Court ruled that securities-fraud civil actions under § 10(b) are domestic only if they involve "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[231] The Court seemed to believe that one closes on a securities transaction in a conference room in New York, or that certificates attesting to stock ownership are still physically transferred. But we no longer live in that world. As I have explored elsewhere, this "focus" determination has resulted in a great deal of messy caselaw as courts have struggled to identify the site of on-line trading and transnational off-exchange deals:[232]

> The test's focus on the site of the transaction may, in an untold number of cases, result in the arbitrary allocation of private rights of action because the site of an exchange transaction has no necessary significance in the 24-hour, global, wired securities marketplace. Investors often will not know where their buy or sell order has actually been executed, and thus cannot protect themselves in the event of fraud. Further, in securities transactions not conducted on an exchange, the results of the test generally turn on when a given transaction is deemed, as a contractual matter, to have become irrevocable;

229. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 267 (2010) (alteration in original) (citations omitted).
230. *Id.*
231. *Id.*
232. O'Sullivan, *supra* note 168.

> this means that the vagaries of contractual drafting control the allocation of causes of action rather than any factors relevant to congressional goals.[233]

C. The "Focus" Test Yields Arbitrary Results

Another cardinal difficulty with the focus test is that its results are often arbitrary if the object is to determine what Congress would likely intend given the nature of the crime at issue. The development of conflicts of laws jurisprudence tells us that this was entirely predictable given the Court's insistence that only conduct is relevant and that a singular congressional "focus" must be identified for statutes with multiple elements.

Larry Kramer and Carlos Vázquez have framed the presumption against extraterritoriality as a choice-of-law rule and have noted that it "closely resembles the rigidly territorialist and now largely discredited choice-of-law rules embodied in the [*Restatement (First) of Conflicts of Laws*], under which a state's law was deemed applicable when a particular event occurred on its territory."[234] One could argue that if the "focus" test is indeed purposive, as Justice Sotomayor argued in *Abitron*, it might reflect the kind of context-specific governmental-interest analysis embodied in the *Restatement (Second) of Conflicts of Laws*.[235] But given the "focus" test's requirement that courts isolate only one element of a cause of action or crime—and the *Abitron* majority's insistence that it be a conduct element within U.S. territory—the "focus" test also appears to reflect the First Conflicts Restatement's rigid approach, virtually guaranteeing that the results of the test will, in many cases, appear arbitrary when measured against likely congressional intent.

For example, the First Conflicts Restatement's choice-of-law rule for tort cases decreed that the applicable law of the state in which the injury occurred (*lex loci delicti*) controlled.[236] The *Restatement (Second) of Conflicts of Laws* rejected the First Conflicts Restatement's one-element approach because experience demonstrated that the place of injury often bore only a slight relationship to the occurrence and the parties with respect to the case, and it was often difficult to identify a single locus of injury.[237] The arbitrariness of the results proved especially vexing in light of the increasing mobility of modern life.

One need only consult *Morrison* itself to see that the privileging of one statutory (conduct) element, à la the First Conflicts Restatement, has the potential to be equally arbitrary and to irrationally skew federal criminal jurisdiction in ways that are unlikely to reflect congressional druthers.

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233. *Id.* at 234.

234. Carlos M. Vázquez, *Out-Beale-ing Beale*, 110 AM. J. INT'L L. UNBOUND 68, 68 (2016); *see also* Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 184.

235. *See* Vázquez & Bogue, *supra* note 209 (discussing Second Restatement's government interest analysis).

236. RESTATEMENT (FIRST) OF CONFLICT OF LAW § 377 (AM. L. INST. 1934).

237. RESTATEMENT (SECOND) OF CONFLICT OF LAW, ch. 7, topic 1, intro. note (AM. L. INST. 1971).

In some instances, this may flow from selection of a "focus" that narrows the scope of the statute in unfortunate ways. For example, prior to *Morrison*, a case could proceed if sufficient conduct—either the securities transactions themselves or the fraudulent conduct alleged—occurred in the United States or if the securities fraud had substantial adverse effects in the United States.[238] After *Morrison*, a private civil securities-fraud case can only proceed if the securities transaction occurred in the United States, regardless of the location of the fraudulent conduct, the perpetrators, or the victims. An American fraudster acting on U.S. soil is thus free to victimize American investors with impunity from civil damages so long as he is careful to ensure that the transaction, potentially involving U.S. securities, is executed on a foreign exchange. As Congress demonstrated shortly after *Morrison* was announced by replacing the "focus" test with the "conduct-and-effects" test in government-initiated securities-fraud actions,[239] this does not comport with congressional aims in criminal cases.

In other contexts, an insistence on a singular "focus" may well expand the scope of the statute beyond that which Congress could rationally have been deemed to intend. For example, were courts to identify § 1343's wiring element as the statutory focus, cases could proceed in which a single "wiring" crossed a U.S. border by happenstance, regardless of whether the fraudulent scheme, its perpetrators, and its victims were located abroad. Such a wiring could reflect, for example, the momentary movement of funds through a correspondent bank in the United States,[240] the accessing of a U.S.-hosted website, or the processing of an email through a server in the United States. And, given the Supreme Court's current interpretation of the wiring element, the case would be cognizably domestic despite the fact that the wiring was innocent in nature, was not generated by the defendant or intended by him, and was incidental to the scheme.

D. Territoriality Has No Normative Meaning in Wire-Fraud Cases

While the "focus" test may make sense where the statute outlaws discrete conduct—a killing, a theft, a rape—there is a real question whether the test makes any sense when directed to conduct that involves the sending or receiving of what is, essentially, a pulse of electrical energy between two points. It is true that the typical wiring involves physical resources even if the content of the wiring reflects nothing more than ones and zeros. The vast majority of telecommunications rely on wire, not satellite communications.[241] Thus, while consumers may believe that that their computers and phones use airborne technologies, they are actually using

238. *See supra* notes 184–86 and accompanying text.

239. *See supra* note 168.

240. *Cf.* United States v. Prevezon Holdings, Ltd., 251 F. Supp. 3d 684, 692 (S.D.N.Y. 2017) (stating that "[t]he use of correspondent banks in foreign transactions between foreign parties constitutes domestic conduct" for purposes of 18 U.S.C. § 2314, which criminalizes the transportation of property stolen or taken by fraud).

241. *See* Jason Petty, Comment, *Neither Here Nor There: Wire Fraud and the False Binary of Territoriality Under* Morrison, 89 U. CHI. L. REV. 803, 807–08 (2022).

an enormous complex of physical cables that crisscross the earth. This complex includes, for example, innumerable fiber optic cables linking cities and hundreds of submerged cables linking continents.[242] One might be tempted to analogize wires' travel over these cables as akin to traditional transportation offenses, such as the interstate transportation of stolen property. But wire fraud is unlike traditional offenses that involve the physical, rather than digital, transfer of goods or information (like the interstate transportation of stolen property) in important respects that make identifying a coherent "focus" difficult.

The distinction lies in what Professor Jen Daskal characterizes as the "un-territoriality" of data.[243] "[T]erritorial-based dividing lines are premised on two key assumptions: that objects have an identifiable and stable location, either within the territory or without; and that location matters—that it is, and should be, determinative of the statutory . . . rules that apply."[244] Data digitally communicated through the wires challenges both these assumptions, and thus a "focus" on the paths through which data flows, or where it is stored and accessed, will almost certainly yield arbitrary results.

The first assumption—that a crime or cause of action has one identifiable location—does not reflect the reality of wire-fraud cases. Consider a case in which a fraudster, from his keyboard in Russia, constructs a website designed to separate persons across the globe from their hard-earned cash, ultimately conveyed to the fraudster's offshore bank account through wire transfers between transnational banking institutions. The information at the heart of the fraud and the money transfers move through cables, taking paths and inhabiting servers determined by the service providers and bearing no necessary relationship to the crime or the victims. When attempting to discern the territorial home of this offense, one could identify the location of the typing Russian as the site of the wrongful conduct. But a pensioner who accesses the website from her kitchen in Omaha and transfers the funds from her local bank could make a good case that the crime was consummated in Nebraska. Does the location of the servers hosting the website have legal salience, as some courts believe?[245] International law would recognize that many States can

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242. *See id.*

243. Jennifer Daskal, *The Un-Territoriality of Data*, 125 YALE L.J. 326, 326 (2015).

244. *Id.* at 329.

245. *See, e.g.*, United States v. Kieffer, 681 F.3d 1143, 1155 (10th Cir. 2012) (noting that "one individual's use of the internet, 'standing alone,' does not establish an interstate transmission" under the wire fraud statute, but proof that a website's "origin server is located in only one state" and computers in other states access the website is sufficient to demonstrate the interstate nexus: "[t]o arrive on a host server in another state (or for that matter on an end user's computer where no local host server is present), the content of the website contained on the origin server must transmit across state lines"); United States v. Hoffman, 901 F.3d 523, 546 (5th Cir. 2018) (same); United States v. Valdés-Ayala, 900 F.3d 20, 33 (1st Cir. 2018) (same); United States v. Biyiklioglu, 652 F. App'x 274, 280–81 (5th Cir. 2017) (same); United States v. Cornelson, 609 F. Supp. 3d 258 (S.D.N.Y. 2022); Wamsley v. United States, 17-CV-434-B, 2018 WL 2321900, at *2 (N.D. Tex. Apr. 23, 2018); United States v. Laedeke, CR 16-33, 2016 WL 5390106, at *4–5 (D. Mont. Sept. 26, 2016); *see also* Havard v. Collins, No. 13-CV-945-N, 2013 WL 12363628, at *3 (N.D. Tex. Aug. 21, 2013) (interstate nature of a wire communication between citizens of the same state will not be presumed) (collecting cases). *See generally* Valeria G. Luster,

criminally prosecute such conduct by virtue of, for example, nationality (Russia) and passive personality (United States) jurisdictional principles.[246] Federal law also recognizes that a continuing crime with interstate or transnational dimensions may be deemed to be "committed" in more than one jurisdiction for venue purposes.[247] But the Supreme Court's "focus" test demands that we identify discrete conduct that either occurs in the United States or abroad—something that may be impossible to do when the conduct at issue necessarily involves accessing or moving data from one point to another across a state or international border.

The second assumption Professor Jen Daskel identifies—that there is some normative significance to the location identified such that the rules of that jurisdiction ought to apply—is also not true in wire-fraud prosecutions. When defendants choose to use the mail to send a communication from Nebraska to New York or choose to transport their loot from California to Nevada, they are choosing to operate in those states and assume the risk that their conduct will be subject to state criminal law. When using the wires, however, neither the perpetrator nor his victims are making choices regarding the path through which their communications and internet access flow, and they have no notice that their conduct may be subject to criminal sanction in a given jurisdiction. As Professor Daskel explains:

> When two Americans located in the United States send an e-mail, the underlying zeroes and ones generally transit domestic cables. But they also, with some nonnegligible frequency, exit our borders before returning to show up on the recipient's computer screen. When one Google chats with a friend in Philadelphia or uses FaceTime with a spouse on a business trip in California, the data may travel through France without the parties knowing that this is the case. Similarly, when data is stored in the cloud, it does not reside in a single fixed, observable location akin to a safe-deposit box. It may be moved around for technical processing or server maintenance reasons. It could also be copied or divided up into component parts and stored in multiple places—some territorially and some extraterritorially. At any given moment, the user may have no idea—and no ability to know—where his or her data is being stored or moved, or the path by which it is transiting.[248]

Where we are charged with finding the "focus" of a criminal statute, it is elemental that we identify conduct that is wrongful; the "focus" of criminality cannot be a random act. If the "conduct" that is the "focus" of a statute is misusing the cables in a certain jurisdiction, then, that misuse must be intentional, or at least knowing, as well as connected in some meaningful sense with the criminal scheme. If the

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Note, *Let's Reinvent the Wheel: The Internet as a Means of Interstate Commerce in* United States v. Keiffer, 67 OKLA. L. REV. 589 (2015).

246. *See, e.g.*, O'Sullivan, *supra* note 49, at 1029–37.

247. *See, e.g.*, United States v. Kim, 246 F.3d 186, 191 (2d Cir. 2001) (stating that wire fraud is a continuing offense under 18 U.S.C. § 3237(a), so a given venue is appropriate both "where it was sent and where it was received").

248. Daskal, *supra* note 243, at 366–67.

fact that a given jurisdiction's cables have been used is entirely happenstantial, it is difficult to conceive of this as being the basis for jurisdiction except to the extent that we conceive of misuse of the wires as a universal jurisdiction crime. Given that wire fraud is a uniquely American crime, born of the fact that Congress needs a constitutional hook (the Commerce Clause) to justify its criminal jurisdiction, it is not a crime that has earned the universal condemnation necessary to warrant universal jurisdiction status.

III. The Lower Courts' Analysis of Wire Fraud's Statutory "Focus" Is Flawed

The "focus" test may be fundamentally flawed but, unless it is overruled, federal courts must continue to apply it. Given that we have concluded that the wire fraud statute does not apply extraterritorially, precedent compels use of the "focus" test to separate domestic from extraterritorial applications of the statute.

This section examines, through reference to the caselaw, the problems courts face in identifying a singular statutory "focus" capable of yielding coherent results. It begins by summarizing the Second Circuit's caselaw—both because it demonstrates how difficult it has been for the lower courts to apply the "focus" test in the many and factually varied circumstances presented and because the test that the Second Circuit ultimately adopted looks something like the test I am proposing. This review, augmented by reference to other circuits' approaches, reveals that the courts are relying on cherry-picked language that cannot be the basis for a reasoned result and on inapposite caselaw concerning double-jeopardy questions.

A. The Confused State of the Circuits

After *Morrison* was decided, the Second Circuit faced a civil case, *Petróleos Mexicanos v. SK Engineering & Construction Co. (Pemex)*, which the district court characterized as "a foreign conspiracy against a foreign victim conducted by foreign defendants participating in foreign enterprises."[249] A foreign oil company, Pemex, brought a RICO claim, based on wire-fraud predicates, against its contractors for bribing Pemex executives to approve certain cost overruns for a project outside the United States.[250] Pemex alleged three contacts between the bribery scheme and the United States: "the financing was obtained here, the invoices were sent to the bank for payment, and the bank issued payment."[251] These contacts were not insubstantial. As a later court observed, "the foreign defendants had obtained financing in the United States and transmitted seven false invoices for over $159 million to a trust in New York, and payment was made through that

249. No. 12 Civ. 9070, 2013 WL 3936191, at *3 (S.D.N.Y. July 30, 2013), *aff'd*, 572 F. App'x 60 (2d Cir. 2014).

250. *Id.* at *1–2.

251. *Pemex*, 572 F. App'x at 61.

New York trust."[252] But the Second Circuit noted that Pemex did not allege "that the scheme was directed from (or to) the United States," and the "activities involved in the alleged scheme—falsifying the invoices, the bribes, the approval of the false invoices—took place outside of the United States."[253] The court therefore held that the wire fraud statute did not apply because the "allegations of domestic conduct [were] simply insufficient."[254]

Taking their cue from *Pemex*, many courts in the Southern District of New York (and some outside New York)[255] evaluated the domesticity of a wire-fraud claim by reference to the locus of the fraudulent conduct, although there were isolated cases to the contrary.[256] Most of these cases involved civil RICO suits built upon wire-fraud predicates. Sometimes the courts were express in adopting the "scheme to defraud" as the focus of the statute.[257] In the mail-fraud context, for example, the district court in *Elsevier, Inc. v. Grossman* articulated the following test to determine what domestic conduct is relevant to that focus: "(i) the defendant [must] commit[] a substantial amount of conduct in the United States; and (ii) the conduct [must be] integral to the commission of a fraud; and (iii) at least some of the conduct [must] involve[] use of the U.S. mails."[258]

In other cases, the focus on the fraud was implicit in the courts' analysis.[259] For example, in five separate civil cases courts dismissed RICO claims based on wire-fraud predicates relating to foreign benchmark-interest-rate manipulation as impermissibly extraterritorial.[260] In many of these cases, the alleged wirings included such actions as:

> [T]ransmitting false quotes through servers located in the United States, causing Thomson Reuters and the BBA to publish manipulated LIBOR fixes into the United States, coordinating their derivative positions with their LIBOR

252. Sonterra Cap. Master Fund, Ltd. v. Barclay's Bank PLC, 366 F. Supp. 3d 516, 556 (S.D.N.Y. 2018).

253. *Pemex*, 572 F. App'x at 61.

254. *Id.*

255. *See, e.g.*, United States v. All Assets Held at Bank Julius, 251 F. Supp. 3d 82, 103 (D.D.C. 2017).

256. *See, e.g.*, United States v. Hayes, 99 F. Supp. 3d 409 (S.D.N.Y. 2015). In *Hayes*, a benchmark interest rate manipulation case, the court stated without qualification that using "domestic wires to carry out [a] fraudulent scheme is 'clearly sufficient'" for domestic application. *Id.* at 420 (quoting United States v. Gilboe, 684 F.2d 235, 237 (2d Cir. 1982)).

257. *See, e.g.*, United States v. Gasperini, 16-CR-441, 2017 WL 2399693, at *8 (E.D.N.Y. June 1, 2017).

258. Elsevier, Inc. v. Grossman, 199 F. Supp. 3d 768, 784 (S.D.N.Y. 2016).

259. *See, e.g.*, United States v. Prevezon Holdings, Ltd., 122 F. Supp. 3d 57, 71 (S.D.N.Y. 2015) (holding that the single wire transfer routed through New York was "not sufficiently central to the overall fraud scheme" to render the case domestic).

260. *See* Sonterra Cap. Master Fund, Ltd. v. Barclays Bank PLC, 366 F. Supp. 3d 516, 557 (S.D.N.Y. 2018); Sonterra Capital Master Fund Ltd. v. Credit Suisse Group AG, 277 F. Supp. 3d 521, 579–83 (S.D.N.Y. 2017); FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A, 16 Civ. 5263, 2017 WL 3600425, at *14–15 (S.D.N.Y. Aug. 18, 2017); Sullivan v. Barclays, PLC, 12-cv-2811, 2017 WL 685570, at *33 (S.D.N.Y. Feb. 21, 2017); Laydon v. Mizuho Bank, Ltd., 12 Civ. 3419, 2015 WL 1515487, at *8–9 (S.D.N.Y. Mar. 31, 2015). *But see Hayes*, 99 F. Supp. 3d at 411–12 (denying a motion to dismiss for various reasons and rejecting the defendant's argument that the complaint involved "an unauthorized extraterritorial application of the conspiracy and wire fraud statutes").

> submissions in electronic chat rooms through servers located in the United States, and sending trade confirmations based on manipulated LIBOR rates to counterparties in the United States.[261]

In these cases, "those contacts were found to create only a minimal nexus to the United States that was insufficient . . . because manipulative communications occurred between defendants located abroad and the manipulated LIBOR quotes were submitted to an organization abroad."[262] As one court noted, these were not cases where the "scheme was allegedly both managed from and directed at the U.S.";[263] another asserted that "if the domestic conduct alleged is peripheral to the overall scheme, and the scheme is not directed to or from the United States, it does not matter that the defendant intentionally used U.S. wires in furtherance of a fraudulent scheme."[264] In short, the RICO claims were dismissed as impermissibly extraterritorial because the "defendants are based abroad, their allegedly manipulated quotes were submitted from abroad to a banking association located abroad, and the LIBOR rate at issue is the LIBOR rate for a foreign currency."[265] The fact the "defendants carried out their manipulation from abroad through servers that happened to route their communications in the United States" could not "render 'domestic' a scheme that was otherwise centered abroad."[266]

To illustrate the difference the "focus" determination makes, consider *United States v. Hayes*, in which the district court affirmed a criminal conviction on indistinguishable facts based on its determination that the statutory "focus" was the statutory wiring, not the scheme to defraud.[267] In *Hayes*, "a foreign national[] [charged] with conspiring to manipulate a foreign financial benchmark, for a foreign currency, while working for a foreign bank, in a foreign country" was convicted of wire fraud.[268] The district court in the Southern District of New York held that "the statute targets the use of domestic wires,"[269] and thus rejected the defendant's challenge to his conviction because "the co-conspirators purportedly caused the manipulated LIBOR to be published to servers in the United States and used United States wires to memorialize trades affected by that rate."[270] The court

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261. *Sonterra*, 277 F. Supp. 3d at 581. "LIBOR" stands for the London Interbank Offer Rate. This was a benchmark interest rate that major global banks used when lending to one another in the international interbank market for short-term loans. The rate was calculated and published every day by the Intercontinental Exchange. LIBOR was phased out after the scandals reflected in these cases undermined its credibility as a benchmark rate. For more information on LIBOR, see Miranda Marquit & Benjamin Curry, *What Is Libor and Why Is It Being Abandoned?*, FORBES (Feb. 16, 2023, 10:09 AM), https://www.forbes.com/advisor/investing/what-is-libor/.

262. *Sonterra*, 277 F. Supp. 3d at 581.

263. *Id.* (quoting *Laydon*, 2014 WL 1280464, at *8).

264. *Sonterra*, 366 F. Supp. 3d at 556 (quoting Worldwide Directories, S.A. de C.V. v. Yahoo! Inc., No. 14-CV-7349, 2016 WL 1298987, at *10 (S.D.N.Y. Mar. 31, 2016)).

265. *Sonterra*, 277 F. Supp. 3d at 582.

266. *Id.*

267. 99 F. Supp. 3d 409, 421 (S.D.N.Y. 2015).

268. *Id.* at 412.

269. *Id.* at 419.

270. *Id.* at 421.

concluded that "culpable conduct underlying the substantive count therefore occurred in the United States."[271]

Finally, the Second Circuit addressed the focus question in another civil RICO case, *Bascuñán v. Elsaca*,[272] alleging wire-fraud predicate acts. The plaintiff, a Chilean inheritor of a substantial estate, alleged that the defendants, his cousin and others, also Chilean, had fraudulently used U.S. wires to essentially steal his funds from New York bank accounts.[273] The Second Circuit rejected the lower court's view that the statute's focus was on "'the scheme to defraud,' which must have been 'planned, managed, and directed' from within the United States."[274] It reasoned that the focus of § 1343 "is not merely a 'scheme to defraud,' but more precisely *the use of the . . . wires in furtherance of a scheme to defraud*."[275] It added that "we are mindful that 'events . . . merely incidental to the [violation of a statute]' do not have 'primacy for the purposes of the extraterritoriality analysis.'"[276] It therefore added a critical caveat: "[I]n order for incidental domestic wire transmissions not to haul essentially foreign allegedly fraudulent behavior into American courts, 'the use of the . . . wires must be essential, rather than merely incidental, to the scheme to defraud.'"[277] Thus, in the Second Circuit, the government must prove that (1) "the use of the wires in furtherance of the schemes to defraud . . . 'occurred in the United States,'" and (2) "'the use of the . . . wires' was 'essential, rather than merely incidental, to [the defendants'] scheme to defraud.'"[278]

The *Bascuñán* Court concluded that the defendants' alleged use of U.S. wires to fraudulently "transfer millions of dollars" out of domestic bank accounts was an essential component of the scheme, and thus the alleged wire fraud was domestic in nature.[279] It concluded by arguing that the "district court's rule would effectively immunize offshore fraudsters from mail or wire fraud."[280] The court wished to make clear what was implied in *RJR Nabisco*: "[W]hile a defendant's location is relevant to whether the regulated conduct was domestic, the mail and wire fraud statutes do not give way simply because the alleged fraudster was located outside the United States."[281]

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271. *Id.*

272. 927 F.3d 108 (2d Cir. 2019).

273. *Id.* at 112.

274. *Id.* at 121 (quoting Bascuñán v. Elsaca, 338 F. Supp. 3d 301, 314–15 (S.D.N.Y. 2018)).

275. *Id.* at 122.

276. *Id.* (quoting WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2138 (2018)).

277. United States v. Napout, 963 F.3d 163, 179 (2d Cir. 2020) (quoting *Bascuñán*, 927 F.3d at 122).

278. *Id.* at 179–80 (first quoting Eur. Cmty. v. RJR Nabisco, Inc., 579 U.S. 325, 337 (2016); and then quoting *Bascuñán*, 927 F.3d at 122) (alteration in original) (citations omitted); *see also* United States v. Cornelson, 609 F. Supp. 3d 258, 267 (S.D.N.Y. 2022).

279. *Bascuñán*, 927 F.3d at 123.

280. *Id.*

281. *Id.*

Although lower courts had intimated that the standard might be different in a criminal case,[282] the Second Circuit applied *Bascuñán* to a case alleging an honest-services-fraud conspiracy.[283] *United States v. Napout* dealt with allegations of corruption in connection with the operation of soccer's Switzerland-based governing body, Fédération Internationale de Football Association (FIFA), and some of its regional affiliates in various parts of the Americas. The case concerned bribes and kickbacks paid in connection with "the process by which FIFA and its regional associates [sold] broadcasting and marketing rights to their more popular tournaments."[284] Over several decades, FIFA officials, "including the leaders of many of the related national associations, accepted millions of dollars in bribes from sports media and marketing companies in return for arranging for those companies to receive broadcasting and marketing rights in connection with tournaments under the leaders' control."[285] Juan Ángel Napout, the former president of the national soccer federation of Paraguay, was convicted, *inter alia*, of conspiracy to commit honest-services wire fraud based on these bribes. Napout and his employer were Paraguayan, and neither the tournaments nor the broadcasting at the heart of the corrupt agreement occurred in the United States. The issue was whether wirings from U.S. banks in support of the scheme were sufficient to make the prosecution domestic in nature.

The Second Circuit explained that the conduct relevant to the statutory focus is the domestic use of the wires in furtherance of the scheme to defraud but cautioned that "we must also conclude that the 'use of the . . . wires' was 'essential, rather than merely incidental, to the [appellants'] scheme to defraud.'"[286] It held that the government presented "ample evidence that the appellants had used American wire facilities and financial institutions to carry out their fraudulent schemes" by virtue of the facts that Napout "was often bribed with American banknotes from U.S. bank accounts that had been wired to a . . . (money changer) in Argentina . . . and then given to Napout by hand;" Napout also received luxury items "which, wherever located, were paid for with money wired from a U.S. bank account."[287] The court ruled that the domestic use of the wires was central to the foreign scheme because the wires provided the "quid" exchanged for the "quo"—that is, the cash in U.S. dollars paid to Napout in bribes was generated by wire transfers originating in the United States.[288]

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282. *See* Sonterra Cap. Master Fund Ltd. v. Credit Suisse Group AG, 277 F. Supp. 3d 521, 581 (S.D.N.Y. 2017) (noting that "*Hayes* itself took pains to distinguish the reach of the criminal wire fraud laws from questions of civil law and personal jurisdiction, noting that 'criminal law and civil law serve different purposes and have different sources and constraints'").

283. *See* United States v. Napout, 963 F.3d 163, 179 (2d Cir. 2020).

284. *Id.* at 169.

285. *Id.* at 172.

286. *Id.* at 179–80 (quoting Bascuñán v. Elsaca, 927 F.3d 108, 122 (2d Cir. 2019)).

287. *Id.* at 180–81.

288. *Id.* at 181. An Argentine sports marking company and a high-ranking broadcast executive were later prosecuted based on the same general allegations of corruption in international soccer. *See* United States v. Full

The First, Fourth, Sixth, Ninth, and Eleventh Circuits have also concluded that the focus of the wire fraud statute is the use of domestic wires in furtherance of a scheme to defraud rather than the scheme itself.[289] But there is some uncertainty about whether they will adopt the Second Circuit's requirement that the wiring be "essential" to the fraud. The First Circuit, in dicta, seemingly endorsed this limiting principal for use in cases where "a foreign defendant is alleged to have committed wire fraud against a foreign victim" but did not explain how such a limiting principle is consistent with the statute or *Morrison*.[290] The Ninth Circuit mentioned the test in *United States v. Hussain* but found it satisfied by the facts of that case without explicitly adopting it.[291]

The Fourth, Sixth, and Eleventh Circuits, however, appear to ask merely whether there was a domestic wiring involved and, if so, deem that sufficient to ground a domestic case without any further inquiry.[292] In transnational cases, as long as the wire transmission originated or was received in the United States, those circuits are satisfied because "the focuses of the mail and wire fraud statutes are the acts of 'depositing' and 'transmitting,' respectively."[293] To illustrate how broad this grant of "domestic" jurisdiction may be, consider the facts of *United States v. Prevezon Holdings, Ltd.*, which involved a scheme by foreign entities to launder the proceeds of a $230 million tax fraud perpetrated by the Russian mob on the Russian Treasury.[294] The U.S. government sought forfeiture of certain assets held in Cyprus. Its wire-fraud theory was premised on a single wire transfer between foreign shell companies that was routed through New York. A judge in the Southern District of New York, using the Second Circuit's test, concluded that this one "domestic contact" by the fraud's perpetrators was "not sufficiently central to

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Play Group, S.A., 15-CR-252 (S-3) (PKC), 2023 WL 5672268 (E.D.N.Y. Sept. 1, 2023). The district court granted the defendants' motion for a judgment of acquittal on the honest services wire fraud charge, ruling that § 1346 does not encompass foreign commercial bribery. This ruling was not founded on an extraterritoriality analysis. Rather, it was based on a determination that the foreign employees of foreign entities did not owe a duty of honest services to their employers under § 1346—a question the district court asserted was not answered in *Napout*. *Id*. at * 35. This ruling is currently being reviewed on appeal. *See* United States v. Webb, 23-7183(L) (2d Cir.).

289. *See, e.g.*, United States v. McLellan, 959 F.3d 442, 469 (1st Cir. 2020) ("[T]he structure, elements, and purpose of the wire fraud statute indicate that its focus is not the fraud itself but the abuse of the instrumentality in furtherance of a fraud."); United States v. Elbaz, 52 F.4th 593, 603 (4th Cir. 2022) ("The statute's text and our precedent reveal that the focus of the wire-fraud statute is the use of a wire, not the scheme to defraud."), *cert. denied*, 114 S. Ct. 278 (2023); United States v. Coffman, 574 F. App'x 541, 558 (6th Cir. 2014) ("[W]ire fraud occurs in the United States when defendants use interstate wires as part of their scheme."); United States v. Hussain, 972 F.3d 1138, 1143 (9th Cir. 2020) ("[T]he focus of the wire fraud statute is the use of the wires in furtherance of a scheme to defraud, which here occurred domestically."); Skillern v. United States, No. 20-13380-H, 2021 WL 3047004, at *8 (11th Cir. Apr. 16, 2021) ("[T]he focuses of the mail and wire fraud statutes are the acts of 'depositing' and 'transmitting,' respectively.").

290. *McLellan*, 959 F.3d at 970 n.7.

291. *Hussain*, 972 F.3d at 1144 n.2.

292. *See Elbaz*, 52 F.4th at 604; *Skillern*, 2021 WL 3047004, at *8; *Coffman*, 574 F. App'x at 557–58.

293. *Skillern*, 2021 WL 3047004, at *8; *see also Elbaz*, 52 F.4th at 604.

294. 122 F. Supp. 3d 57, 61 (S.D.N.Y. 2015).

the overall fraud scheme to convert this foreign scheme into a domestic one."[295] In the Fourth, Sixth, and Eleventh Circuits, however, this single wiring may suffice.

B. Pasquantino *and* Morrison *Do Not Decide the "Focus" Question*

The Supreme Court has not addressed the "focus" of the wire fraud statute, but it has made statements in two cases that lower courts have seized upon in addressing the "focus" of the wire fraud statute. Neither exercise in cherry-picking ought to control.

Some lower courts seeking to identify the "focus" of the wire fraud statute have since seized upon a misreading of language in *Pasquantino*. They believe that the Court referred to the defendants' use of U.S. interstate wires as the "domestic element of [their] conduct . . . [that] the Government is punishing in this prosecution."[296] This, they contend, indicates the Court's belief that the interstate or foreign wiring is the "focus" of the legislation. In fact, however, the Court observed that the "wire fraud statute punishes the *scheme*" and further stated that "[*t*]*his* domestic element of petitioners' conduct is what the Government is punishing in this prosecution."[297] These courts' analyses also ignore other portions of the opinion in which the Court identifies the fraud as the centerpiece of the statute. In one passage, the Court noted that none of the precedents cited by the defendants applied the common-law revenue rule to bar "an action that had as its primary object the deterrence and punishment of fraudulent conduct—a substantial domestic regulatory interest entirely independent of foreign tax enforcement."[298] Similarly, the majority noted that "the wire fraud statute advances the Federal Government's independent interest in punishing fraudulent domestic criminal conduct, a significant feature absent from all of petitioners' revenue rule cases."[299]

The next case to mention wire fraud was *Morrison*. Although the Court rejected the courts of appeals' "conduct-and-effects" test, "effects" were not at issue in the case; it was argued that qualifying "conduct," in the form of fraudulent acts, occurred in the United States.[300] The question, then, was what conduct qualified as "domestic." The Solicitor General had argued for the following test for territoriality: "[A] transnational securities fraud violates [§] 10(b) when the fraud involves significant conduct in the United States that is material to the fraud's success," and cited *Pasquantino* as support for its position.[301] The Court refused to adopt the

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295. *Id*. at 72.

296. *See, e.g*., United States v. Hayes, 99 F. Supp. 3d 409, 421 (S.D.N.Y. 2015) (quoting Pasquantino v. United States, 544 U.S. 349, 371 (2005)); United States v. Coffman, 771 F. Supp. 2d 735, 738–39 (E.D. Ky. 2011).

297. *Pasquantino*, 544 U.S. at 371 (quoting United States v. Pierce, 224 F.3d 158, 166 (2d Cir. 2000)) (emphasis added).

298. *Id*. at 364.

299. *Id*. at 365; *see also id*. at 370 ("The present prosecution, if authorized by the wire fraud statute, embodies the policy choice of the two political branches of Government—Congress and the Executive—to free the interstate wires from fraudulent use, irrespective of the object of the fraud.").

300. 561 U.S. at 266, 270–73.

301. Brief for the United States as Amicus Curiae Supporting Respondents at 16–23, *Morrison*, 561 U.S. at 270.

Solicitor General's test and read *Pasquantino* in a way that could support a view that "fraud" is the focus of the wire fraud statute:

> In . . . [*Pasquantino*] we concluded that the wire-fraud statute . . . was violated by defendants who ordered liquor over the phone from a store in Maryland with the intent to smuggle it into Canada and deprive the Canadian Government of revenue. Section 1343 prohibits "any scheme or artifice to defraud,"—fraud *simpliciter*, without any requirement that it be "in connection with" any particular transaction or event. The *Pasquantino* Court said that the petitioners' "offense was complete the moment they executed the scheme inside the United States," and that it was "[t]his domestic element of petitioners' conduct [that] the Government is punishing." Section 10(b), by contrast, punishes not all acts of deception, but only such acts "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered." Not deception alone, but deception with respect to certain purchases or sales is necessary for a violation of the statute.[302]

This passage has been cited in support of the view that the focus of the statute is the scheme to defraud.[303] Once again, however, this language is dicta, and one should be careful not to overread it. Indeed, the Court stated just the reverse in *Bridge v. Phoenix Bond & Indemnity Co.*,[304] asserting there that Congress defined § 1341 "not as fraud *simpliciter*, but mail fraud."[305]

C. The Lower Courts Are Relying on Inapposite Caselaw

Many lower courts have identified the statutory focus of § 1343 as the wiring element by primarily relying on an unrelated line of cases decided before the Court articulated the "focus" test. In particular, the First, Second, Fourth, and Ninth Circuits have cited these cases in support of a "focus" on the statutory wiring.[306] The cases concern the appropriate "unit of prosecution" for double-jeopardy purposes.[307] The Double Jeopardy Clause precludes the imposition of multiple punishments for the same "offence."[308] "Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple

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302. *Morrison*, 561 U.S. at 271–72. (citations omitted) (first quoting 18 U.S.C. § 1343; and then quoting *Pasquantino*, 544 U.S. at 371).

303. *See, e.g.*, United States v. Prevezon Holdings, Ltd., 122 F. Supp. 3d 57, 70–71 (S.D.N.Y. 2015).

304. 553 U.S. 639 (2008).

305. *Id.* at 652.

306. *See, e.g.*, United States v. Elbaz, 52 F.4th 593, 603 (4th Cir. 2022) (relying in part on unit of prosecution case); United States v. Hussain, 972 F.3d 1138, 1143–45 (9th Cir. 2020) (same); Bascuñán v. Elsaca, 927 F.3d 108, 121 (2d Cir. 2019) (same); United States v. Driver, 692 F. App'x 448, 449 (9th Cir. 2017) (same); United States v. McLellan, 959 F.3d 442, 469 (1st Cir. 2020) (same); United States v. Kazzaz, 592 F. App'x 553, 544–55 (9th Cir. 2014) (same).

307. *See, e.g.*, Williams, *supra* note 157, at 314–16; L. B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 L. & CONTEMP. PROBS. 64, 79–80 (1948).

308. U.S. CONST. amend. V.

punishments for the same offense."[309] "Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended . . . to impose multiple punishments, imposition of such sentences does not violate the Constitution."[310]

If an indictment charges a defendant with multiple counts under the same statute for what could be characterized as the same course of conduct and the defendant lodges a double-jeopardy challenge, the question the courts must answer is what the appropriate "unit of prosecution" for the charged statute is.[311] For example, assume that a fraudster makes ten wirings chock full of misrepresentations to a single victim pursuant to one scheme to defraud. Should a prosecutor charge this wire-fraud case in one count, based on the singular victim and scheme to defraud, or ten counts, based on the multiplicity of wirings? If the prosecutor chooses to charge ten counts, would a conviction and sentence on all counts constitute multiple punishments for the "same offense"? The lower courts have long held that the appropriate unit of prosecution for mail fraud is each mailing; these cases commonly refer to the jurisdictional mailing as the "'gist,' 'essence,' 'gravamen,' and 'substance'" of the statute.[312] Courts are also in accord in holding that the wiring is the "unit of prosecution" for wire fraud, so that each wiring in furtherance of a single scheme can be charged as a separate count without violating double jeopardy.[313]

Reliance on the unit-of-prosecution cases, however, makes little sense when identifying the statutory "focus." First, the question in these double-jeopardy cases is the congressional intent regarding the amount of punishment a fraudster ought to endure, not Congress' intention regarding the geographic scope of the statute. These are two very different questions driven by different policy considerations. For example, in determining the extraterritorial reach of a statute, Congress is likely to be primarily concerned about whether expansive jurisdiction will create conflicts with foreign laws, invite retaliatory actions by foreign states, and waste prosecutorial resources on cases that do not significantly affect U.S. national interests. Such considerations are not relevant to the unit-of-prosecution question.

Second, the courts' analyses regarding the appropriate unit of prosecution for wire fraud are themselves questionable. Most simply rely on the mail-fraud precedents, asserting that both statutes are designed to "protect the instrumentalities of communications,"[314] or, put another way, that the statutes "criminalize the means

309. Brown v. Ohio, 432 U.S. 161, 165 (1977).

310. Albernaz v. United States, 450 U.S. 333, 344 (1981).

311. *See* Bell v. United States, 349 U.S. 81, 81 (1955).

312. Rakoff, *supra* note 3, at 777–78; *see also* Williams, *supra* note 157, at 293 & n.44 (collecting cases).

313. *See, e.g.*, United States v. Coburn, 439 F. Supp. 3d 361, 376 & n.14 (D.N.J. 2020) (collecting cases); United States v. Garlick, 240 F.3d 789 (9th Cir. 2001); Williams, *supra* note 157, at 304 & n.105 (collecting cases).

314. *Garlick*, 240 F.3d at 792.

of committing a substantive offense" rather than the substantive offense itself.[315] They argue, with reason, that Congress' purpose in enacting the mail fraud statute was "[t]o safeguard the integrity of the postal system," and thus punishment was intended to reflect "not so much . . . the degree of the fraud as . . . the degree of misuse of the mails."[316] But, as one district court pointed out in positing that "the scheme to defraud itself could . . . plausibly be viewed as the 'gist' of the [wire fraud] offense" for unit-of-prosecution purposes:

> The goal of preserving governmental integrity does not apply in the same way to the wire fraud statute; wire communications, for example, have not traditionally been a federal function, like the delivery of mail. Yet the rule that each communication constitutes a separate offense has been extended from mail fraud to wire fraud with little discussion or controversy.[317]

Finally, the identification of the wiring as the unit of prosecution illustrates once again that the Court's reading of the statute—and the consequent failure of concurrence between the *actus reus* and a culpable *mens rea*—leads to troubling results; certainly it has resulted in scholarly criticism.[318] The rule that each mailing or interstate wiring pursuant to a single fraudulent scheme constitutes a separate count means that each count will potentially yield a sentence of twenty years or more.[319] But the number of counts "turns not on the scope or duration of the fraud, the number of victims, the amount of damage, or any other factor relating to the moral culpability of the perpetrator or the social damage inflicted by his fraud."[320] Rather, the number of counts depends entirely on the happenstance of how many "reasonably foreseeable" but not actually intended, potentially "innocent," and only incidentally related mailings or interstate wirings occurred. This has led commentators to object to courts' preoccupation with the jurisdictional element rather than with substantive criminality in identifying the relevant unit of prosecution. As L.B. Schwartz noted in 1948:

> Courts find themselves talking nonsense like the oft-repeated declaration that the use of the mails is the "gist" of the offense of mail fraud, when all that is meant is that this federal jurisdictional element must, of course, be alleged and proved. To regard mailing as the essence of mail fraud is like treating the localization of the offense in Pennsylvania as the gist of a Pennsylvania prosecution for larceny.[321]

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315. United States v. Gordon, 875 F.3d 26, 36 (1st Cir. 2017) (quoting Rakoff, *supra* note 3, at 779).
316. *Id*. at 37.
317. *Coburn*, 439 F. Supp. 3d at 377.
318. *See, e.g*., Williams, *supra* note 157 *passim*.
319. *See id*. (criticizing this rule); Schwartz, *supra* note 308, at 79; *see also* Rakoff, *supra* note 3, at 778.
320. Rakoff, *supra* note 3, at 778.
321. Schwartz, *supra* note 308, at 79 (footnote omitted).

IV. A TAXONOMY FOR DETERMINING "FOCUS" REVEALS THAT WIRE FRAUD'S "FOCUS" IS A WIRING DONE *FOR THE PURPOSE OF EXECUTING* THE SCHEME TO DEFRAUD (DESPITE THE SUPREME COURT'S MISSTEPS IN INTERPRETING THAT LANGUAGE)

If the lower courts' "focus" analysis is unsatisfactory, what *should* they be looking at? Because the "focus" test was without precedent and ignored the traditional method of ascertaining territoriality, there are limited precedents to consult to determine how to apply this test—that is, what objective sources courts should consult in determining whether alleged conduct relevant to the statute's "focus" occurred in the United States. And, as discussed above, *Abriton* leaves courts with little direction regarding what exactly is meant by the statutory "focus" and, specifically, whether legislative purpose remains relevant to that inquiry.

Justice Alito's concern in *Abitron* about the potential administrative and line-drawing difficulties associated with a focus on "effects" is understandable. But his seeming solution to the problem—to simply use as a statute's "focus" the primary conduct element of the offense—is obviously inconsistent with the result in *Morrison* as well as the purposive test *Morrison* articulated and later decisions employed: "'The focus of a statute is the '*objec[t] of [its] solicitude*,' which can include the conduct it 'seeks to "regulate,"' *as well as* the parties and interests it 'seeks to protec[t]' or vindicate."[322]

The *Abitron* approach is likely to lead to even more arbitrary results than the traditional focus analysis. Where a crime has only one conduct element, the court will be forced to adopt that element as its "focus," even if it is, as in the wire-fraud context, nothing more than a jurisdictional element that is collateral to the actual wrongdoing the statute seeks to address. This, of course, was why the *Abitron* Court was forced to conclude that "the *conduct* relevant to any focus the parties have proffered is infringing use in commerce"[323] because it was the *only* conduct element in the statute.

The act proscribed by a federal criminal statute may also be arbitrary given the vagaries of congressional drafting. The bank fraud statute, examined at greater length within, was modeled on the mail fraud statute, but the *actus reus* of that statute is "execut[ing] or attempt[ing] to execute" a scheme to defraud a bank.[324] This example also demonstrates that conduct elements are not necessarily any easier to reduce to a singular location than "effects." One can only imagine what line-drawing difficulties would be involved in identifying one physical location for a transnational "execution of a scheme to defraud" involving bank fraud conducted through the internet. In short, if we are forced to identify a statutory "focus," we

322. *See, e.g.*, WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2136 (2018) (alteration in original) (emphasis added) (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 267 (2010)).

323. *Abitron*, 600 U.S. at 422.

324. *See* 18 U.S.C. § 1344.

are better off attempting "a legislative séance"[325] than myopically focusing on statutory verbs.

To that end, the following taxonomy can be drawn from the caselaw to date:

1. *Statutory Language*. The Supreme Court has relied on the text of various statutes when determining their focus. The *Morrison* Court first examined the language of the securities fraud statute itself, noting that the statute proscribed not merely fraud, but fraud only in connection with the purchase or sale of securities.[326] In a subsequent case, *WesternGeco LLC v. ION Geophysical Corp.*, the Court looked primarily to the statutory language to determine that the focus of a damages remedy for patent infringement was the infringement.[327] In *Abitron*, the Court also referred primarily to the text of the Lanham Act in determining that "use in commerce" is the focus of the pertinent statutory provisions.[328]

2. *Legislative History*. The *Morrison* Court looked to the prologue of the Exchange Act, "which sets forth as its object '[t]o provide for the regulation of securities exchanges . . . operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges.'"[329] And in *WesternGeco*, the Court explained that the "overriding purpose" of the patent infringement damages remedy is to "affor[d] patent owners complete compensation" for infringements.[330] One obvious way of identifying "those transactions that the statute seeks to 'regulate'" is to reference the impetus for the legislation and to plumb the legislative history to identify the parties to those transactions that the "statute seeks to 'protec[t].'"[331]

3. *Statutory Context*. In *Morrison*, the Court referenced other statutory sections of the Exchange Act and the Securities Act of 1933, which it explained were "part of the same comprehensive regulation of securities trading."[332] In *WesternGeco*, the Court again endorsed a contextual approach, asserting that "[w]hen determining the focus of a statute, we do not analyze the provision at issue in a vacuum":

> If the statutory provision at issue works in tandem with other provisions, it must be assessed in concert with those other provisions. Otherwise, it would be impossible to accurately determine whether the application of the statute in the case is a "domestic application." And determining how the statute has actually been applied is the whole point of the focus test.[333]

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325. Transcript of Oral Argument at 56, Abitron Austria GmbH v. Hetronic Int'l Inc., 600 U.S. 412 (2023) (No. 21-1043) (quoting Justice Gorsuch).

326. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266–67 (2010).

327. 138 S. Ct. at 2137.

328. *Abitron*, 600 U.S. at 422–23.

329. *Morrison*, 561 U.S. at 267 (omission in original) (alternation in original).

330. *WesternGeco*, 138 S. Ct. at 2137 (alteration in original) (quoting General Motors Corp. v. Devex Corp., 461 U.S. 648, 655 (1983)).

331. *Morrison*, 561 U.S. at 267 (alteration in original).

332. *Id.* at 268.

333. *WesternGeco*, 138 S. Ct. at 2137 (quoting RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 344 (2016)).

4. *Practical Administrability*. According to the Court, "practical problems" in the choice and administration of various elements as the statutory "focus" are relevant.[334] In *RJR Nabisco*, the Court ruled that § 1962(b) and (c) of the RICO statute apply extraterritorially to the extent that the predicate statutes upon which those claims rest have extraterritorial application.[335] Accordingly, RICO claims resting on extraterritorial predicates would apply according to their terms and no further inquiry into the sections' focus was necessary.[336] That said, the Court raised serious questions about the viability of RJR Nabisco's argument that the focus of the statute was the "enterprise" element of a RICO claim and thus that claims founded on foreign enterprises could not be heard. In so doing, the Court pointed out that a domestic enterprise requirement "would lead to difficult line-drawing problems and counterintuitive results."[337] Similarly, in *Abitron*, the Court rejected the dissent's proffered focus on the effects of the conduct proscribed in part because it would "create headaches for lower courts required to grapple with" applying this focus.[338]

5. *(Perhaps) International Comity*. Finally, it may be appropriate to reference the same policy considerations which underlie the presumption in testing the statutory "focus." For example, the *Morrison* Court reasoned that, were the statute to reach transactions occurring on foreign exchanges, "[t]he probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application 'it would have addressed the subject of conflicts with foreign laws and procedures.'"[339]

I will introduce my application of these criteria with my conclusion. As noted in the introduction to this Article, I believe that when the "focus" test is applied to a criminal statute, one must presume that Congress was focused on a fusion of an *actus reus* with a culpable *mens rea*. It would be exceedingly odd if an act that is innocent in and of itself and has no necessary relationship to a culpable state of mind were deemed the "focus" of a *criminal* statute. The nature of the criminal sanction generally requires some awareness of the culpability of one's conduct; as the Supreme Court has instructed:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a

334. *RJR Nabisco*, 579 U.S. at 344.

335. *Id.* at 340–41.

336. *See id.* at 342.

337. *Id.*

338. Abitron Austria GmbH v. Hetronic Int'l, Inc., 600 U.S. 412, 425 (2023).

339. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 269 (2010) (quoting EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 256 (1991)).

> consequent ability and duty of the normal individual to choose between good and evil.[340]

This understanding is reflected in criminal law doctrine in the concurrence requirement: *actus non facit reum, nisi mens sit rea* (roughly, "an act does not make a person guilty unless there is a guilty mind"). As the Supreme Court has recognized,[341] "a basic premise of Anglo-American criminal law" is "that the [proscribed] physical conduct and the state of mind . . . concur . . . . [T]here is concurrence when the defendant's mental state actuates the physical conduct."[342] "Although authors of criminal law casebooks tend to ignore this concurrence requirement, it is in fact fundamental to criminal jurisprudence."[343]

Happily, the wire fraud statute, as written, satisfies the concurrence requirement: the charged wiring must be done for "the *purpose* of executing" the fraudulent scheme.[344] Thus, the statutory focus should be wirings in interstate or foreign commerce that are done with the "conscious object" of executing the scheme to defraud.[345] Where a defendant "causes" such a wiring, it is not sufficient that the wiring be "reasonably foreseeable"; instead, the fraudster must knowingly and willfully cause the wiring to be done by another in service of the fraud. The statute also mandates that the wiring cannot be an innocent, even if intentional, act, by requiring that the wiring be done for the purpose of "executing" the culpable fraudulent scheme. In this respect, the Second Circuit is correct in requiring that "the use of the . . . wires must be essential, rather than merely incidental, to the scheme to defraud."[346] Where the Second Circuit has erred is in identifying this caveat as a prudential way to eliminate cases in which foreign conduct predominates, rather than a result required by the statutory language and cardinal principles of criminal law.

The principal difficulty with my proposedsolution to the "focus" question is, as is demonstrated below, that the Supreme Court has read the language—"for the purpose of executing"—upon which this analysis is founded right out of the statute. My thesis is that, at least for these purposes, the Court must read it right back in.

A. Statutory Language

We begin by examining the statute on its face, with reference to basic principles of criminal law. Section 1343 provides:

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340. Morissette v. United States, 342 U.S. 246, 250 (1952); *see also* Ruan v. United States, 142 S. Ct. 2370, 2376–77 (2022).

341. *See Morissette*, 342 U.S. at 251–52 ("Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.").

342. WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.3(a) (3d ed. 2023). "[T]he true meaning of the requirement that the mental fault concur with the act or omission is that the former actuate the latter." *Id.* § 6.3.

343. Gabriel S. Mendlow, *Thoughts, Crimes, and Thought Crimes*, 118 MICH. L. REV. 841, 845–46 (2020).

344. 18 U.S.C. § 1343 (emphasis added).

345. MODEL PENAL CODE § 2.02(2)(a)(i) (AM. L. INST. 1962).

346. United States v. Napout, 963 F.3d 163, 179 (2d Cir. 2020) (omission in original) (quoting Bascuñán v. Elsaca, 927 F.3d 108, 122 (2d Cir. 2019)).

> Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.[347]

The plain language of the statute makes it clear that *transmitting* writings, signs, signals, pictures or sounds by means of wire communications is the prohibited act—that is, *actus reus*—constituting the crime. (We will put aside for the moment the question of "causing to be transmitted" but return to it below.) As the Supreme Court put it in the mail-fraud context, "the indictable act under § 1341 is not the fraudulent misrepresentation, but rather the use of the mails with the purpose of executing or attempting to execute a scheme to defraud."[348]

As discussed previously, it is a basic precept of criminal law that there be a concurrence between the criminal act and the criminal state of mind.[349] In the wire-fraud context, given that the transmission is the *actus reus* of the crime, the concurrence requirement would normally demand that that act be prompted by a *mens rea* that renders the act—the wiring—a criminally culpable one.

Consistent with this rule, the statutory language specifies the mental state necessary to actuate the criminal act: the transmission must be done "for the *purpose* of *executing* such scheme or artifice" to defraud.[350] As the Supreme Court recently recognized in *Borden v. United States*, "purpose" constitutes the most demanding (for the government) *mens rea* in the Model Penal Code's taxonomy of culpable mental states.[351] The *Borden* Court's endorsement of the MPC definition of "purpose" suggests that this language requires proof that it is the defendant's "conscious object" that the wiring "execute" the scheme to defraud.[352] Courts often paraphrase this language as requiring only that the wiring be done "in furtherance" of the scheme, but the language of the statute requires more than a transmission that in some general sense "help[s] [the scheme] forward."[353] A wiring done with a purpose to "execute" a fraud requires a transmission whose conscious object is to "to carry out fully" or "put completely into effect."[354] The statutory language contemplates, then, that the defendant must knowingly make the transmission and intend that it serve, at the least, to directly effectuate his fraud.

Were the statutory language taken seriously, one would have concurrence between the act and the criminal purpose that rendered it culpable. And the focus

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347. 18 U.S.C. § 1343.
348. Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 652 (2008).
349. *See supra* notes 56–57, 341–44 and accompanying text.
350. 18 U.S.C. § 1343 (emphasis added).
351. 141 S. Ct. 1817, 1823–24 (2021) (citing MODEL PENAL CODE § 2.02(2)(a) (AM. L. INST. 1962)).
352. *Id.* at 1844 (citing MODEL PENAL CODE § 2.02(2)(a) (AM. L. INST. 1962)).
353. *Further*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).
354. *Execute*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

of the statute would be clear: a wiring done *for the purpose of executing* the scheme to defraud. But the Supreme Court has read this culpable mental state and required nexus to the fraud out of the statute.

1. *According to the Court, the Wiring Element Carries No* Mens Rea

Principal Liability. In contravention of the statutory language and what it logically implies, as the law stands now, the defendant need not know about the wiring, or even be reckless or negligent as to its occurrence. He certainly does not have to intend the wiring,[355] much less intend that the wiring be made for the *purpose* of effectuating his fraudulent scheme. Given that the wiring is the *actus reus* of the crime, wire fraud is, in essence, a strict liability offense, although an attendant circumstance element—the fraud—carries with it a *mens rea* requirement. This departure from the usual rules governing criminal liability is exacerbated by the fact that the *actus reus* does not itself require wrongful conduct because the Court has made clear that the wirings themselves do not have to contain any false or fraudulent communications or have a more than glancing relationship to the effectuation of the fraudulent scheme.[356]

Aiding and Abetting ("Causing" a violation). The only requirements the Supreme Court has recognized as part of the wiring element are that it be done in interstate or foreign commerce and that the wiring be reasonably foreseeable,[357] although circuit courts have held that it is unnecessary for the interstate nature of the wiring to be reasonably forseeable.[358] Reasonable foreseeability, however, is not a mental state; it is an objective test of causation born of the fact that the statute permits conviction if the defendant merely "causes" a wiring to be transmitted in interstate or foreign commerce for the purpose of executing a fraudulent scheme. A defendant who "causes" a criminal act is an aider and abettor, not a principal, under 18 U.S.C. § 2. This distinction has little consequence in federal law because § 2 provides that those accomplices who "cause" the *actus reus* of the crime are treated as equally culpable under federal law as those who actually perform the

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355. *See, e.g.*, Pereira v. United States, 347 U.S. 1, 8–9 (1954) ("Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used.").

356. *See* Schmuck v. United States 489 U.S. 705, 714–15 (1989). The Supreme Court ruled:

> To the extent that Schmuck would draw from [our] . . . previous cases a general rule that routine mailings that are innocent in themselves cannot supply the mailing element of the mail fraud offense, he misapprehends this Court's precedents. In [*Parr v. United States*, 363 U.S. 370, 390 (1960)], the Court specifically acknowledged that "innocent" mailings—ones that contain no false information—may supply the mailing element. In other cases, the Court has found the elements of mail fraud to be satisfied where the mailings have been routine. *See, e.g.*, Carpenter v. United States, 484 U.S. 19, 28 (1987) (mailing newspapers).

Id.

357. *See, e.g.*, *Pereira*, 347 U.S. at 8–9; Pasquantino v. United States, 544 U.S. 349, 355 (2005).

358. *See, e.g.*, United States v. Lindemann, 85 F.3d 1232, 1240–41 (7th Cir. 1996); United States v. Bryant, 766 F.2d 370, 375 (8th Cir. 1985).

criminal act.[359] The Supreme Court clearly founded the foreseeability requirement on the fact that the statute addresses such aiders and abettors: "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used."[360]

But the federal aiding and abetting statute—18 U.S.C. § 2—makes clear Congress' belief that reasonable foreseeability is an insufficient ground for criminal accomplice liability. It requires that an accomplice "willfully" cause an act to be done that, if directly performed by him or another, would be an offense against the United States.[361] Although the term "willful" has various meanings in federal criminal law, the Court has said that it "typically refers to a culpable state of mind."[362] "As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'"[363]

In the wire-fraud context, then, the Court has ignored the fact that accomplice liability for "causing" a wiring generally requires, at the least, culpable knowledge and, under § 2, willfulness; all the Court requires is reasonable foreseeability. The reasonable foreseeability language is closely aligned to civil tort concepts of proximate cause, but, as Judge Rakoff has noted:

> [A]lthough such requirements help to define a notion of "fault" sufficient to impose civil liability for damages, they are rarely to be found in criminal statutes, which typically require as a prerequisite to imposing criminal sanctions that the defendant have actual knowledge of the commission of the injurious or forbidden act and that he not only cause but also actually intend its commission.[364]

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359. 18 U.S.C. § 2.

360. *Pereira*, 347 U.S. at 8–9.

361. *See id.* (stating that "[a]iding, abetting, and counseling . . . have a broader application, making the defendant a principal when he consciously shares in a criminal act").

362. Bryan v. United States, 524 U.S. 184, 191 (1998).

363. *Id.* (quoting Ratzlaf v. United States, 510 U.S. 135, 137 (1994)).

364. Rakoff, *supra* note 3, at 776. The modern Court's elimination of any *mens rea* for "causing" the criminal wire is inconsistent with the Court's own caselaw. In particular, in *United States v. Kenofskey*, cited by the *Pereira* Court as the genesis of its reasonable foreseeability standard, the Court upheld the conviction upon a finding that the defendant acted "deliberately" in causing the jurisdictional mailing. 243 U.S. 440, 443 (1917). The defendant, who lived in New Orleans, was the agent of a Virginia life insurance company. It was his job to obtain proofs of death of policyholders and to deliver those proofs to the superintendent of his local office. The proofs were then forwarded by mail "in the usual course of business" to the home office in Virginia. *Id.* at 441. Kenofskey cooked up a scheme whereby he presented false proofs of death, presumably for a cut of the falsely obtained insurance proceeds. "Kenofskey knew that all claims required the approval of the main office and were to be transmitted from the local office through the United States mails, and, if handed by him to the superintendent [of the New Orleans office], would be so transmitted, and, for that *purpose*, he delivered the proofs to the superintendent." *Id.* (emphasis added).

The Supreme Court explained that the statutory term "caused" was used "in its well-known sense of bringing about," and it was satisfied because Kenofskey "deliberately calculated the effect of giving the false proofs to his superior officers; and the effect followed, demonstrating the efficacy of his selection of means." *Id.* at 443. *Kenofskey*, then,

Criminal law's concurrence requirement argues for taking the statutorily specified *mens rea* seriously, whether the defendant herself initiates the wiring or "causes" another to do so. The presumption of *mens rea* that the Supreme Court normally applies in criminal cases also argues for taking the *mens rea* seriously.[365] The Supreme Court has used this presumption to inject a *mens rea* into statutes as to which Congress has not specified a mental state.[366] As Judge Rakoff has explained:

> [I]f the second element of federal mail fraud—using the [wires]—[is] nothing more than a bare jurisdictional act, having only an incidental relation to the criminal activity described in the [scheme to defraud] element and no relation whatever to the actor's intent, it is doubtful whether the statute . . . state[s] a crime (at least in any ordinary sense), since it would not be addressed to any conduct that is both overt and reprehensible.[367]

How, then, does one account for the Court's willingness to read the stringent "purpose" element out of the statute? The answer appears to lie, in part, in the Supreme Court's conceptualization of the statutory "wiring" as a so-called "jurisdictional element." With respect to § 1341, the mailing justifies Congress' use of its Postal Power to enact legislation proscribing what would otherwise be state law fraud cases.[368] And with respect to § 1343, the interstate wiring element provides Congress the prescriptive jurisdiction under the Commerce Clause[369] to allow federal prosecutors to indict frauds that would normally be left to state prosecutors. The Court does not apply a presumption of *mens rea* to "jurisdictional elements"[370] because, according to the Court, "[j]urisdictional elements do not describe the 'evil Congress seeks to prevent,' but instead simply ensure that the Federal Government

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provides no support for the proposition that a mailing can be unknowing and unintentional and that "reasonable foreseeability" suffices.

365. *See, e.g.*, Staples v. United States, 511 U.S. 600, 619 (1994).

366. *See, e.g.*, Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019) ("We apply the presumption in favor of scienter even when Congress does not specify any scienter in the statutory text.") (citing *Staples*, 511 U.S. at 606); United States v. U.S. Gypsum Co., 438 U.S. 422, 438 (1978) (stating that "[c]ertainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement," and noting that criminal offenses requiring no *mens rea* have a "generally disfavored status").

367. Rakoff, *supra* note 3, at 775.

368. U.S. CONST. art. I, § 8, cl. 7.

369. *Id.* art. I, § 8, cl. 3.

370. *Rehaif*, 139 S. Ct. at 2196 (quoting Luna Torres v. Lynch, 578 U.S. 452, 467 (2016)); *see also* United States v. Yermian, 468 U.S. 63, 68–69 (1984) ("The statutory language requiring that knowingly false statements be made 'in any matter within the jurisdiction of any department or agency of the United States' is a jurisdictional requirement. Its primary purpose is to identify the factor that makes the false statement an appropriate subject for federal concern. Jurisdictional language need not contain the same culpability requirement as other elements of the offense."); United States v. Feola, 420 U.S. 671, 676 n.9 (1975) ("[T]he existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute.").

has the constitutional authority to regulate the defendant's conduct."[371] The Court reasons that "[b]ecause jurisdictional elements normally have nothing to do with the wrongfulness of the defendant's conduct, such elements are not subject to the presumption in favor of scienter," although there may be exceptions to this exception.[372] In this context, however, it would be absurd to treat the statutory wiring as a jurisdictional element as to which *mens rea* is unnecessary and at the same time conclude that the wiring is the "focus" of the crime.

2. The Court Has Read the Required Nexus Between the Fraud and the Wiring Out of the Statute

The language of the statute requires a close nexus between the wiring and the fraudulent scheme, but the Court has read the language mandating that the wiring be for the purpose of "*executing*" the scheme to defraud out of the statute, demanding only a very attenuated nexus between the wiring and the fraud. The Supreme Court has said that a jurisdictional wiring need not be an "essential part of the scheme"; "[i]t is sufficient for the [wiring] to be 'incident to an essential part of the scheme' or 'a step in [the] plot.'"[373] This rule appears to be founded on a misreading of precedent. *Pereira v. United States* is the case often cited for this proposition,[374] but the quoted language is picked out of context; in fact, the nexus approved by the *Pereira* Court using this formulation was much closer than that which is now accepted.

In *Pereira*, the defendant engineered a "confidence game" to defraud a wealthy widow, Mrs. Joyce, pursuant to which one of the defendants, Pereira, wooed and wed her.[375] The defendants then defrauded her out of substantial assets by persuading her to fund various fake investments. In the end, Mrs. Joyce-Pereira liquidated some of her assets, received a check for $35,000 drawn on a Los Angeles bank, and gave the check to Pereira, who endorsed it for collection to the State National Bank of El Paso.[376] The check cleared, Pereira was issued a cashier's check for $35,000, and he took off into the sunset with the proceeds of the fraud and his coconspirator in the Cadillac his bride had purchased for him.[377] The Court noted that "[c]ollecting the proceeds of the check was an essential part of [the] scheme" and

371. *Rehaif*, 139 S. Ct. at 2196; *see also Staples*, 511 U.S. at 605 (1994) (applying a presumption of *mens rea* to a statute that had no express *mens rea* element, stating that under the common law "the requirement of some *mens rea* for a crime is firmly embedded"); Morissette v. United States, 342 U.S. 246, 250 (1952).

372. *Rehaif*, 139 S. Ct. at 2196; *see also id.* at 2211 (Alito, J., dissenting) (citing cases in which jurisdictional elements may transform lawful conduct into criminal conduct).

373. Schmuck v. United States, 489 U.S. 705, 710–11 (1989) (alteration in original) (quoting Badders v. United States, 240 U.S. 391, 394 (1916)).

374. 347 U.S. 1 (1954); *see, e.g.*, *Schmuck*, 489 U.S. at 712; United States v. Maze, 414 U.S. 395, 401–03 (1974); Parr v. United States, 363 U.S. 370, 389–90 (1960).

375. *Id.* at 3–4.

376. *Id.* at 4–6.

377. *Id.* at 5.

thus the mailing of the check from the El Paso Bank to the California bank for collection was "incident to an essential part of the scheme."[378]

Courts lean heavily on the "incident to" language in this opinion but in so doing adopt the wrong meaning of the phrase given the facts of *Pereira*. The word "incident" bears a number of definitions. Given that the mailing is the *actus reus* of the crime and the *Pereira* Court's characterization of its necessary relation to the scheme's success, the use of the word in this context connotes "dependent on or relating to another thing in law"—that is, that the wiring relates to an integral part of the scheme—rather than, as courts seem to assume, "a chance or minor accompaniment" to the scheme.[379] In *Pereira*, for example, the mailing was integral to the success of the scheme: that is, the defendant's ability to obtain and make off with his ill-gotten proceeds.[380]

At one point the Court policed a line that required that the jurisdictional act at least occur before the scheme has come to fruition—that is, before the property that is the subject of the fraud has been obtained by the defendant.[381] In *Schmuck v. United States*, however, the Court allowed prosecutors to evade even this limitation by recharacterizing the scheme as a continuing one, such that that future fraudulent transactions might be threatened if the post-transaction wiring or mailing had not gone through.[382] Other theories also work: Mailings or wirings "occurring after receipt of the goods obtained by fraud are within the statute if they 'were designed to lull victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely'" than if no jurisdictional acts had taken place.[383]

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378. *Id.* at 8.

379. *Incident*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 629 (11th ed. 2020).

380. That subsequent cases have misread the degree of nexus *Pereira* required is also demonstrated by the case that the *Pereira* Court relied upon, *United States v. Young*, 232 U.S. 155 (1914). In *Young*, the defendant was alleged to have devised a scheme to induce various persons to purchase, or lend money on, the notes of a company of which the defendant was the president based on doctored financial statements indicating that the company was much healthier than it was. To this end, the defendant mailed documents misrepresenting the company's financial position to a "money broker" who was in the business of inducing investors to purchase and lend money on commercial paper. "Part of the scheme was to make [the broker] believe the statements were correct, and they did make that firm so believe, and to rely upon them; and, so relying upon their truth, to recommend the purchase of the [company's] notes and the lending of money upon them, defendant knowing that that company 'was not then and there in a strong financial condition.'" *Id.* at 157.

The Supreme Court held that the indictment sufficiently alleged a scheme to defraud and a mailing in furtherance of the fraud and that the allegations were sufficient to constitute an offense. *Id.* at 161–62. At no point did the Court say that the required mailing need not be essential to the scheme. Indeed, the identified mailings were in fact essential to the scheme in that they were chock full of false statements that were communicated to the broker for the purpose of defrauding the broker's clients into financing the company.

381. *See, e.g.*, United States v. Maze, 414 U.S. 395, 395 (1974); Parr v. United States, 363 U.S. 370, 389–90, 393 (1960); Kann v. United States, 323 U.S. 88, 94 (1944).

382. 489 U.S. 705, 711–12 (1989).

383. United States v. Lane, 474 U.S. 438, 451–52 (1986) (quoting *Maze*, 414 U.S. at 403); *see* United States v. Sampson, 371 U.S. 75, 83 (1962).

The Supreme Court's caselaw, then, has rendered nugatory the "execution" requirement of the statute; not only can the *actus reus* of the crime be innocent in character and unintended, it need have no necessary connection to the wrongful scheme.

3. Fraud: Culpability Without an Act

If the wiring, as a mere jurisdictional element, does not represent the "evil Congress seeks to prevent"[384] and has "nothing to do with the wrongfulness of the defendant's conduct,"[385] it is difficult to see how it can be the "focus" of this criminal statute. The statute requires as an attendant circumstance element that the person transmitting the wire have devised or intended to devise a scheme to defraud. Should this element, then, be the statutory focus?

Clearly, the devising of a scheme to defraud victims of their property or their right to honest services is what most people would view as the moral heart of the statute. As Judge Rakoff has explained, "it is obvious that the prime concern of those who commit [the] . . . fraud, those who legislate against it, those who prosecute it, and those who judge it, is the fraud and not the" jurisdictional wiring.[386] It is also this element that bears a culpable *mens rea*: the government must prove an intent to defraud to establish wire fraud.[387]

If the difficulty with identifying the wiring element as the statutory focus is that it is an act as to which no culpability need be shown, the problem with the scheme-to-defraud element is that it is a culpable state of mind that need not be accompanied by an act. The scheme-to-defraud element cannot alone be the "focus" of the statute because the Supreme Court's caselaw focuses on where the operative *conduct* takes place,[388] and a scheme to defraud does not require proof of any conduct. It is clear that, under the statute, a scheme to defraud may be inchoate—that is, that it need not be put into motion much less be successful in causing harm.[389] Most federal prosecutors will not waste resources targeting a defendant whose fraudulent scheme was entirely inchoate even if they are able to find competent evidence of a scam that was never made manifest outside of the defendant's thoughts. But the fact remains that, under the statute, a qualifying scheme to

384. *Rehaif*, 139 S. Ct. at 2196 (quoting Torres v. Lynch, 578 U.S. 452, 467 (2016)).

385. *Id.*

386. Rakoff, *supra* note 3, at 778.

387. *See, e.g.*, Carpenter v. United States, 484 U.S. 19, 28 (1987).

388. *See* Abitron Austria GmbH v. Hetronic Int'l, Inc., 600 U.S. 412, 418–19 (2023).

389. *See, e.g.*, Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 648 (2008) ("Using the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud . . . even if no one relied on any misrepresentation."); Neder v. United States, 527 U.S. 1, 24–25 (1999); United States v. Trapilo, 130 F.3d 547, 552 (2d Cir. 1997) ("These cases teach, as the statute plainly states, what is proscribed is use of the telecommunication systems of the United States in furtherance of a scheme whereby one *intends* to defraud another of property. Nothing more is required. The identity and location of the victim, and the success of the scheme, are irrelevant."); United States v. Helmsley, 941 F.2d 71, 94 (2d Cir. 1991); *see also* Durland v. United States, 161 U.S. 306, 313 (1896) (for purposes of the statute, the "significant fact is the intent and purpose").

defraud can exist solely in the mind of the defendant and thus cannot be the voluntary act required for liability.

Longstanding principles of criminal liability dictate that "[b]ad thoughts alone cannot constitute a crime; there must be an act, or an omission to act where there is a legal duty to act. . . . [S]tatutory crimes are unconstitutional unless so defined."[390] This is often referred to as Justinian's maxim: "*cogitationis poenam nemo patitur*" or "nobody suffers punishment for (mere) thinking."[391] "Under the criminal law's voluntary act requirement," writes Adam Kolber, "we do not punish people's culpable mental states *unless they take some implementing action*."[392] Because the devising of a scheme to defraud "is not itself conduct at all (although it may be made manifest by conduct), but is simply a plan, intention, or state of mind," it is patently "insufficient in itself to give rise to any kind of criminal sanctions."[393]

4. It Is Wire Fraud, Stupid

Just as the concurrence requirement mandates that the wiring be attended by a culpable state of mind, then, Justinian's maxim requires that the scheme to defraud element be yoked to an act. The answer to our inquiry, then, is that it is neither the wire nor the fraud that is "focus" of the statute. Foundational principles of criminal law, as well as the statutory language, dictate that it is the conjunction of the two—a wiring designed to effectuate the fraud—that is the "focus." It is only by taking the express language of the statute seriously and recognizing that the wiring must be done *with the purpose of executing* the scheme that we have both concurrence and a qualifying act.

B. Legislative History

A second possible criteria for evaluating the statutory "focus" is the legislative intent, as revealed in the legislative history. The legislative history of the original enactment of the wire fraud statute sheds light on the question of statutory focus, and it supports the view that Congress took aim at the use of the wires for the *purpose of executing* a scheme to defraud, not at frauds that unintentionally and tangentially involve the use of the wires.

The wire fraud statute was the brainchild of the Federal Communications Commission ("FCC"), not the Department of Justice ("DOJ"), and was first

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390. LAFAVE, *supra* note 335, § 6.1; *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 86–87 (LexisNexis 2012) (describing why thoughts are not punished). Thus, the Supreme Court has decreed that defendants may not be criminally sanctioned for mere status—such as being a drug addict—as opposed to acts such as public drunkenness. *See, e.g.*, Powell v. Texas, 392 U.S. 514 (1968) (upholding conviction for public drunkenness because defendant was not prosecuted for the status or condition of his alcoholism, but rather for the act of getting intoxicated and going into a public place); Robinson v. California, 370 U.S. 660, 667 (1962) (holding that the Eighth Amendment's bar on cruel and unusual punishment precludes a state from criminalizing drug addiction).

391. Translation courtesy of Daniel Atticus O'Sullivan.

392. Adam J. Kolber, *Two Views of First Amendment Thought Privacy*, 18 U. PA. J. CONST. L. 1381, 1398 (2016) (emphasis added).

393. Rakoff, *supra* note 3, at 775.

enacted as Section 18 of the Communications Act Amendments of 1952 (the "Act").[394] The overall Act passed the Senate as S. 658 in February 1951.[395] The wire-fraud provision was not mentioned during Senate debate on the bill[396] and was only briefly mentioned in the committee report. That report stated that the provision, then entitled "Radio Fraud," had been requested by the FCC on several occasions to combat radio fraud, and that the committee had "heard of no opposition to [the provision] from any source."[397]

In the House, the Judiciary Committee took the lead in advancing a standalone bill (H.R. 2948) with language nearly identical to the "Radio Fraud" section of the larger Senate bill. The relevant language was:

> SEC. 1343. [Fraud by radio] Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, shall transmit or cause to be transmitted by means of radio communication or interstate wire communication, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, or whoever operating any radio station for which a license is required by any law of the United States, knowingly permits the transmission of any such communication, shall be fined not more than $10,000 or imprisoned not more than five years, or both.[398]

The bill was intended to address a "new, but relatively isolated area of criminal conduct" by "making it a Federal criminal offense to use wire or radio communications as *instrumentalities for perpetrating* frauds upon the public."[399]

A subcommittee of the House Judiciary Committee held the only hearing on this bill on April 9, 1951.[400] Benjamin Cottone, the general counsel of the FCC, provided the affirmative case for the provision. His testimony focused on the problem of fraudulent radio advertising, citing examples such as Christmas ornaments marketed as world-class but actually made of cardboard,[401] "bait advertising" in which companies mislead consumers about the cost of products sold by the company, and a variety of fly-by-night servicing arrangements.[402] Cottone articulated two primary justifications for the bill: under existing law, the FCC's only remedy for fraudulent advertising would be to target the radio station operator rather than the

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394. Act of July 16, 1952, Pub. L. No. 82-554, 66 Stat. 722 (codified as amended at 18 U.S.C. § 1343); *see Fraud by Radio: Hearing on H.R. 2948 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 82nd Cong., at 6–12 (1951) [hereinafter *Hearing on H.R. 2948*].

395. 97 CONG. REC. 960–61 (1951).

396. *Id.*

397. S. REP. NO. 8244, at 14 (1951).

398. H.R. 2948, 82nd Cong. (1951).

399. H. R. REP. NO. 82-388, at 1 (1951) (emphasis added).

400. *Hearing on H.R. 2948*, *supra* note 394.

401. *Id.* at 30 (article inserted for the record from Broadcast magazine, titled "P. I. Offers Mount," and dated January 1951).

402. *Id.* at 9 (statement of Benjamin P. Cottone, General Counsel, Federal Communications Commission).

actual perpetrator of the fraud;[403] and the existing mail fraud statute did not cover some radio frauds that didn't involve the mails or involved such a paltry use of the mails that the Department of Justice and the Post Office Department couldn't gather enough evidence for a case.[404] He pointed to a recently enacted statute criminalizing the dissemination of lottery information over the radio (18 U.S.C. § 1304) as a model for the new bill, as its language tracked similar provisions that applied to the mails (18 U.S.C. § 1301 and 18 U.S.C. § 1302).[405]

Cottone's discussion of the bill's application to telephone and telegraph transmissions consisted of exactly one paragraph in nearly thirty pages of testimony.[406] This was because, according to Cottone, "most of the cases which have already come to the attention of the Commission have involved fraudulent use of radio rather than wire facilities."[407] However, because it was "entirely possible to conduct fraudulent sales campaigns" by telephone or telegraph, Cottone stated that it was "entirely appropriate" for the bill to cover those technologies as well as radio.[408] No other witness discussed this issue, and the "wire" provision of the statute was not mentioned during full House consideration of H.R. 2948 on June 4, 1951.[409]

The Department of Justice's witness at the hearing, Ellis Arenson of the Department's Criminal Division, stated that although DOJ didn't oppose the bill, it didn't really see a need for it either, as schemes to defraud by radio or television would almost always also involve use of the mails.[410] Arenson stated that DOJ knew of only five or six examples that didn't involve use of the mails[411] and that they "were trivial and easily within the prosecutive jurisdiction of the State."[412] He did concede, however, that fraudsters were smart and some may work to avoid the postal system in order to avoid prosecution.[413]

One aspect of the statute—later dropped—illustrates the degree to which Congress contemplated that those liable under the statute know of the fraudulent nature of the wiring and that the wiring itself be fundamental to the fraud; it is only this knowledge and tight nexus that justified the draft's provision for liability on the part of broadcasters for wire frauds. The witness for the broadcasters was Judge Justin Miller, the President of the National Association of

403. *Id*. at 7.

404. *Id*. at 8–10. While the Federal Trade Commission Act (15 U.S.C. § 54) allowed criminal prosecutions for fraudulent advertising of food, drug and cosmetic products, no similar provision applied to other products. *Id*.

405. *Id*. at 6.

406. *Id*. at 11–12.

407. *Id*. at 11.

408. *Id*. at 11–12.

409. 97 CONG. REC. 6086–87 (1951) (noting a supporter of the bill stated that "the principal objective of this bill is to eliminate fraudulent radio advertising").

410. *Hearing on H.R. 2948*, *supra* note 394, at 56 (statement of Ellis L. Arenson, Criminal Division, Department of Justice).

411. *Id*. at 58.

412. *Id*. at 56.

413. *Id*. at 58–59.

Broadcasters, and a former D.C. Circuit judge.[414] Judge Miller argued that the legislation as drafted was unconstitutional, as the initial version applied to all "radio communication" and not interstate radio communication.[415] He also expressed concern that extending federal power over this area would interfere with state law-enforcement efforts[416] and that radio broadcasters were being discriminated against.[417] But his biggest objection was to the portion of the bill imposing criminal liability on a station owner who "knowingly permits the transmission of any such [fraudulent] communication." Judge Miller opposed the use of the word "knowingly," which he called a "very dangerous word"[418] that could be interpreted by overzealous prosecutors and judges to apply to any radio stations that ran fraudulent ads even if they had no knowledge of or reason to suspect the ad's fraudulent nature.[419]

The FCC[420] and DOJ[421] witnesses contested Judge Miller's interpretation of the "knowingly" provision. But the House Judiciary Committee subsequently decided to remove that provision from the bill.[422] To address Judge Miller's constitutional concerns, the fraud was restricted to those involving "interstate wire, radio or television communication."[423] The maximum fine was reduced from $10,000 to $1,000 to match the mail fraud statute.[424] And, without explanation in the committee report, the section title was changed from "Fraud by radio" to "Fraud by wire, radio or television." Thus, despite little discussion of the "wire" aspect of the bill, the radio fraud statute became the wire fraud statute.

H.R. 2948 passed the House on June 4, 1951.[425] A year later, it was resurrected when the House and Senate negotiated a compromise version of the broader Communications Act Amendments package.[426] The language, incorporated into Section 18 of the bill, now states:

> § 1343. Fraud by wire, radio, or television.
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of interstate wire, radio, or television communication, any writings, signs, signals,

414. *See Justin Miller*, WIKIPEDIA, https://en.wikipedia.org/wiki/Justin_Miller_(judge).

415. *Hearing on H.R. 2948*, *supra* note 394, at 32 (statement of Judge Justin Miller, President, National Association of Radio and TV Broadcasters).

416. *Id.* at 32–33.

417. *Id.* at 34.

418. *Id.* at 35.

419. *Id.* at 41–42.

420. *Id.* at 64 (statement of Ellis L. Arenson, Criminal Division, Department of Justice).

421. *Id.* at 62 (statement of Benjamin P. Cottone, Federal Communications Commission).

422. H. R. REP. NO. 82-388, at 1 (1951).

423. *Id.*

424. *Id.*

425. 97 CONG. REC. 6086–87 (1951).

426. H.R. REP. NO. 82-2426, at 13 (1952) (Conf. Rep.).

> pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.[427]

The final bill passed both the House[428] and the Senate[429] on July 2, 1952. The wire-fraud provision was not discussed during floor debate. It was signed into law on July 16, 1952.[430]

What, then, can we draw from this history? Congress was clearly concerned about communications by wire that were themselves fraudulent; the legislative discussion concerned false statements delivered through the radio. The legislation, then, did not address innocent communications. Congress clearly knew the difference between a "knowing" *mens rea* (proposed to apply to station owners) and one that requires "purpose." And the wirings were clearly purposeful. The class of cases targeted involved a close nexus between the wiring and the fraud—that is, the wirings were the actual means by which consumers received the fraudulent information. The radioed communication was not a collateral consequence of the scheme but rather constituted the essence of the scheme. This legislative history also sheds light on what was intended by "caus[ing]" the objectionable wiring. Although those who placed the ads did not themselves broadcast them, the radio communications were not merely reasonably foreseeable. The fraudsters "caused" them in a very intentional sense: that is, they bought the ads intending that the ads would induce listeners to rely upon the information to their detriment. The statutory language—requiring that a wiring be made for the "purpose" of "executing" a scheme to defraud—must be read in this light.

The legislative history of the 1956 amendment to the statute provides support—albeit reed-slim—for the view that the wiring is the focus of the statute and fraudulent activity abroad is proscribed as long as a domestic wire is proven. As discussed *supra*, Congress added the "foreign commerce" language to § 1343 to clarify that the statute covers wirings that originate (or end) in a foreign jurisdiction as long as the wirings also use domestic U.S. wires. The Attorney General asserted that the amended statute would "cover, for example, telephone calls from Canada made by fraudulent stock promoters to victims residing in the United States."[431] In the one case to address this history, a district court in the Southern District of New York rejected the view that this history rebutted the presumption against extraterritoriality.[432] In so doing, however, it reasoned that, "[i]n the case inspiring the amendment, the wire transmission entered the United States; that is, it used domestic wires. Congress thus seemed to be clarifying that frauds originating in foreign territory that use wires touching the United States can be prosecuted under the

427. 18 U.S.C. § 1343.

428. 98 CONG. REC. 9022–33 (1952).

429. 98 CONG. REC. 8906 (1952).

430. Act of July 16, 1952, Pub. L. No. 82-554, 66 Stat. 722 (codified as amended at 18 U.S.C. § 1343).

431. H.R. REP. No. 84-2385, at 2.

432. *See* United States v. Hayes, 99 F. Supp. 3d 409, 419–20 (S.D.N.Y. 2015) (citing Eur. Cmty. v. RJR Nabisco, 764 F.3d 129, 139 (2d Cir. 2014)).

statute."[433] These statements, of course, are not attributable to Congress, nor does this amendment alter the record concerning Congress' understanding, at the time of the statute's enactment, of the wiring element's *mens rea* or nexus requirements.

C. Statutory Context

The third possible criteria for determining the statutory focus requires consultation of the statutory context. Two categories of statutes are potentially relevant in this regard. First, one could consider only those statutes that often are invoked with or instead of § 1343—mail fraud (§ 1341), conspiracy to commit wire and mail fraud (§ 1349), and honest-services fraud (§ 1346) (the "Related statutes"). Second, one could reference all the provisions included in the Fraud Chapter of Title 18, including bank fraud (§ 1344), health care fraud (§ 1347), and securities fraud (§ 1348) because these were modeled after mail and wire fraud (the "Proximate statutes").[434] A brief examination of both statutory contexts provides little reason to alter any of the above conclusions.

1. Related Statutes

The same "focus" analysis outlined above ought to be applied to the mail fraud statute, § 1341, given the similarity in statutory language and structure. Reference to the other proximate statutes adds little to either the question of the extraterritoriality or the appropriate "focus" of the wire fraud statute because § 1349 and § 1346 ought to be treated as ancillary offenses whose extraterritorial treatment mirrors that of the underlying statute.

Title 18 U.S.C. § 1349 provides that "[a]ny person who attempts or conspires to commit any offense under this chapter [which includes the mail and wire fraud statutes] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."[435] The law is clear that "[g]enerally, the extraterritorial reach of an ancillary offense like aiding and abetting or conspiracy is coterminous with that of the underlying criminal statute."[436] Thus, if a conspiracy to commit wire fraud is alleged under § 1349, then that count will be deemed to apply to extraterritorial conduct only if the wire

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433. *Id.*

434. *See* Loughrin v. United States, 573 U.S. 351, 359 (2014) (noting that mail fraud "served as a model for § 1344" but declining to read them in *pari materia*); Neder v. United States, 527 U.S. 1, 20 (1999) (interpreting a scheme to defraud for purposes of whether materiality is an element of a "scheme or artifice to defraud" under the federal mail fraud, wire fraud, and bank fraud statutes to include a materiality requirement).

435. 18 U.S.C. § 1349.

436. United States v. Hoskins, 902 F.3d 69, 96 (2d Cir. 2018) (quoting United States v. Ali, 718 F.3d 929, 939 (D.C. Cir. 2013)); *see also* United States v. Ballestas, 795 F.3d 138, 144–45 (D.C. Cir. 2015); United States v. Belfast, 611 F.3d 783, 813 (11th Cir. 2010) ("[E]xtraterritorial jurisdiction over a conspiracy charge exists whenever the underlying substantive crime applies to extraterritorial conduct."); United States v. Yakou, 428 F.3d 241, 252 (D.C. Cir. 2005) ("The aiding and abetting statute, however, is not so broad as to expand the extraterritorial reach of the underlying statute."); United States v. Hill, 279 F.3d 731, 739 (9th Cir. 2002)

fraud statute applies extraterritorially.[437] Similarly, if the wire fraud alleged is deemed to be domestic in character, so will any conspiracy count that has that wire fraud as its object.

Title 18 U.S.C. § 1346, entitled "Definition of 'scheme or artifice to defraud,'" provides: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[438] Although this is not a conspiracy or accomplice liability provision, courts considering the question have treated it in the same manner. As the Second Circuit explained:

> [Honest services fraud] is not something different from wire fraud; it is a type of wire fraud that is explicitly prohibited by that statute. The statute includes a provision specific to honest services wire fraud not because it is in some essential aspect different from other wire fraud, but to clarify the application of the law of wire fraud to honest services fraud.[439]

The court traced the development of the theory of honest-services fraud in the courts, the Supreme Court's rejection of that theory in *McNally v. United States*,[440] and Congress' overruling of *McNally* shortly thereafter by making clear that honest services is a species of mail and wire fraud in § 1346.[441] The Second Circuit concluded that:

> On this point, therefore, the law is clear: Honest services wire fraud is "include[d]" as a type of wire fraud prohibited under § 1343. 18 U.S.C. § 1346. The fact that the appellants were convicted of honest services wire fraud thus has no bearing on our extraterritoriality analysis; it is § 1343, not § 1346, whose "focus" we must "look to" in step two of the analysis.[442]

2. Proximate Statutes

The Supreme Court has noted that mail and wire fraud "served as the model" for the bank fraud statute (§ 1344), which in turn bears a great structural resemblance

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("[A]iding and abetting, and conspiracy . . . have been deemed to confer extraterritorial jurisdiction to the same extent as the offenses that underlie them.").

437. *See, e.g.*, United States v. Napout, 963 F.3d 163, 178–79 (2d Cir. 2020).

438. 18 U.S.C. § 1346.

439. *Napout*, 963 F.3d at 179.

440. 483 U.S. 350 (1987).

441. *Napout*, 963 F.3d at 179–80.

442. *Id.* at 180 (alteration in original). A judge in the District of Columbia reached the same conclusion, explaining that § 1346 "is a definitional statute related to 18 U.S.C. § 1343, the wire fraud statute; it is not a separate substantive statute . . . . Because a claim for honest services fraud must be brought under 18 U.S.C. §§ 1343 [sic] as well, any claim for honest services fraud would also need to allege a proper domestic application of the wire fraud statute." United States v. All Assets Held at Bank Julius, 251 F. Supp. 3d 82, 103 n.16 (D.D.C. 2017).

to the health care fraud (§ 1347), and securities fraud (§ 1348)[443] statutes. These statutes do not, however, provide a helpful framing for evaluating the focus of the wire fraud statutes because they are quite different in intention, structure, history, and in interpretive context.

To begin, the *actus reus* of all these sections, as well as their titles, makes clear that Congress' intent was not to police a channel of communication but rather the particular type of fraud proscribed. Thus, the *actus reus* of all three sections is not a mailing or wiring, but rather "execut[ing], or attempt[ing] to execute, a scheme or artifice" to defraud in a discrete context. Consistent with Congress' concern about certain types of fraud, federal prescriptive jurisdiction rests on the nature of the victim of the fraud. Thus, under § 1347 the scheme must be addressed to a "health care benefit program,"[444] which is defined as "any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual."[445] Under § 1344, the scheme to defraud must be aimed at a "financial institution,"[446] because Congress enacted the statute "to provide an effective vehicle for the prosecution of frauds in which the victims are financial institutions that are federally created, controlled or insured."[447] The Supreme Court has recognized that federal jurisdiction for the bank fraud statute is based on the fact that the victim of the offense is a federally controlled or insured institution.[448] And, under § 1348,[449] the fraud must be done in connection with certain

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443. *Loughrin*, 573 U.S. at 359 (noting that mail fraud "served as a model for § 1344" but declining to read them in *pari materia*); *see also Neder*, 527 U.S. at 20 (interpreting a scheme to defraud for purposes of whether materiality is an element of a "scheme or artifice to defraud" under the federal mail fraud, wire fraud, and bank fraud statutes to include a materiality requirement).

444. Section 1347 of Title 18 provides that:

> (a) Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud any health care benefit program; or
>
> (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned . . . .

18 U.S.C. § 1347.

445. 18 U.S.C. § 24(b).

446. Section 1344 of Title 18 provides that:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined . . . or imprisoned . . . .

18 U.S.C. § 1344.

447. S. REP. NO. 98-225, at 377 (1983).

448. *See* Loughrin v. United States, 573 U.S. 351, 366 (2014).

449. Section 1348 of Title 18 provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice–

types of commodities futures or options or securities regulated under federal law. In each section, the *actus reus* element has an express *mens rea* requirement; bank and securities fraud require a showing that such execution be "knowing" and health care fraud requires that it be "knowing and willful." In this context, in contrast to wire and mail fraud, courts have recognized that these elements must be proven.[450] Accordingly, these statutes raise no concurrence issues of the sort explored above.

In *Neder v. United States*, the Court examined whether materiality was an element of a "scheme to defraud" under the mail, wire, and bank fraud statutes as a singular question answerable not by reference to their individual structures and histories.[451] But that decision rested on the common law meaning of fraud,[452] a term common to all three statutes. In other contexts, however, the Supreme Court has declined to read the bank fraud statute in *pari materia* with the mail fraud statute, both because of "notable textual differences between" them and because of their different histories.[453] Bank fraud's legislative history indicates that Congress enacted the statute in part to cover that which mail and wire fraud did not.[454] Notably, some of the differences in the statutory history of these statutes may well affect extraterritoriality determinations. For example, the legislative history of the bank fraud statute provides:

> Since the use of bogus or "shell" offshore banks has increasingly become a means of perpetrating major frauds on domestic banks and the considerable delay in collections between domestic and foreign banks makes manipulation of foreign financial transactions an attractive mode of defrauding banks within the United States, it is intended that there exist extraterritorial jurisdiction over the offense. This means that even if the conduct constituting the offense occurs outside the United States, once the offender is present within the country, he may nonetheless be subject to Federal prosecution.[455]

> (1) to defraud any person in connection with any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)); or
>
> (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)) shall be fined under this title, or imprisoned . . . .

18 U.S.C. § 1348.

450. *See, e.g.*, United States v. Hickman, 331 F.3d 439, 444–46 (5th Cir. 2003) (examining *mens rea* instructions in health care fraud prosecution).

451. 527 U.S. 1, 20–25 (1999).

452. *See id.* at 21–25 (holding materiality is an element of all three statutes).

453. *Loughrin*, 573 U.S. at 359–60.

454. Congress believed that the Court's mail fraud precedents created "serious gaps . . . in Federal jurisdiction over frauds against banks and other credit institutions which are organized or operating under Federal law or whose deposits are federally insured." S. REP. NO. 98-225, at 377 (1983).

455. *Id.* at 379.

Whether such legislative history, unmoored to express language in the text of the statute, is sufficient to overcome the presumption is an open question. It does, however, present a discrete issue that has no bearing on the interpretation of the wire fraud statute.

Finally, these statutes may require interpretation in light of other statutory provisions and lines of Supreme Court precedent. The Court's ruling on the focus of § 10(b) in *Morrison* may have some bearing on how the securities fraud statute is evaluated. Certainly, the case law concerning what constitutes a fraud "in connection with" covered securities transactions—that is the required nexus that needs to be shown—is likely to be interpreted in light of the Supreme Court's reading of the same language in other securities law contexts rather than the body of precedent relating to the nexus required between the jurisdictional wiring and § 1343's scheme to defraud.

D. Practical Administrability

The *Morrison* Court's goal in adopting its "focus" test was to create an easily administrable standard for determining whether a given case is domestic versus extraterritorial.[456] In that case, of course, it elected to identify the securities transaction as the "focus" because it seemed to provide a bright-line rule. As noted above, the Court's "focus" on the securities transaction has proved to be anything but easily administrable in practice. And the *Morrison* transaction test also yields arbitrary results, not least because, given the nature of modern securities trading, the site of the transaction is not necessarily something investors choose and has no normative significance.

Although isolating the interstate wiring as the statutory focus would likely be more easily administrable than *Morrison*'s transactions test, it would create arbitrariness issues on a mammoth scale. How a given communication is routed through the wires is not something consumers choose; in at least some cases, then, it would be difficult to conclude that a defendant chose to abuse U.S. wires which, according to some courts, is the harm that Congress sought to address in the statute.[457] Certainly, such a "focus" would result in the same kind of arbitrary results that flowed from the *Morrison* transaction test if courts accept that innocent uses of the wires that are not known, intended, or closely related to the fraud can be sufficient to render a case cognizably "domestic." Given the extent to which wire communications and money transfers cross U.S. borders and internet activity is hosted on U.S. servers, the scope of the statute would be virtually unlimited and would allow U.S. prosecutors to pursue frauds that do not threaten U.S. persons or national interests.

At the same time, the *Morrison* Court was not wrong in being concerned that identifying the fraudulent scheme as the "conduct" that separates domestic from

456. *See* 561 U.S. 247, 269–70 (2010).

457. *See* cases cited *supra* notes 303–04.

extraterritorial cases would be problematic in practice. First, at least in theory, the scheme-to-defraud element does not require "conduct" that can be sited in a certain location. Second, in most cases prosecutors choose to pursue, the fraud will be manifested by conduct, but that conduct will commonly cross district, state or national borders by virtue of the interstate- or foreign-commerce requirement, leaving courts to figure out which conduct in which location suffices to ground the case. The fraud may be hatched in the various places in which participants reside or travel, and relevant functions such as identifying and grooming victims may take place in different jurisdictions. One may confront the question whether the site of the fraud turns on the location of the author of the fraud, the places in which various actions were taken in furtherance of the fraud, or the places in which the victims suffered losses. Money commonly flows between banks in different jurisdictions in the course of fleecing the victims and hiding of the purloined funds—one must then ask which location ought to control for purposes of determining where the crime was committed. In cases where cyber-fraud is at issue, one must ask whether the location of the relevant servers is determinative. In short, if the "focus" is the scheme to defraud, and courts were to look to the location of the activities through which the scheme is put into effect, they will have to engage in difficult line-drawing exercises to isolate what types of fraudulent activities suffice and just how much of such activities must be concentrated in a jurisdiction to be considered sufficient. This will mirror many of the difficulties presented by the "conduct-and-effects" test that the Court found unworkable in *Morrison*.

This Article proposes a standard that looks not just to the "wiring" or the "fraud" but rather a meaningful union of the two, requiring, as Congress intended, that the charged wiring is actually made for the "purpose" of "executing" the scheme to defraud. This means that (1) the wiring in interstate or foreign commerce must be a knowing and intentional act done with the "conscious object" of executing the scheme to defraud; (2) where a defendant "causes" the wiring to be made through another person, the fraudster must knowingly and willfully cause the wiring to be done; and (3) the wiring must be integral or essential to the scheme. The question is: will this standard be administrable in practice? The answer is that it is not a bright-line rule, but it is capable of principled application.

Concededly, this standard will require courts to make case-by-case determinations that may generate dissensus. That said, the test will not create the sort of difficulties that the Court attributed to the "conduct-and-effects" test in the course of rejecting that standard. The "conduct-and-effects" inquiry dictated that courts evaluate (1) what kind of conduct—and how much of it—occurred in the United States; (2) what kind of effects—and of what magnitude—were felt domestically; and (3) whether a combination of the two sufficed to warrant a judgment that the crime occurred within U.S. borders.[458] All these are judgment calls and, given that

458. *See supra* notes 190–94 and accompanying text.

all three had to be consulted in the course of a totality of circumstances approach, little in the way of concrete guidance could be gleaned from precedent.

By contrast, the standard this Article proposes essentially requires courts to answer two questions. The first is whether the government has proved that it was the defendant's conscious object to transmit a wiring (or willfully cause a wiring to be made by another) to execute the scheme to defraud. This *mens rea* element is a question of historical fact and thus does not involve line-drawing. The second nexus element presents the greater administrability concern because courts may well disagree whether the wiring is "essential" or "integral" to the execution of the scheme. We have already seen that different judges in the Southern District of New York have expressed different views on whether the U.S. wirings that flowed from foreign actors' manipulation abroad of foreign benchmark interest rates ought to be sufficient to ground U.S. wire fraud jurisdiction.[459] And one could easily second-guess some of the judgments the Second Circuit has already made—such as its decision in *Napout* that the sourcing of the bribes from New York banks was "essential" to the scheme.[460]

One possible way to resolve this difficulty would be to require that, to show that a wiring was "essential" to the scheme, the government must prove "but for" causation. In *Napout*, for example, the government would be asked to demonstrate that, but for the existence of these bank accounts, the scheme likely would not have gone forward. In *Napout*, this standard would likely not have been met because one assumes that, if push came to shove, the corrupt officials would have accepted their bribes in currencies other than dollars. This would eliminate the most troubling implication of the *Napout* result, which is that if any bribe is paid in dollars, which necessitates some involvement by U.S. correspondent banks, the United States has jurisdiction over foreign bribery. For example, the Second Circuit justified its ruling in part by noting that because $2.5 million of Napout's $3.3 million in bribes was "paid in cash in U.S. dollars generated by wire transfers originating in the United States . . . [t]he use of wires in the United States . . . was integral to the transmission of the bribes" to him.[461] Such a result would give the United States potentially breathtaking jurisdiction in foreign corruption cases. This would be inconsistent with congressional intent as revealed in the Foreign Corrupt Practices Act, which was designed to *exclude* the corrupt foreign official from its reach.[462] Certainly the result in *Napout* is very difficult to square with the Second Circuit's earlier decision in *Pemex*.[463]

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459. *See supra* notes 259–72 and accompanying text.

460. *See supra* notes 284–89.

461. United States v. Napout, 963 F.3d 163, 181 (2d Cir. 2020).

462. *See* 15 U.S.C. §§ 78dd-1 to -3; United States v. Castle, 925 F.2d 831, 835 (5th Cir. 1991) (noting the "overwhelming evidence of a Congressional intent to exempt foreign officials from prosecution for receiving bribes" in ruling that the foreign officials receiving the bribes could not be prosecuted under the FCPA).

463. *See supra* notes 249–54.

Even if this "but for" test is not adopted, one could imagine that lines could be drawn where particular, commonly recurring uses of the wires are at issue. For example, a question could be raised whether "foreign-exchange conversions—which occur naturally as part of the banking system and are not directed or requested by a defendant—that use U.S. banks as a counterparty suffice to confer domestic jurisdiction"[464] and conclude that these common international banking transactions should not ordinarily suffice unless the fraud was directed at the conversion transaction itself. Other questions that may commonly arise are whether "all internet-based frauds merit domestic application of the wire fraud statute because internet communications that use U.S.-based website hosting platforms use interstate wires" and whether "exchanges of information using cloud-based repositories merit the same treatment as direct wire transfers to and from the United States."[465] These queries may require more nuanced answers, but it is likely that some administrable criteria will be identified over time to guide judges' decision-making.

In short, this proposed standard—which is mandated by the language of the statute and comports with congressional intent—may not be as clean a rule as one that provides that any transmission in interstate or foreign commerce, no matter how unintentional, random, or "incidental" to the fraud, suffices to render a case domestic in character. But administrability must be measured against the rule's capacity to yield defensible results. As discussed above, a rule that focuses only on the wiring is likely to yield arbitrary outcomes that are simply unacceptable in criminal cases. This proposed standard certainly holds more promise if the aim is to identify criminally culpable conduct that implicates U.S. national interests and warrants the expenditure of scarce prosecutorial resources.

E. International Comity

Historically the presumption against extraterritoriality was justified as necessary "to protect against unintended clashes between our laws and those of other nations which could result in international discord."[466] Many have expressed skepticism regarding whether this rationale for the presumption makes sense.[467] Even if one believes that this rationale has weight, one could argue that the conflict-avoidance criterion is adequately addressed by the application of the presumption; using it to determine the statutory focus as well gives it undue weight.

In any case, concerns about international comity ought not be referenced in determining the focus of criminal statutes. If conflicts are created, it is the Executive Branch that will be creating them. The Executive Branch, not the courts,

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464. Petty, *supra* note 241, at 829.

465. *Id.* at 830.

466. EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991); *see also* RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 335 (2016); Benz v. Compania, 353 U.S. 138, 147 (1957).

467. *See, e.g.*, O'Sullivan, *supra* note 49, at 1082–83.

has the greatest expertise in evaluating whether a given case may cause unwanted conflicts with foreign authorities and has the responsibility for doing so. As the Court concluded in *Pasquantino*, federal prosecutions "create[] little risk of causing international friction" because they are:

> [B]rought by the Executive to enforce a statute passed by Congress. In our system of government, the Executive is "the sole organ of the federal government in the field of international relations," and has ample authority and competence to manage "the relations between the foreign state and its own citizens" and to avoid "embarass[ing] its neighbor[s]."[468]

Courts, then, ought to use the criteria outlined above and leave concerns about conflicts with foreign regulators to the judgment of the Department of Justice.

CONCLUSION

The Supreme Court's strong presumption against extraterritoriality is not rebutted by the wire fraud statute's language or context, nor does the *Bowman* exception apply. Because the wire fraud statute does not apply extraterritorially, precedent requires us to apply the "focus" test, no matter how flawed. This Article urges that the "focus" of the wire fraud statute be identified by reference to its plain language and foundational principles of criminal law; this will yield an administrable standard and defensible results. A "focus" requiring a meaningful connection between the wiring and fraud is also consistent with the nature of the crime. As Justice Scalia explained in the mail-fraud context:

> The purpose of the mail fraud statute is "to prevent the post office from being used to carry [fraudulent schemes] into effect." The law does not establish a general federal remedy against fraudulent conduct, with use of the mails as the jurisdictional hook, but reaches only "those limited instances in which the use of the mails is *a part of the execution of the fraud*, leaving all other cases to be dealt with by appropriate state law." In other words, it is mail fraud, not mail and fraud, that incurs liability. This federal statute is not violated by a fraudulent scheme in which, at some point, a mailing happens to occur—nor even by one in which a mailing predictably and necessarily occurs. The mailing must be in furtherance of the fraud.[469]

Justice Scalia was, however, writing in dissent. Is the Court likely to adopt my position given that it rests on a rejection of the Court's rewriting of the statute?

In favor of the restrictive standard I am advocating is the Court's recent inclination to cabin the reach of the statute. The Court has found that additional proof requirements—that the fraud be material[470] and that the defendant act with the

468. 544 U.S. 349, 369 (2005) (citations omitted).
469. Schmuck v. United States, 489 U.S. 705, 722–23 (1989) (Scalia, J., dissenting) (citations omitted).
470. *See* Neder v. United States, 527 U.S. 1, 4 (1999).

"specific intent to defraud"[471]—are inherent in the "scheme to defraud" element. With respect to cases founded on schemes designed to defraud victims of money or property, the Court has repeatedly held that schemes directed at obtaining or controlling government benefits or functions are not "property" for purposes of these statutes.[472] It has further mandated that "a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme" to defraud; instead, the property at issue must be the object of the fraud.[473] In its last term, the Court rejected a longstanding "right to control" theory of wire fraud—under which a conviction can rest on a scheme to deprive a victim of potentially valuable economic information necessary to make discretionary economic decisions—holding that this is not a traditional property interest of the sort that must underlie a "money or property" wire-fraud case.[474]

With respect to schemes to defraud aimed at the government's or employers' rights to "honest services," in 1987 the Court famously held that such schemes did not fall within the ambit of the statutes.[475] After this ruling was quickly overruled by statute,[476] the Court construed the overruling statute narrowly to include only cases in which bribery or kickbacks caused the denial of honest services.[477] The Court also read an element—that the corruption be in connection with an "official act"—into the statute and then defined it narrowly.[478]

On the other hand, the Court does not seem particularly bothered by the idea of selecting a non-culpable act as the focus of a statute that addresses both civil and criminal wrongs. The *Morrison* Court chose to emphasize an element of the offense—a domestic securities transaction—that, without reference to the fraud that actuates it, is not a culpable act. The Court refused to look to the site of the fraudulent conduct that made the securities transactions in that case allegedly problematic. The Court's apparent rationale—that it wanted an easily administrable test that would turn on a discrete event located in a specific place[479]—might counsel that the Court would adhere to its rewriting of the wire fraud statute and simply require that a wiring cross a U.S. or state border. But it is worth remembering that the *Morrison* Court was determining the focus of a civil cause of action. Where the focus of a criminal statute is at stake, it is much more difficult to explain how a

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471. *See, e.g.*, Carpenter v. United States, 484 U.S. 19, 28 (1987).

472. *See* Kelly v. United States, 140 S. Ct. 1565, 1568 (2020); Cleveland v. United States, 531 U.S. 12, 15 (2000).

473. *Kelly*, 140 S. Ct. at 1568.

474. *See* Ciminelli v. United States, 598 U.S. 306, 312 (2023).

475. McNally v. United States, 483 U.S. 350 (1987).

476. *See* 18 U.S.C. § 1346.

477. Skilling v. United States, 561 U.S. 358, 368 (2010).

478. McDonnell v. United States, 579 U.S. 550, 555–56, 574 (2016). Last term the Court heard a case that queried what type of relationship gives rise to an actionable duty of honest services. *See* Percoco v. United States, 598 U.S. 319 (2022). The Court "reject[ed] the argument that a person nominally outside public employment can *never* have the necessary fiduciary duty to the public." *Id.* at 329. But it reversed petitioner's conviction, ruling that the jury instructions regarding when such a duty is owed were unconstitutionally vague. *Id.* at 331–32.

479. *See supra* notes 202–05 and accompanying text.

non-culpable act can be the object of the statute's solicitude. In such cases, the Court has long and consistently required a "concurrence of an evil-meaning mind with an evil-doing hand,"[480] and the fact that many wire-fraud cases involve transnational conduct should not affect that foundational commitment.

The Supreme Court would also encounter practical difficulties in adopting my approach. It may have a hard time explaining why it reads the statute to require the jurisdictional act to be done with the actual purpose of executing the scheme to defraud and that it bear a close nexus to the fraud in this context but no other. Most important, to overturn the caselaw that reads the "for the purpose of executing" language out of the statute would severely limit the applicability of a statute that federal prosecutors rely upon in many, if not most, white-collar cases and would call into question decades of convictions.

It may be worth a final note that Congress has the ultimate authority over the geographic scope of a statute, and it has not infrequently overruled the Court's extraterritoriality precedents.[481] In the context of wire fraud, Congress has also shown a preference for a broad application of these statutes. Congress overruled the Supreme Court's attempt to eliminate the "honest services" theory of fraud employed in public corruption cases by expressly endorsing the theory in 18 U.S.C. § 1346. In 1994, it amended the mail fraud statute to cover deliveries by private or commercial interstate carriers, thus converting the statute from one protecting the Postal Service to one that licenses federal jurisdiction over frauds with ancillary mailings.[482] And it has repeatedly increased the potential sentencing consequences of a conviction.[483] The penalty for wire fraud when that statute was first enacted was imprisonment up to five years; inflation has been such that the maximum penalty for the same types of fraud is now twenty years—and thirty years if the fraud affects a financial institution.[484] Given this proclivity, it may be that Congress would promptly act to overrule the Supreme Court's attempts to read narrowly the geographic scope of the wire fraud statute.

480. Morissette v. United States, 342 U.S. 246, 251–52 (1952).
481. *See* O'Sullivan, *supra* note 49, at 1054 nn.191–94, 1084 n.367.
482. *See supra* note 156.
483. *See supra* note 119.
484. *See* 18 U.S.C. § 1343.