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The Effects Test: Extraterritoriality's Fifth Business

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The Effects Test: Extraterritoriality's Fifth Business

Austen Parrish[*]

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INTRODUCTION

The world has recently seen a tremendous expansion in countries using extraterritorial laws[1]—laws that regulate the activities of foreigners outside a country's borders.[2] In the United States, domestic laws now commonly regulate extraterritorial conduct and transnational litigation has blossomed.[3] No longer limited to the antitrust and commercial contexts,[4] courts apply all sorts of public and private laws to activity occurring abroad.[5] Academics have encouraged

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1. Paul B. Stephan, *A Becoming Modesty – U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627, 650–56 (2002) (describing extraterritorial civil and criminal litigation in Australia, Canada, England, and Europe and arguing that these sort of extraterritorial cases are no longer unique to the United States). For a detailed description of the growth of countries using extraterritorial laws, see generally Austen Parrish, *Reclaiming International Law From Extraterritoriality*, 93 MINN. L. REV. (forthcoming 2009) (describing how extraterritorial litigation is no longer an American phenomenon).

2. A law is extraterritorial when a court applies a domestic law to foreigners for conduct occurring beyond the territorial borders of the nation-state in which the court sits. The extraterritorial application of domestic law is referred to as the exercise of legislative jurisdiction. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987); *cf.* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1218 n.3 (1992) (explaining that a case "involves extraterritoriality when at least one relevant event occurs in another nation").

3. Some have described the three largest exports of the United States as "rock music, blue jeans, and United States law." United States v. Verdugo-Urquidez, 494 U.S. 259, 281 (1990) (Brennan, J., dissenting) (quoting V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L LAW. 257, 257 (1980)); *see also* Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT'L ECON. L. 1297, 1299–1301 (2004) (describing the expanding number of transnational cases); Harold Hongju Ko, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183 (1996) (describing the rise of transnational litigation); *cf.* Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 389 (2005) (exploring the reasons for the increased use of extraterritorial laws in the United States).

4. *See* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 505–09 (3d ed. 1996) (describing extraterritorial laws in a variety of commercial cases, including antitrust, securities, and others); *see also* Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 159 (1990) (describing how in both the United States and the EU, extraterritorial enforcement of antitrust and competition law has become routine).

5. UNITED NATIONS, REPORT OF THE INTERNATIONAL LAW COMMISSION, 58TH Sess. (2006), Annex E, p.516, *available at* http://untreaty.un.org/ilc/reports/2006/english/annexes.pdf (describing and providing examples of how the use of U.S. domestic laws to regulate conduct occurring beyond U.S. borders has become "increasingly common"); *see also* Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 255 (2006) (analyzing domestic cases that "seek to apply a shared norm, in domestic courts, for the benefit of the international community"); Harold Hongju Ko, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2348–49 (1991) (suggesting transnational public law litigation merges formerly distinct types of

the trend, finding the notion that law should be tied to territory to be an archaic remnant of a preglobalized world.[6] In an age of globalization, the argument goes, law should find national and political borders of little significance.[7] The enactment and application of extraterritorial laws have become unexceptional.

A doctrinal culprit has sustained this growth in extraterritoriality. At the heart of most extraterritoriality cases lies the effects test.[8] Developed at a time when legal realism captivated legal academia,[9] the effects test permits a U.S. court to exercise prescriptive jurisdiction—and Congress is assumed to have intended to regulate—when an activity has direct or substantial effects within

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litigation). *See generally* Parrish, *supra* note 1 (listing contexts in which U.S. laws have been applied extraterritorially).

6. *See, e.g.*, Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 61–79 (1992) (criticizing territoriality); Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 184 (1991) (suggesting that "the world in which a presumption against extraterritoriality made sense is gone," criticizing the presumption against extraterritoriality, and arguing that territoriality should be abandoned); Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 717, 736 (1995) (arguing that Liberal analysis concludes the presumption of territoriality "makes no sense"); Anne-Marie Slaughter & David T. Zaring, *Extraterritoriality in a Globalized World*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=39380 ("In such a [globalized] world, tidy circles demarcating national jurisdiction, even based on an expanded conception of territoriality, became either impossible or meaningless.").

7. Numerous scholars have explored the continuing relevance of territoriality outside the legislative jurisdiction context. *See, e.g.*, Thomas J. Biersteker, *State, Sovereignty and Territory*, *in* HANDBOOK OF INTERNATIONAL RELATIONS 157, 167–72 (Walter Carlsnaes et al. eds., 2002) (discussing the continuing relevance of concepts of sovereignty and territory to international relations); Kal Raustiala, *The Evolution of Territoriality: International Relations and American Law*, *in* TERRITORIALITY AND CONFLICT IN AN ERA OF GLOBALIZATION 219, 220, 234–48 (Miles Kahler & Barbara F. Walter eds., 2006) (arguing territoriality is "decreasingly important as a jurisdictional principle" in a globalizing world); John Gerrard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L ORG. 139, 148–63 (1993) (discussing the evolution of modern territoriality); Saskia Sassen, *Territory and Territoriality in the Global Economy*, 15 INT'L SOC. 372, 373 (2000) ("[W]e are seeing processes of incipient denationalization of sovereignty – the partial detachment of sovereignty from the nation state."). For a specific example, Paul Berman recently argued that in an age of globalization, territorial borders should have little significance in jurisdictional questions. Paul Schiff Berman, *Dialectical Regulation, Territoriality, and Pluralism*, 38 CONN. L. REV. 929, 932–38 (2006) [hereinafter Berman, *Dialectical Regulation*] (exploring how to accommodate non-territorial based norms through legal pluralism and arguing that territoriality is eroding); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1168 (2007) [hereinafter Berman, *Global Legal Pluralism*] (arguing for a conflict approach different from "territorially-based sovereigntism" and universalism); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 329–70 (2002) [hereinafter Berman, *Globalization of Jurisdiction*] (leveling ten critiques against territorial based rules for jurisdiction).

8. *See infra* Section I.C (listing and describing cases applying the effects test).

9. *See infra* Section I.B (describing changes in legal theory and the move from legal formalism to legal realism).

the United States.[10] Academics have embraced the effects test (albeit in slightly different forms) as a panacea to all extraterritorial jurisdictional dilemmas.[11] And although once condemned abroad,[12] other countries have started to follow suit, permitting jurisdiction over activities that have effects within their territory.[13] In short, under current doctrine, the effects test is the linchpin to understanding the geographic reach of domestic laws.

But here's the rub. Although the effects test has become central to what many scholars perceive to be a correct modern analysis for

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10. United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1986) (setting forth the effects test).

11. *See, e.g.*, William S. Dodge, *Extraterritoriality and Conflicts-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 141, 154 (1998) [hereinafter Dodge, *Judicial Unilateralism*] (applying a unilateral analysis favoring U.S. law whenever conduct abroad causes substantial and foreseeable effects that the U.S. law was intended to prevent); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 99 (1998) [hereinafter Dodge, *Understanding the Presumption*] (arguing that the effects test should reverse the presumption of territoriality); Larry Kramer, *Extraterritorial Application of American Law after the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT'L L. 750, 751 (1995) (arguing for application of U.S. law over foreign conduct that produces a substantial effect in the United States); Russell Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a Choice-of-Law Approach*, 70 TEX. L. REV. 1799, 1825 (1992) (arguing for a rebuttable presumption in favor of applying U.S. law whenever conduct abroad produces substantial and foreseeable effects in the United States); *cf.* Born, *supra* note 6, at 88 (arguing that legislative jurisdiction should be treated as a choice-of-law problem with U.S. law applied if the United States has the most significant relationship to the parties and the transaction); Andreas Lowenfeld, *Public Law in the International Arena: Conflicts of Laws, International Law, and Some Suggestions for Their Interaction*, 163 RECUEIL DES COURS 311, 373–83 (1979) (arguing that U.S. law should be applied only if reasonable under concepts of international comity, regardless of the effect in the United States).

12. BORN, *supra* note 4, at 507 (noting that U.S. assertions of extraterritorial jurisdiction on the basis of the effects test has led to "vigorous and repeated protest" from other countries).

13. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. n.3 (1987):

> [Germany and m]ost other states of Western Europe, including Austria, Denmark, Finland, France, Greece, Norway, Portugal, Spain, Sweden, and Switzerland, as well as Canada and Japan (but not the United Kingdom or the Netherlands), have accepted the effects doctrine as applied to economic effects, either in their legislation or in political decisions, though with varying interpretations of the doctrine.

see also Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 27–37 (1992) (describing how Europe has embraced an effects test for extraterritorial legislation); James J. Friedberg, *The Convergence of Law in an Era of Political Integration: The* Wood Pulp *Case and the* Alcoa *Effects Doctrine*, 52 U. PITT. L. REV. 289, 309–18 (1991) (describing history of European resistance to the effects test); Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT'L L.J. 173, 204 (2005) (explaining how by the end of the 1980s the "EC had incorporated the effects test into its own competition law").

legislative jurisdiction,[14] courts rarely apply it appropriately.[15] This is problematic. Properly determining the geographic scope of U.S. law is important. Because of globalization of trade and commerce and the proliferation of electronic methods of communication, transnational disputes have become commonplace[16] and the intensity of these disputes has escalated.[17] To solve these disputes, plaintiffs increasingly seek to apply U.S. laws to foreign conduct.[18] Yet as U.S. courts apply domestic laws extraterritorially, other countries have not only periodically retaliated,[19] but have also begun to accept extraterritoriality and use it for their own ends.[20] Indeed, as

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14. *See supra* note 11 (citing articles advocating the use of the effects test). Legislative jurisdiction is a nation-state's authority to prescribe or regulate conduct. *See infra* note 30.

15. *See infra* notes 129–41 and accompanying text (examining courts' application of the effects test and describing its failures).

16. *See* Stephan B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1456 (1991) (noting that international litigation is of "increasing practical important and substantial theoretical interest"); Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 799 (1988) ("It is trite but true to observe that disputes between United States nationals and people from other lands have been increasing steadily and doubtless will continue to do so."); *see also* Austen Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 42–43 (2006) (describing increases in international litigation, globalization, and the prevalence of parallel proceedings and class actions); Willibald Posch, *Resolving Business Disputes Through Litigation or Other Alternatives: The Effects of Jurisdictional Rules and Recognition Practice*, 26 HOUS. J. INT'L L. 363, 367 (2004).

17. David J. Gerber, *Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems*, 26 HOUS. J. INT'L L. 287, 301 (2004) (explaining how global markets "tend to increase the likelihood of [jurisdictional] conflicts and their intensity").

18. *See* Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, 79 FOREIGN AFF., Sept.–Oct. 2000, at 102, 104 (discussing the Second Circuit's decisions that broadened the reach of U.S. human rights law). For a discussion of how nongovernmental organizations have influenced the field of human rights, see Yves Dezalay & Bryant Garth, *From the Cold War to Kosovo: The Rise and Renewal of the Field of International Human Rights*, 2 ANN. REV. LAW SOC. SCI. 231 (2006).

19. *See infra* notes 194–96 and accompanying text (describing methods of retaliation); *cf.* RICHARD A. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 6 (1964) ("This pretension supports the treatment of national policy, interest, and value as if they were universal. Such behavior invites retaliation, engenders distrust, and undermines those actual and potential claims of international law to make stable the relations among the entire community of states"); David J. Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INT'L L. 185, 187 (1984) (describing the negative impacts of extraterritoriality).

20. *See, e.g.*, Born, *supra* note 6, at 67–68 (describing extraterritorial laws in foreign countries, including France, Germany, Japan, and Switzerland); Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1059, 1059–60 (2004) (explaining how criminal complaints or investigations, in the past decade, have been instituted before courts in Austria, Canada, Denmark, France, Germany, the Netherlands, Senegal, Spain, Switzerland, and the United Kingdom, for atrocities throughout the world); Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 450–56 (2002) (describing extraterritorial litigation in Australia, Canada,

extraterritorial laws are more frequently applied worldwide, the very purpose of legislative jurisdiction—to avoid conflict between countries and the harms that conflicts inevitably cause—is threatened. Stated differently, the story of modern extraterritoriality is one where the effects test, like a Fifth Business,[21] has driven the plot. And the mischief it has caused has displaced the "golden voices"[22] of territoriality and international law that once governed legislative jurisdiction analysis.

A thoroughly practical consideration also is in play. Although courts find increasingly more transnational cases on their dockets,[23] the U.S. Supreme Court's jurisprudence for determining when U.S. law regulates foreign conduct has failed to keep pace with the changes globalization has wrought. Condemned as incoherent and convoluted,[24] a patchwork of incompatible rules presently governs

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England, Europe, and South Africa, and arguing that these sorts of transnational cases are no longer unique to the United States).

21. The famous novelist Robertson Davies described Fifth Business in his masterwork of the same title, as a character in theater and opera who has no opposite—the odd man out, neither heroine nor her lover, rival nor villain—yet who is essential to the plot. ROBERTSON DAVIES, FIFTH BUSINESS 266–67 (1971).

22. *Id.* at 267 ("The prima donna and the tenor, the contralto and the basso, get all the best music and do all the spectacular things, but you cannot manage the plot without Fifth Business . . . . [T]hose who play it sometimes have a career that outlasts the golden voices.")

23. As one example, a landmark extraterritorial case found its way to the Supreme Court just this last year. Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-AAM, 2004 WL 2578982 (E.D. Wash. Nov. 8, 2004) (denying motion to dismiss on jurisdictional grounds), *aff'd*, 452 F.3d 1066 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 858 (2008). A slew of commentary from both sides of the border underscores the importance of these kinds of extraterritorial cases. *See, e.g.*, Jutta Brunnée, *The United States and International Environmental Law: Living with an Elephant*, 15 EUR. J. INT'L L. 617, 628 (2004) (stating that one of the "cornerstone principles of environmental law, the prohibition against causation of significant transboundary environmental harm," can be traced back to the *Trail Smelter* case between the United States and Canada); Neil Craik, *Transboundary Pollution, Unilateralism, and the Limits of Extraterritorial Jurisdiction: The Second* Trail Smelter *Dispute*, *in* TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION 109, 109–21 (Rebecca M. Bratspies & Russell A. Miller eds., 2006) (examining the *Trail Smelter* decision and asserting that "the EPA's turn to extraterritoriality has the potential to be a positive development for addressing transboundary environmental harm"); Kevin R. Gray, *Transboundary Environmental Disputes along the Canada-U.S. Frontier: Revisiting the Efficacy of Applying the Rules of State Responsibility*, 43 CAN. Y.B. INT'L L. 333, 385–90 (2005) ("As transboundary environmental disputes are not expected to wane in number or importance, one can expect reinvigorated efforts, or at least legal advocacy to this effect, to give meaningful application to the rules of state responsibility."); Austen L. Parrish, *Trail Smelter Deja Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363, 368 (2005) (concluding that "the use of international arbitration provides an effective . . . way to resolve transboundary water pollution issues").

24. GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 638 (4th ed. 2007) (describing the "confusion for private parties and lower courts" based on the courts' different approaches to legislative jurisdiction); Mark P. Gibney, *The*

legislative jurisdiction.[25] Some scholars go so far as to describe the Court's extraterritoriality decisions as patently inconsistent, if not hopelessly confused.[26] Not surprisingly, without sufficient direction, lower courts have been ill-equipped to decide the scope of Congress's legislative jurisdiction.[27] In some instances, courts have reached contrary results on nearly identical facts.[28] Courts would be well served then if they had greater guidance in this area of law.

This Article provides that guidance. It seeks to clear away the confusion that mars analysis of extraterritorial questions in international cases. In Part I, the Article provides a brief historical overview of the legal doctrine governing legislative jurisdiction. It also introduces a key doctrinal manifestation of the demise of the presumption against extraterritoriality in law: the effects test. Part II

Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles, 19 B.C. INT'L & COMP. L. REV. 297, 301–03 (1996) (describing inconsistencies in doctrines surrounding extraterritoriality); Kramer, *supra* note 6, at 180 (describing the inconsistencies that exist in doctrine related to extraterritoriality); Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT'L L. 975, 975, 978–84 (1994) (explaining how "[c]onflict of laws is a source of constant embarrassment" because it suffers from a "lack of theoretical coherence" and is in theoretical disarray).

25. BORN & RUTLEDGE, *supra* note 24, at 658–59:

> With almost haphazard nonchalance, the Court has applied several fundamentally different rules of construction in international cases . . . . Unfortunately, the Court has neither acknowledged the existence of these different approaches, nor provided guidance as to when it will apply one, rather than another. The result is confusion for litigants and lower courts, and arbitrary, unpredictable results.

Dodge, *Judicial Unilateralism*, *supra* note 11, at 121–34 (describing three conflicting approaches to extraterritoriality taken by the courts).

26. Joseph E. Fortenberry, *Jurisdiction Over Extraterritorial Antitrust Violations – Paths Through The Great Grimpen Mire*, 32 OHIO ST. L.J. 519, 519 (1971) (describing the confusion that exists in extraterritorial antitrust cases); Gibney, *supra* note 24, at 302 (describing the "patently inconsistent applications of the extraterritorial presumption").

27. *See* Kramer, *supra* note 6, at 179–80 (describing how appellate courts rely on the U.S. Supreme Court to "revisit an issue and sort through disparate strands to restore order" and consistency in the law); James E. Ward, *"Is That Your Final Answer?" The Patchwork Jurisprudence Surrounding the Presumption Against Extraterritoriality*, 70 U. CIN. L. REV. 715, 716 (2002) ("[L]ower courts continually embrace divergent approaches to extraterritoriality, the resulting mélange being wholly inadequate to adjudicate the growing tide of transnational litigation."); *cf.* BORN & RUTLEDGE, *supra* note 24, at 646 (listing cases that apply "a wide variety of formulations of the [effects test]").

28. *See* Gibney, *supra* note 24, at 301 (lamenting the courts' inconsistencies and noting that "[i]n some instances the courts have read very ambiguous statutory language quite expansively, but in other cases they have taken equally broad language and given it a territorial interpretation"); Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 601, 634–35 (1990) (arguing that courts have treated market and nonmarket cases differently without justification when deciding whether laws should apply extraterritorially).

then explains how tossing territoriality aside in transboundary cases is a mistake. In a modern, globalized, integrated economy, territoriality should play a larger role in answering jurisdictional questions, not a smaller one. While many scholars have focused on how extraterritorial laws impinge on foreign interests, Part II describes how extraterritoriality threatens American interests: a threat that has been unwisely underestimated or, at least, unjustifiably downplayed. Finally, in Part III, the Article counsels for judicial and legislative restraint. Having examined how courts apply the effects test—and assuming that courts, respectful as they must be of precedent,[29] will be disinclined to ignore it—the Article argues that the effects test is best understood as a narrow limit on congressional power, not as a doctrinal command that reverses the presumption against extraterritoriality. The Article concludes by examining why territoriality as a constraint on state power should be reinvigorated. Courts should be much more reluctant than they have been in finding that Congress has enacted a law with extraterritorial reach. And Congress would also do well to be more restrained than it has been and enact extraterritorial laws in rare circumstances only.

I. THE HISTORICAL CONTEXT

Legislative jurisdiction is a nation-state's authority to prescribe or regulate conduct.[30] It can be distinguished from adjudicative or judicial jurisdiction, which is the power of a court to subject particular persons or things to the judicial process.[31] When a state uses its legislative jurisdiction to regulate the conduct of those outside its borders, the law has been applied extraterritorially.

Two questions arise in any legislative jurisdiction analysis. The first is whether Congress has the power to extend the force of domestic

29. A plethora of scholarship examines the role of precedent in judicial decisionmaking. For some of the more well-known articles, see Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999); Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271 (2005); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedent*, 87 VA. L. REV. 1 (2001); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

30. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987); *see also* Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 179–212 (1978) (describing legislative jurisdiction); Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1587 (1978) (defining legislative jurisdiction as "the power of a state to apply its law to create or affect legal interests").

31. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(b)–(c) (1987); *see also* KEVIN M. CLERMONT, CIVIL PROCEDURE: TERRITORIAL JURISDICTION AND VENUE 2 (1999). Examples of adjudicative jurisdiction include personal and subject matter jurisdiction.

law beyond U.S. borders. Congress's power to do so is nearly unconstrained.[32] The second is whether Congress intended to regulate extraterritorially when enacting specific legislation. Complicating this question is the reality that Congress rarely specifies the geographic reach of the laws it enacts.[33] The answer to this second question, and the history of legislative jurisdiction, is one that begins with territoriality, and ends, at least for now, with the effects test. This history has been described elsewhere;[34] but the following summarizes briefly how the effects test has come to dominate legislative jurisdiction analysis.

A. An Era of Territoriality

The concept of territoriality as a limitation on sovereign power has a venerable history. Beginning around the 1600s with the Treaty of Westphalia, a nation's power was deemed to end at its border.[35] A concept theorized by Dutch scholars,[36] territoriality was a defining

32. *Compare* A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379, 384–417 (1997) (arguing that due process does not limit the territorial reach of federal law), *with* Brilmayer & Norchi, *supra* note 2, at 1223 (arguing that the Fifth Amendment limits federal extraterritoriality, but only minimally); Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880 (1989) (arguing that Congress's respect for the territorial limitations of international law accords with the intent of the Framers of the Constitution). A recent student note provides an overview of the issue. Alex Ellenberg, Note, *Due Process Limitations on Extraterritorial Tort Legislation*, 92 CORNELL L. REV. 549, 554–63 (2007) (defining "legislative jurisdiction" and examining early Supreme Court jurisprudence governing jurisdiction).

33. Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 LAW & CONTEMP. PROBS., Summer 1987, at 11, 15, 17 ("In certain statutes, Congress has specified the proper extraterritorial reach. More commonly, however, it has not. In the resulting exercise in statutory construction, courts often find little guidance in the legislative history about the extent to which the statute was designed to apply to transnational disputes."). Dodge, *Judicial Unilateralism*, *supra* note 11, at 145 (explaining how there is rarely good evidence of congressional intent of the statute's geographic scope).

34. *See, e.g.*, KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? TERRITORIALITY AND EXTRATERRITORIALITY IN AMERICAN LAW (forthcoming 2009).

35. The Treaty of Westphalia, in 1648, is credited under conventional wisdom as creating an international political system based on territoriality. Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT'L L. 20, 28–29 (1948); *see also* Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2508 (2005) (explaining that "[t]he Westphalian conception of the state represented a break with the past because it drew all legitimate power into a single sovereign, who controlled absolutely a defined territory and its associated population").

36. D.J. Llewelyn Davies, *The Influence of Huber's* De Conflictu Legum *on English Private International Law*, 18 BRIT. Y.B. INT'L L. 49, 65 (1937); Arthur Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 COLUM. L. REV. 189, 190 (1942); *see also* Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 259 (explaining how Justice Story borrowed from Dutch theorist Ulrich Huber the concept of sovereign authority that each sovereign had jurisdictional prerogative within its borders); James Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century*

feature of public international law.[37] In international law, territoriality—and the related concept of sovereignty—implied external and internal independence.[38] Each nation-state possessed exclusive jurisdiction within its territory and, in theory, each state shared a legal equality with other states, despite economic or military disparities.[39] For international law, territorial borders limited and defined the state.[40]

Conflicts-of-law doctrine shared international law's commitment to territoriality.[41] Associated most famously with Joseph

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America, 38 AM. J. COMP. L. 73, 74–85 (1990) (describing how early American jurisdictional principles developed from Dutch theorists, including Huber).

37. John H. Herz, *Rise and Demise of the Territorial State*, 9 WORLD POL. 473, 480 (1957) ("From territoriality resulted the concepts and institutions which characterized the interrelations of sovereign units, the modern state system . . . . Only to the extent that it reflected their territoriality and took into account their sovereignty could international law develop in modern times."); *see also* S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18–19 (Judgment of Sept. 7):

> Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

The Apollon, 22 U.S. 363, 370 (1824) ("The laws of no nation can justly extend beyond its own territory, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction.").

38. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287 (6th ed. 2003) (describing the twinned concepts of external and internal sovereignty); Judith Resnick & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1921–23 (2003) (distinguishing external and internal territorial sovereignty); *cf.* Corfu Channel (U.K. & N. Ir. v. Alb.), 1949 I.C.J. 4, 35 (Apr. 9) (rejecting a state's claim of a right of intervention into the territory of another state, noting that "[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations").

39. Raustiala, *supra* note 35, at 2509 (citing HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 78 (Richard Henry Dana, Jr. ed., Boston, Little, Brown & Co., 8th ed. 1866)). The doctrine of equality of states can be traced back to theorists like Hobbes and Bodin. *See, e.g.*, JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 7–9 (M.J. Tooley trans., Basil Blackwell 1955) (1576); THOMAS HOBBES, LEVIATHAN ch. XV (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

40. Stuart Elden, *Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders*, 26 SCH. ADVANCED INT'L STUD. REV. 11, 11 (2006) (explaining how the international system is based on "three central tenets: the notion of equal sovereignty of states, internal competence for domestic jurisdiction, and territorial preservation of existing boundaries"); John Agnew, *Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics*, 95 ANN. ASS'N AM. GEOGRAPHERS 437, 437 (2005) ("Implicit in all claims about state sovereignty as the quintessential form taken by political authority are associated claims about distinguishing a strictly bounded territory from an external world and thus fixing the territorial scope of sovereignty.").

41. Conflict of laws is directly related to legislative jurisdiction issues: "Unless a state possesses legislative jurisdiction over the issue in question, its law may not properly be selected

Beale's writings[42] and the First Restatement,[43] vested rights theory determined what law applied to a particular dispute.[44] Vested rights theory was the handmaiden of territoriality because it "envision[ed] that rights will 'vest,' or attach, in a particular jurisdiction, based on the occurrence of certain events in that jurisdiction."[45] Once rights vested in one territorially defined jurisdiction, other jurisdictions were required to respect them. As Beale explained, "the chief task of the Conflict of Laws [is] to determine the place where a right arose and the law that created it."[46] For if "two laws were present at the same time and in the same place upon the same subject, we should . . . have a condition of anarchy."[47] The theory, if crude, was pragmatic: "By dividing the world into exclusive territorial units and positing that rights vested in only one state," vested rights would "in theory avoid the 'anarchy' of concurrent jurisdiction and assure uniformity in choice of law decisions."[48]

Given this adherence to territoriality, regulation of extraterritorial conduct was viewed as illegitimate—legislative jurisdiction would not extend beyond borders.[49] "Westphalian sovereignty . . . create[d] a system in which legal jurisdiction [was]

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by choice of law analysis." BORN & RUTLEDGE, *supra* note 24, at 561; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 cmt. b (1971); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) & cmt. b (1987).

42. 1 JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935); *see also* Elliott E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 379–85 (1945) (describing Beale's vested rights theory and how it was advanced on the Court by Justice Holmes).

43. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 378, 382, 383 (1934).

44. For a good overview, see LEA BRILMAYER, CONFLICT OF LAWS 20–46 (2d ed. 1995) (describing the "rise and fall of vested rights" and the influence of Beale and the First Restatement); *see also* Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 890–91 (2002) (describing the vested rights approach to conflict of laws).

45. Trachtman, *supra* note 24, at 999; *see also* BRILMAYER, *supra* note 44, at 22 (describing how rights would vest under Beale's vested rights theory).

46. BEALE, *supra* note 42, at 64.

47. *Id.* at 46; *see also* Cheatham, *supra* note 42, at 369, 379 (describing how under the vested rights theory, each act is subject to one law).

48. Dodge, *Judicial Unilateralism*, *supra* note 11, at 113; *see also* BRILMAYER, *supra* note 44, at 23 (explaining how Beale's choice of law approach was believed to have certain practical advantages, including predictability).

49. Buxbaum, *supra* note 5, at 268; *see also* Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 255 (2005) (describing how territorial limits on a court's power has taken many forms, including "the doctrine of *lex loci delicti* (the law of the place of the wrong) in choice of law, the presumptive territorial limits of prescriptive jurisdiction, the breadth of the act of state doctrine, and the great stinginess with which res judicata and collateral estoppel were applied across borders"); Parrish, *supra* note 16, at 8–13 (describing how concepts of territorial sovereignty guided personal jurisdiction doctrines until after the Second World War).

congruent with sovereign territorial borders."[50] In Justice Story's words, "every nation possesse[d] an exclusive sovereignty and jurisdiction within its own territory," and "it would be wholly incompatible with equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory."[51] Or, perhaps Beale was more to the point: "Since the power of a state is supreme within its own territory, no other state can exercise power there . . . . It follows generally that no statute has force to affect any person, thing, or act outside the territory of the state that passed it."[52]

In the United States, the territoriality principle reached its zenith in the 1800s. In 1812, Chief Justice John Marshall declared that the jurisdiction of a nation within its own territory is "necessarily exclusive and absolute" and, accordingly, that territory demarcated the limits of a nation's law.[53] Or, as Justice Holmes explained the presumption against extraterritoriality a century later in the famous *American Banana* case: "The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[54] Accordingly, statutes were construed "to be confined in . . . operation and effect to the territorial limits over which the lawmaker has general and legitimate power."[55]

Tethering power to territory made sense: the territoriality principle—as a limitation on legislative authority—served important goals. Conflicts of law, and the related law surrounding legislative

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50. Raustiala, *supra* note 35, at 2509.

51. JOSEPH STORY, COMMENTARIES ON THE CONFLICTS OF LAWS 19, 21 (Hilliard, Gray & Co. 1834); *see also* BORN & RUTLEDGE, *supra* note 24, at 564 ("Story's view of international law was highly influential in nineteenth-century America."); *cf.* The Apollon, 22 U.S. 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens"); Pennoyer v. Neff, 95 U.S. 714, 720 (1878) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse."); Mills v. Duryee, 11 U.S. (7 Cranch) 481, 486 (1813) (Johnson, J., dissenting) ("[J]urisdiction can not be justly exercised by a state over property not within the reach of its process, or over persons not owing them allegiance or not subjected to their jurisdiction . . . .").

52. BEALE, *supra* note 42, at 311–12.

53. Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812); *see also* Sandberg v. McDonald, 248 U.S. 185, 195 (1918) ("Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction."); The Antelope, 23 U.S. (10 Wheat) 66, 122 (1825) (explaining that "no nation can prescribe a rule for others" and finding the United States does not have the authority to nullify foreign laws); Rose v. Himely, 8 U.S. (4 Cranch) 241, 279 (1807) (turning to international law and territorial limits in defining personal jurisdiction).

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

55. *Id.* at 357.

jurisdiction, sought to accommodate the competing policies of independent sovereigns.[56] With the world carved up into separate jurisdictional regions, territoriality became an easily applied principle to decide whose law should govern.[57] Jurisdiction based on territory served the goals of predictability and efficiency:

> By establishing a priori that only the nation where an event occurs has power, it limited states' lawmaking competence so that conflict was practically impossible .... The rationale was simple: because sovereignty is defined by territorial control, any other principle would be a source of friction and discord "inconvenient to the commerce and general intercourse of nations."[58]

Yet by the mid-1900s, territoriality's heyday was over.

B. Territoriality's Demise

The demise of territoriality accompanied changes in legal theory. In the nineteenth century, when territoriality held its greatest sway, classic legal thought and legal formalism dominated the law. Legal rules were "fixed, inexorable, and logically deducible."[59] An underlying assumption was that "law is a closed, logical system."[60] From a formalistic perspective, territoriality fit nicely with this assumption.[61] Answers to legislative jurisdiction questions—as with judicial jurisdiction questions—could be reduced to a simplistic question: "Is the activity there?"

By the end of the Second World War, pragmatism, legal realism, and other related theories had discredited (or, at least

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56. Kramer, *supra* note 6, at 188–89.

57. *See* Gerber, *supra* note 17, at 293 (explaining how territoriality "has much value as a conflict-avoidance mechanism because territory has well-defined and easily identifiable boundaries," and that "[a]ssuming that relevant conduct can be identified, the task of identifying the territory in which it occurred is easy enough, and thus it avoids jurisdictional overlaps").

58. Kramer, *supra* note 6, at 189 (citing ULRICH HUBER, DE CONFLICTU LEGUM, *translated in* D.J. Llewelyn Davies, *The Influence of Huber's "De Conflictu Legum" on English Private International Law*, 18 BRIT. Y.B. INT'L L. 49, 66 (1937)); *see also* Gerber, *supra* note 19, at 193–202 (describing the development of the jurisdictional paradigm).

59. Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 316 (1990) (citing MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860 259 (1977)).

60. GRANT GILMORE, THE AGES OF AMERICAN LAW 62 (1977):

> Judges do not make law: they merely declare the law which, in some Platonic sense, already exists. The judicial function has nothing to do with the adaptation of rules of law to changing conditions; it is restricted to the discovery of what the true rules of law are and indeed always have been. Past error can be exposed and in that way minor corrections can be made, but the truth, once arrived at, is immutable and eternal.

61. RAUSTIALA, *supra* note 34 (describing how territoriality fits with classical legal thought).

displaced) classic legal theory.[62] Legal realists attacked the formalist assumptions[63] that undergirded territorial approaches to law.[64] The power to regulate, realists argued, did not follow "naturally and inevitably from some self-evident theory" like territoriality.[65] As they did with judicial jurisdiction, realists deconstructed the law and pushed for "reasonableness" as the touchstone of any jurisdictional analysis.[66] Territoriality—as a concept limiting law's geographic application—lost some of its potency.[67]

Concomitant with changes in legal theory was the reality on the ground. In the 1920s, the international cartel movement created complex business relationships that crossed national borders.[68] In the United States, the rise of the modern administrative state meant the

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62. *See id.* (explaining how formalism gave way in the 1930s and 1940s to pragmatism, functionalism, and legal realism, reflecting an interest in replacing territoriality with effects test or interest-based jurisdiction (citing Thomas C. Grey, *The New Formalism* 8 (Stanford Law Sch. Pub. Law & Legal Series, Working Paper No. 4, 1999), *available at* http://ssrn.com/abstract=200732)). *See generally* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 32–64 (1995) (describing the legal realist response to legal formalism).

63. BRILMAYER, *supra* note 44, at 33–46 (describing how legal realism challenged territorial approaches to jurisdiction and choice of law); Kramer, *supra* note 6, at 192, 202, 208–10 (describing how the "[t]raditional choice of law theory had been thoroughly dismantled by a realist critique demonstrating (among other things) that the territorial principle reflected neither what states do nor what they should necessarily want in multistate situations").

64. BRILMAYER, *supra* note 44, at 35 (explaining how "[t]he legal realist approach was so fundamentally antithetical to both the abstract concept of territorial sovereignty and Beale's conception of vested rights"); *see, e.g.*, WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS ix (Harvard Univ. Press 1942) (criticizing the Conflict of Laws approach developed by Beale and the First Restatement of Conflict of Laws); David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 176–82 (1933) (explaining the problems with existing approaches); Felix S. Cohen, *Transcendental Nonsense and Functional Approach*, 35 COLUM. L. REV. 809, 810–21 (1935) (criticizing formalist approaches to personal jurisdiction); *see also* Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 379 (1966) (describing how scholars like Cavers, Cook, Leflar, Lorezen, Rheinstein, Stumberg, and Yntema criticized the territorial approach embodied in the First Restatement of Conflict of Laws).

65. Kramer, *supra* note 6, at 209; *see also* ERNEST LORENZEN, SELECTED ARTICLES ON THE CONFLICTS OF LAWS 11 (1947) ("The common law has not hidden in its bosom a logical set of rules which can be derived from its notion of territoriality. . . . [T]he adoption of the one rule or the other depends entirely upon considerations of policy which each sovereign state must determine for itself.").

66. *See* Parrish, *supra* note 16, at 13–18 (citing sources and discussing the move to reasonableness in jurisdictional analysis).

67. In the conflicts of law context, theorists after Beale offered multiple theories to replace Beale's territorial rules that were embodied in the First Restatement. *See, e.g.*, DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS (1965); BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963) (proffering a variety of conflict of law theories); ALBERT A. EHRENZWEIG, A TREATISE OF THE CONFLICT OF LAWS (1962); ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW (3d ed. 1977); ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS (1965).

68. Gerber, *supra* note 17, at 293.

dramatic expansion of comprehensive regulation.[69] As economies became more interdependent, the pressure to regulate cross-border activity increased.[70] For many, "an increasingly interdependent and globalized world . . . rendered strict territorial limits on jurisdiction increasingly unworkable."[71] And, as international law was still in its most nascent stages and seemed ill-equipped to address transboundary challenges, expanding the geographic reach of domestic laws to relieve those pressures appeared logical.

Territoriality had other problems that made it open to attack. Not only was territoriality perceived as an insufficiently nuanced concept incapable of solving jurisdictional questions in a modern world with a fast-paced global economy,[72] its pedigree was also tainted.[73] Some saw territoriality as having been used for regrettable ends. On the one hand, the United States had hidden behind territoriality as a means of limiting constitutional protections.[74] In the international law context, courts invoked territoriality—and the related concept of

69. Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 12–13 (2002) (describing how "[i]n the New Deal and immediate postwar eras, domestic regulatory law expanded markedly in the U.S. and across the globe"); *see also* RAUSTIALA, *supra* note 34 (describing the impact the rise of the regulatory state had on concepts of territoriality); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986) (describing the evolution of the federal regulatory system in the United States); Slaughter & Zaring, *supra* note 6, at 2–5 (connecting the growth of extraterritoriality with the rise of the regulatory state).

70. For a discussion of how this occurred in the domestic context, see Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 506–09 (1997) (discussing how as states became interdependent, pressure resulted on the courts to interpret the dormant commerce clause as protecting a single, common market, rather than the states being divided into a series of markets).

71. Raustiala, *supra* note 35, at 2512; *see also* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1185 (E.D. Pa. 1980) (describing the "vastly altered economic climate since the time of *American Banana*").

72. Several scholars have criticized territorial conceptions in a modern economy. *See supra* note 7 (listing several scholarly works criticizing the concept of territoriality as outdated); *see also* Born, *supra* note 6, at 1–2 (arguing against territorial approaches to legislative jurisdiction); Turley, *supra* note 28, at 659–62 (arguing that courts should reverse the presumption that statutes do not apply extraterritorially absent clear congressional intent to the contrary and instead assume that statutes do apply extraterritorially absent clear congressional intent to the contrary).

73. *See* BRILMAYER, *supra* note 44, at 247 (explaining how territoriality's "association with the old-fashioned vested rights approach has given it something of a bad name" and that "territoriality is currently out of fashion").

74. The Constitution has been held to have no extraterritorial effect. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens." (citing Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909))).

sovereignty—to prevent enforcement of human[75] and indigenous rights.[76] Liberal internationalists disliked territoriality, preferring, as a descriptive matter, to disaggregate the state and focus on interests, not territorial power.[77] International realists,[78] in contrast, while using territory to define the state as a rational actor, were skeptical of the territorial theories, believing that states should fend for themselves and pursue their own state interests.[79] For realists, only politics and power—not international legal norms tethered to territoriality theories—should constrain state action.[80] Extraterritorial laws were thus acceptable only so long as they served American hegemonic interests.[81]

C. The Rise of the Effects Test

As territoriality lost its hold over law,[82] the prohibition against extraterritoriality weakened to a mere presumption.[83] Congress had

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75. *See, e.g.*, Catherine Powell, *Locating Culture, Identity, and Human Rights*, 30 COLUM. HUM. RTS. L. REV. 201, 206–07 (1999) (noting how governments raise claims of sovereignty to limit human rights accountability).

76. Austen Parrish, *Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights*, 31 AM. INDIAN L. REV. 291, 297–302 (2007); *see also* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 26–28 (2d ed. 2004) (describing how European concepts of territorial sovereignty were antithetical to traditional ways indigenous groups organized with decentralized political structures and overlapping spheres of territorial control).

77. David G. Post, *The "Unsettled Paradox": The Internet, the State, and the Consent of the Governed*, 5 IND. J. GLOBAL LEGAL STUD. 521, 540 (1998) (describing how liberal theory focuses on interests, rather than territoriality and power).

78. International realists are now commonly associated with Sovereigntist or revisionist scholarship. *See* Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64, 72–76 (2006) (describing different approaches to realism); *see also* Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1405 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005) (describing Sovereigntists as nationalists or revisionists)); Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and its False Prophets*, 79 FOREIGN AFF. 9, 9–15 (2000) (describing Sovereigntist theory).

79. BRILMAYER, *supra* note 44, at 41–46, 115 (describing international realism, its attack on territoriality theories of choice of law, and its dismissal of "rules of international law as simple sentimental nonsense"); Parrish, *supra* note 1 (describing Sovereigntist approaches to international law).

80. HANS J. MORGENTHAU, IN DEFENSE OF THE NATIONAL INTEREST 36 (1951); *see also* Parrish, *supra* note 1 (listing sources).

81. Tonya Putnam's empirical work traces how extraterritorial laws have been used for instrumental ends. *See* Tonya Putnam, *Courts Without Borders: The Domestic Sources of U.S. Extraterritorial Regulation* (Mar. 4, 2007) (on file with the Vanderbilt Law Review).

82. International law now recognizes several bases of jurisdiction that are decoupled from territory. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987) (describing factors used to determine jurisdiction to prescribe, including territoriality, effects, nationality, and protection); *see also* MARK W. JANIS, AN INTRODUCTION TO

the power to enact extraterritorial laws, but it was presumed not to have used that power in most circumstances. The development of the effects test, however, marked the beginning of the end for meaningful territorial limits on legislative jurisdiction.

The precursor to the effects test appeared in the 1920s.[84] The Permanent Court of International Justice ("ICJ") in the famous *Lotus* case set the groundwork by establishing a presumption in favor of a nation's legislative jurisdiction, even over conduct occurring abroad.[85] In that case, a French ship collided with a Turkish ship, causing several of the Turkish passengers to drown.[86] The ICJ sustained the Turkish government's right to prosecute the French officer allegedly responsible for the crash. The ICJ held that Turkey had jurisdiction over acts occurring in French territory (i.e., aboard the French ship), when its effects were felt in Turkish territory (i.e., on the Turkish ship).[87]

After *Lotus* set the groundwork, other cases soon followed. In 1945, Judge Hand injected the effects test into U.S. law with his landmark *Alcoa* opinion.[88] In *Alcoa*, the Court held that the Sherman Act applied to foreign conduct impacting the United States, even when

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INTERNATIONAL LAW 317–25 (4th ed. 2003) (describing different principles of jurisdiction recognized under international law).

83. Turley, *supra* note 28, at 607 ("What began . . . as a prohibition against the perceived violation of international law through extraterritorial regulation became simply a legal test for subject matter jurisdiction.").

84. Admittedly, "[a] few early American state court decisions also embraced very limited versions of what would come to be known as the 'effects doctrine,' although such decisions appear to have been rare." BORN & RUTLEDGE, *supra* note 24, at 566 n.27 (citing cases).

85. S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 16 (Judgment of Sept. 7), *available at* http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/ (rejecting notions of strict territoriality and finding that national regulatory efforts are presumptively valid); *see* BORN & RUTLEDGE, *supra* note 24, at 567–68 (describing the importance of the *Lotus* case in the creation of the effects test); Gerber, *supra* note 19, at 196–97 (describing how the *Lotus* case led to the creation of the "effects test" by undermining territoriality as a limiting constraint on legislative jurisdiction); Gerber, *supra* note 17, at 293–94 ("In 1927, the *Lotus* case . . . encouraged further expansion of [the objective territoriality principle's] scope" and "led to the development of the effects principle . . . .").

86. *S.S. "Lotus,"* 1927 P.C.I.J., at 6.

87. *Id.* at 23 (explaining that "if . . . a guilty act committed on the high seas produces its effects on a vessel flying another flag . . . the same principles must be applied as if the territories of two different States were concerned" and that Turkey had jurisdiction over effects felt within its territory); *see also* Najeeb Samie, *The Doctrine of "Effects" and the Extraterritorial Application of Antitrust Laws*, 14 U. MIAMI INTER-AM. L. REV. 23, 31 (1982) (describing the *S.S. Lotus* holding).

88. *See* United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 443–44 (2d Cir. 1945) (noting that agreements, though made abroad, are still unlawful if they are intended to affect imports and actually do affect them). For an early analysis of the use of the effects test in the criminal context, see Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SUPP. 435 (1935).

that conduct occurred abroad.[89] Judge Hand declared that "it is settled law[90] . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its border that has consequences within its borders that the state reprehends . . . ."[91] The test asserted that activities abroad, even those of foreign citizens, may be regulated because of their impact on interests within the nation-state's territory.[92] The decision "ushered in [a] new era and marked a dramatic and undeniable break with" the tradition of territoriality.[93] Coincidentally, 1945 was also the year the Supreme Court decided *International Shoe Co. v. Washington*[94]—a case that interred territoriality in the related adjudicative jurisdiction context.[95]

Often seen as a tool for expanding American hegemony, the effects test gained widespread currency among U.S. courts in the years following *Alcoa*.[96] In 1965, the Second Restatement of Foreign

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89. *Alcoa*, 148 F.2d at 444.

90. Samie, *supra* note 87, at 29 (noting that despite Judge Hand's language, "*Alcoa* actually represented a deviation from prior holdings of the United States courts").

91. *Alcoa*, 148 F.2d at 443; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987) ("[A] state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory . . . ."); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965) (providing that a state has jurisdiction to prescribe law to conduct outside its territory if the effect of the conduct within the territory is substantial and if the conduct meets certain other requirements); THE INTERNATIONAL CHAMBER OF COMMERCE, THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAW 36 (Dieter Lange & Gary Born eds., 1987) (explaining how the effects test "authorizes application of national laws to conduct that, while it does not take place on national territory, has certain 'effects' within national territory").

92. Samie, *supra* note 87, at 23 (citing Int'l Law Ass'n, *Report of the Fifty-First Conference*, Tokyo, Japan, Aug. 16–22, 1964, at 369).

93. Courtney G. Lytle, *A Hegemonic Interpretation of Extraterritorial Jurisdiction in Antitrust: From* American Banana *to* Hartford Fire, 24 SYRACUSE J. INT'L L. & COM. 41, 57 (1997).

94. 326 U.S. 310 (1945); *see also* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702–03 (1982) (explaining that personal jurisdiction is concerned with an individual's liberty interest and is not intended to protect the territorial sovereignty of the states); Shaffer v. Heitner, 433 U.S. 186, 211–12 (1977) (disclaiming the notion from *Pennoyer v. Neff* that "territorial power is both essential to and sufficient for jurisdiction").

95. For a description of how *International Shoe* broke from the territorial jurisdictional theories established in *Pennoyer*, see Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 692, 697–98 (1987) (describing *International Shoe* as both a break with, and a refinement of, *Pennoyer*). I have previously described how territorial concepts were discarded in the personal jurisdiction context, even in international cases. *See* Parrish, *supra* note 16, at 49–50 (discussing the assertion of jurisdiction over Canada in the *Trail Smelter* case). The same transformation occurred in other areas. *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318–20 (1950) (replacing territorial-based notice rules with rules focused on fairness).

96. *See* BORN & RUTLEDGE, *supra* note 24, at 642 (explaining how "*Alcoa*'s effects test rapidly gained wide acceptance in the United States"); *see also* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 (1969) ("Zenith's evidence, although by no means conclusive,

Relations Law stated that federal statutes apply to "conduct occurring within, or *having an effect within*, the territory of the United States."[97] By the 1980s, the Court's adherence to territoriality as expressed in the *American Banana* case, although "still often quoted," did not reflect U.S. law.[98] And although other countries first challenged the effects test as an illegitimate expansion of U.S. economic and political hegemony[99]—particularly in the 1950s through 1970s[100]—by the 1990s most countries had come to accept the doctrine as a valid basis to exercise legislative jurisdiction.[101]

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was sufficient to sustain the inference that Zenith had in fact been injured to some extent by the Canadian pool's restraints upon imports of radio and television sets."); Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 697 (1962) (finding that, "where the plaintiff proves a loss, and a violation by defendant of the antitrust laws of such a nature as to be likely to cause that type of loss," the jury can infer that a causal relationship exists); Steele v. Bulova Watch Co., 344 U.S. 280, 286 (1952) ("Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States."); Alford, *supra* note 13, at 9 ("The *Alcoa* 'effects doctrine' rapidly gained acceptance in the United States.") .

97. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965) (emphasis added).

98. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 415 cmt. n.2 (1987) (citing United States v. Sisal Sales Co., 274 U.S. 268 (1927) and United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945)). For an argument for the primacy of effects in choice-of-law analysis, see Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 894–98 (2002).

99. *See* BORN & RUTLEDGE, *supra* note 24, at 569, 573, 648–50 (explaining how "post-War assertions of U.S. legislative jurisdiction often aroused diplomatic protests and legal objections from foreign states"); Alford, *supra* note 13, at 9 (exploring how "*Alcoa* [and its effects test] was met with disapproval from abroad" and "frequently criticized"); P.M. Roth, *Reasonable Extraterritoriality: Correcting the "Balance of Interests,"* 41 INT'L & COMP. L.Q. 245, 247 (1992) (describing how "the response [to *Alcoa*] from foreign States made it clear that they were far from accepting this broad-reaching jurisdiction of the American courts"); John B. Sandage, Forum Non Conveniens *and the Extraterritorial Application of United States Antitrust Law*, 94 YALE L.J. 1693, 1698 (1985) (explaining that the effects test was perceived as "Yankee 'jurisdictional jingoism' [that] created wide-spread resentment"); *see also* 1 SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD §§ 4:16–17 (3d ed. 1997) (providing examples of countries that enacted "blocking legislation" as a means of countering U.S. jurisdictional assertions).

100. By the late 1970s, many countries had enacted blocking statutes in response to perceived exorbitant assertions of jurisdiction. *See* P.C.F. Pettit & C.J.D. Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697, 707–14 (1982) (listing blocking statutes).

101. *See* BORN & RUTLEDGE, *supra* note 24, at 569 (explaining that "recently, a number of European states have begun to apply selected national regulatory statutes extraterritorially with rigor approaching that of the United States"); Gerber, *supra* note 17, at 295 ("Resistance to the effects principle outside the United States has weakened as increasing numbers of states have recognized the value of applying their laws to conduct they consider harmful, regardless of where it occurs."); Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 511 (1998) (noting that the "European Union appears to be moving towards acceptance of the American notion of jurisdiction based upon 'effects' " and citing sources).

Yet the effects test did more than legitimize a basis for legislative action; it undermined the presumption of territoriality. When Congress was silent as to a statute's geographic reach, the courts had traditionally presumed Congress intended the statute to apply only within U.S. borders.[102] In those circumstances, courts required clear evidence of congressional intent to overcome the presumption and find that the statute applied to conduct occurring abroad.[103] The presumption was founded on a "commonsense notion" that Congress generally legislates "with domestic conditions in mind."[104] With the advent of the effects test, however, if foreign conduct substantially affects the United States, then extraterritoriality is now often assumed.[105] Accordingly, courts have employed the effects test to apply federal laws extraterritorially, despite the lack of evidence that Congress intended this reach.[106] And

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102. Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." (internal quotation omitted)); *see also* Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) (describing the presumption against extraterritoriality).

103. *Aramco*, 499 U.S. at 248 (requiring the "affirmative intention of Congress clearly expressed" (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957))).

104. Smith v. United States, 507 U.S. 197, 204 n.5 (1993). For a discussion of the reasons for the presumption against extraterritoriality, see Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 513–17 (1997) (describing reasons for the presumption against extraterritoriality). The presumption "serves to protect against unintended clashes between our laws and those of other nations." *Aramco*, 499 U.S. at 248.

105. *See, e.g.*, Pakootas v. Teck Cominco Metals Ltd., 452 F.3d 1066, 1071 (9th Cir. 2006) (noting "the well-established principle that the presumption [against extraterritoriality] is not applied where failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States"); *In re* Simon, 153 F.3d 991, 995 (9th Cir. 1998) (finding presumption inapplicable when effects felt in the United States); Envtl. Def. Fund v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993) (noting that "the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States" even if significant effects of the conduct are felt abroad); Tamari v. Bache & Co. (Lebanon) S.A.L., 730 F.2d 1103, 1108 n.11 (7th Cir. 1984) (finding reliance on the presumption "misplaced" when conduct outside the United States "could otherwise affect domestic conditions"); Laker Airways, Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 925 (D.C. Cir. 1984) (noting that the presumption against extraterritoriality is inapplicable when the regulated conduct is "intended to, and results in, substantial effects within the United States"); Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968) (rejecting presumption and finding Securities Exchange Act to apply extraterritorially based on effects in the United States); *see also* Dodge, *Understanding the Presumption*, *supra* note 11, at 124 (noting that U.S. legislation should apply to conduct that affects domestic conditions regardless of where the conduct occurs).

106. *See* Bradley, *supra* note 104, at 519 (describing criticism of the presumption against extraterritoriality and noting that "the courts have construed several federal statutes as having extraterritorial effect despite the absence of clear extraterritorial language"); *see also* Kramer, *supra* note 6, at 190–97 (examining situations in which courts have been willing to apply federal statutes extraterritorially despite a lack of clear extraterritorial language); Turley, *supra* note 28, at 608–17 (same).

although the presumption against extraterritoriality remains (at least on the books), in reality it has lost almost all its influence.[107]

By the turn of the twenty-first century, the effects test had killed off any guarantee that territoriality would constrain courts. Although the test once required that the defendant intend the effect to be felt in the United States, many courts now omit any intent requirement.[108] Some courts find extraterritorial jurisdiction even when the effects seem insubstantial. As Kal Raustiala has explained: "[T]he doctrinal reversal [was] so complete that, recently, the D.C. Circuit went so far as to hold that even *foreign* plaintiffs could sue *foreign* defendants under the Sherman Act for harms that occurred overseas, as long as some harmful effect was felt within the United States."[109] Even in the environmental context—where territoriality at one time applied with greater force[110]—the Ninth Circuit concluded

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107. *See* Guzman, *supra* note 98, at 925 (noting that "[a]lthough the presumption against extraterritoriality remains part of the legal landscape, it has suffered a significant loss of influence"); *cf.* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965) ("Rules of United States statutory law . . . apply only to conduct occurring within, or having effect within, the territory of the United States . . . ."). That the effects test reverses the presumption of territoriality is now accepted by academics and law students as almost black-letter law, as demonstrated by a sampling of recently published articles. *See, e.g.*, Paul Boudreaux, *Biodiversity and a New "Best Case" for Applying the Environmental Statutes Extraterritorially*, 37 ENVTL. L. 1107, 1115–17 (2007) (arguing that "spillovers" or effects reverse the presumption of territoriality); Melissa Feeney Wasserman, *Divided Infringement: Expanding the Extraterritorial Scope of Patent Law*, 82 N.Y.U. L. REV. 281, 300–09 (2007) (arguing that the extraterritorial application of patent law should be expanded through the effects test); Carrie Greenplate, Comment, *Of Protection and Sovereignty: Applying the Computer Fraud and Abuse Act Extraterritorially to Protect Embedded Software Outsourced to China*, 57 AM. U. L. REV. 129, 160–65 (2007) (stating that the effects test permits a state to regulate extraterritorially); João C. J. G. de Medeiros, Note, *How the Presumption Against Extraterritoriality Has Created a Gap in Environmental Protection at the 49th Parallel*, 92 MINN. L. REV. 529, 553 (2007) (arguing that the effects test is an exception to the presumption against extraterritoriality).

108. *See* BORN & RUTLEDGE, *supra* note 24, at 646 (citing Sabre Shipping Corp. v. Am. President Lines, 285 F. Supp. 949 (S.D.N.Y. 1968) and United States v. Imperial Chem. Indus., 100 F. Supp. 504 (S.D.N.Y. 1951)).

109. Raustiala, *supra* note 35, at 2515 (noting how the D.C. decision was overturned by the U.S. Supreme Court); *see also* Slaughter, *supra* note 6, at 732 (explaining that "[a]t its high point, the effects doctrine permitted the application of U.S. antitrust laws to an alleged conspiracy in restraint of trade between a Japanese parent company and its U.S. subsidiary operating in Indonesia with regard to an agreement to ship logs to Japan" (citing Indus. Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982))).

110. *See* ENVTL. LAW INST., STRENGTHENING U.S.-MEXICO TRANSBOUNDARY ENVIRONMENTAL ENFORCEMENT: LEGAL STRATEGIES FOR PREVENTING THE USE OF THE BORDER AS A SHIELD AGAINST LIABILITY 37–40 (2002) (noting that "the presumption against extraterritoriality has been applied with greater force to environmental laws"); Mark R. Ruppert, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No"*, 40 A.F. L. REV. 1, 14 (1996) (arguing that the "available commentary on the issue of extraterritorial application of U.S. environmental statutes unanimously concludes that these laws do not apply outside U.S. territory"); Anna D. Stasch, Arc Ecology v. United States Department of Air Force:

recently that U.S. environmental laws can regulate Canadian companies operating solely in Canada in accordance with Canadian law.[111] The court's reasoning underscored how completely the effects test has overpowered the territorial presumption: if U.S. law seeks to remedy harmful effects in the United States, then, according to the Ninth Circuit, the law is not being applied extraterritorially, regardless of where the conduct giving rise to the claim occurred.[112]

Certainly, at times, courts have attempted to pull back from the effects test. The Supreme Court has suggested that international comity[113] may limit the extraterritorial application of U.S. laws.[114] Drawn from conflicts-of-law doctrine[115]—referred to alternatively as the balancing, rule of reason, or interest approach[116]—courts have attempted to temper the effects test and infuse comity into the jurisdictional analysis.[117] In some ways, comity became a substitute

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Extending the Extraterritorial Reach of Domestic Environmental Law, 36 ENVTL. L. 1065, 1070–72, 1078–84 (2005) (describing how environmental laws have been territorially limited, but explaining how to achieve extraterritorial application of domestic environmental laws); Turley, *supra* note 28, at 655 (explaining that environmental laws have been typically territorially constrained).

111. Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1075–77 (9th Cir. 2006).

112. For a recent critique of the Ninth Circuit's decision, see Libin Zhang, Pakootas v. Teck Cominco Metals, Ltd., 31 HARV. ENVTL. L. REV. 545, 559 (2007) (describing the "tortuous and unsound reasoning" of the Ninth Circuit decision).

113. Hilton v. Guyot, 159 U.S. 113, 163–64 (1895) (defining international comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens").

114. *See, e.g.*, F. Hoffmann-La Roche, Ltd. v. Empagran, SA, 542 U.S. 155, 164–65 (2004) (explaining that a court should "ordinarily construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations" and noting the need to avoid conflicts "in today's highly interdependent commercial world"); Lauritzen v. Larsen, 345 U.S. 571, 583–92 (1953) (looking towards principles of international law in defining the reach of federal statutes and adopting a multi-factor balancing approach); *see also* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297–98 (3d Cir. 1979) (applying a balancing of interests approach); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613–14 (9th Cir. 1976) (limiting the effects test through a rule of reason or interest balancing approach that accounts for international comity concerns).

115. *See* Brilmayer, *supra* note 33, at 48–68 (describing the interest analysis approach to conflict of laws). The interest analysis approach to conflict of laws is, of course, most commonly associated with Brainerd Currie's work in the 1950s and 1960s. *See, e.g.*, CURRIE, *supra* note 67; *see also* Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 13 (1989) (describing the interest analysis approach to conflict of laws).

116. The jurisdictional "rule of reason" is believed to have been first described by Kingman Brewster. *See* KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958).

117. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987); *see also* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS: ESSAYS IN PRIVATE INTERNATIONAL LAW 228 (1996) (describing the rule of reason approach); Alford, *supra* note 13, at 10 ("To temper the harsh results created by the *Alcoa* judgment, several Courts of Appeals have modified the 'effects doctrine' by incorporating a

for territoriality—a way to moderate the jurisdictional analysis in a particularly pragmatic, nonformalistic way.[118] But even then, the Court has found international comity to apply in only the rarest of circumstances.[119] And when comity does apply, significant questions exist as to whether courts are able to evaluate foreign interests meaningfully[120] or do so in a way that does not inevitably favor U.S. interests.[121] Comity as a preferred touchstone for legislative

'jurisdictional rule of reason' in order to show due regard, in the interests of international comity, to the foreign sovereignty of third countries.").

118. BORN & RUTLEDGE, *supra* note 24, at 653 (questioning whether comity is a "substitute for the *Charming Betsy* presumption and the territoriality presumption"). In other ways, comity analysis seemed to be a way for followers of Currie's interest analysis to reinvigorate interest-based theories after they had been rejected in domestic conflict of laws.

119. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797–98 (1993) (finding that comity concerns come into play only after the court has determined that the acts complained of are subject to the Sherman Act); Nat'l Bank of Can. v. Interbank Card Ass'n, 666 F.2d 6, 8 (2d Cir. 1981) (rejecting *Timberlane*'s comity considerations and stating that jurisdiction is possible only with an appreciable anticompetitive effect on this country's commerce); *see also* Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The* Hartford Fire *Case*, 1993 SUP. CT. REV. 289, 295–97 (1993) (explaining how *Hartford Fire* ignored comity concerns); Gerber, *supra* note 17, at 296 (explaining how the Court in *Hartford Fire* "appeared to dispense with balancing considerations, at least for most cases"); Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563, 564 (2000) (explaining how the *Hartford Fire* case "dealt comity a near death blow").

120. *See* Griffin, *supra* note 101, at 519 ("American and foreign judges, as well as commentators, question the competence of judges to evaluate the diplomatic, national security, and international economic issues [raised by the balancing test]."); Philip J. McConnaughay, *Reviving the "Public Law Taboo" in International Conflict of Laws*, 35 STAN. J. INT'L L. 255, 284–85 (1999) (arguing that courts are not equipped to identify and balance the interests of multiple countries); Michael G. McKinnon, *Federal and Legislative Jurisdiction Over Entities Abroad: The Long-Arm of U.S. Antitrust Law and Viable Solutions Beyond the* Timberlane/Restatement *Comity Approach*, 21 PEPP. L. REV. 1219, 1277 (1994) (noting the courts' inherent tendency to discount the strength of the foreign regulatory interests involved); *see also* Laker Airways Ltd. v. Sabena, 731 F.2d 909, 948–51 (D.C. Cir. 1984) ("We are in no position to adjudicate the relative importance of antitrust regulation or nonregulation to the United States and the United Kingdom."); *In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) ("The judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country . . . .").

121. *See* BORN & RUTLEDGE, *supra* note 24, at 575, 655 ("Other critics of the rule of reason have argued that U.S. courts inevitably resolve interest-balancing tests in favor of U.S. interests."); Alford, *supra* note 13, at 12 ("U.S. courts in ultimately every case found the balance tipped in favor of asserting jurisdiction over the foreign entity except where the court found no cognizable adverse impact on U.S. competitors' interests whatsoever . . . ."); Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 588–95 (1983) (suggesting that U.S. courts have shown a parochial bias in applying the interest-balancing test); McKinnon, *supra* note 120, at 1278 ("As long as there is more than a *de minimis* United States regulatory interest, courts have refused to allow interest-balancing to defeat an otherwise legitimate antitrust claim."); *see also Laker Airways Ltd.*, 731 F.2d at 948–51 ("A pragmatic assessment of those decisions adopting an interest balancing approach indicates *none where U.S. jurisdiction was declined* when there was more than a *de minimis* United States interest . . . . When push comes to shove, the domestic forum is rarely unseated."); *cf.* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 158 (2005) (Scalia, J., dissenting) ("The fine-tuning of

jurisdiction analysis proved short lived[122] and a poor means of limiting extraterritoriality.[123]

II. THE DANGERS OF EXTRATERRITORIALITY

Academics and courts have unwisely underestimated the problems created by the effects test, and with it the problems associated with countries applying their law beyond their borders. As described below, the unwillingness to respect international comity is not the primary concern, as valid as that concern may be. Extraterritoriality is problematic because it poses a significant threat to long-term American interests.

A. The Effects Test Examined

The effects test is problematic for both conceptual and pragmatic reasons. The test presently provides no meaningful constraint on the exercise of jurisdiction. At its inception in the 1940s, the effects test had a limited impact. In a less interdependent world, the likelihood of foreign corporations having an effect in the U.S. market was small. But now, the "tremendous increase in cross-border activity" has all but guaranteed an increase in overlapping jurisdictional conflicts.[124] As famously once said in the antitrust

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[extraterritorial] legislation . . . would be better left to Congress. To attempt it through the process of case-by-case adjudication is a recipe for endless litigation and confusion . . . .").

122. *See* Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 229–37 (2001) (describing the rise and fall of interest balancing). For a discussion of interest-balancing in the domestic conflict of laws context, see Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53 (1991).

123. *See* Philip E. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT'L L. 53, 57 (1995) (arguing that the balancing and international comity approach has lost any influence); Waller, *supra* note 119, at 564–66 (noting that with the *Hartford Fire* decision, and decisions by the lower courts following *Hartford Fire*, "comity as a legal doctrine in the courts has seen better days and will rarely be successful" in dismissing extraterritorial litigation and that now "[t]raditional comity concerns have little role to play"). Many have criticized the comity approach. *See, e.g.*, Jack I. Garvey, *Judicial Foreign Policy-Making in International Civil Litigation: Ending the Charade of Separation of Powers*, 24 LAW & POL'Y INT'L BUS. 461, 482–91 (1993) (arguing comity approach provides courts with questionable power to affect foreign relations); James M. Grippandom, *Declining to Exercise Extraterritorial Antitrust Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine*, 23 VA. J. INT'L L. 395, 399–403 (1983) (questioning legitimacy of reliance on comity); Steven A. Kadish, *Comity and the International Application of the Sherman Act: Encouraging Courts to Enter the Political Arena*, 4 NW. J. INT'L L. & BUS. 130, 156–66 (1982) (criticizing comity in theory and in practice).

124. Hannah L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance*, 42 VA. J. INT'L L. 931, 940, 943 (2002); *see, e.g.*, BORN & RUTLEDGE, *supra* note 24, at 573 (describing the jurisdictional issues created by globalization); Brilmayer, *supra* note 33, at 18 ("Today's world,

context, "everything affects everything."[125] The effects test thus gives license for near universal jurisdiction.[126] In so doing, it has "dramatically expanded the potential for concurrent jurisdiction and its accompanying conflict potential."[127] In other words, the effects test has permitted precisely what legislative jurisdiction is designed to prevent: conflicts with foreign states.[128]

The effects test has also encouraged courts to exercise jurisdiction broadly. Because statutes are typically silent as to their geographic application, courts must determine legislative jurisdiction from this silence.[129] Once the effects test is embraced as a way to reverse the presumption against extraterritoriality, declining to extend jurisdiction becomes near impossible. The court presumes that Congress intended to regulate whenever harm (an effect) is felt in the United States, because surely Congress would wish to deter conduct causing harm and provide redress for past harm. To reach a contrary result, a court would need to account for foreign interests and then find that those foreign interests trump the previously presumed, yet fictional, congressional intent.[130] But significant forces—and what

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however, contains many foreign corporations whose activities have effects on American markets solely as an incidental byproduct of their foreign activities.").

125. 1 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 255 (1978).

126. BORN & RUTLEDGE, *supra* note 24, at 573 (questioning whether in today's global economy the effects test permits almost limitless legislative jurisdiction); Berman, *Global Legal Pluralism*, *supra* note 7, at 1182 ("[I]n an electronically connected world the effects of any given action may immediately be felt elsewhere with no relationship to physical geography at all."); R.Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146, 159 (1957) (explaining how the effects test means there exists "virtually no limit to a State's territorial jurisdiction").

127. Gerber, *supra* note 17, at 294.

128. Kramer, *supra* note 6, at 193.

129. Brilmayer, *supra* note 33, at 16–17 (criticizing courts for invoking a fictitious congressional intent to give American regulations an overly expansive reach).

130. A significant number of scholars have questioned whether courts are competent to ever account for foreign interests. Bradley, *supra* note 104, at 550; *see also* Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 830 (1989) (noting the problems with domestic courts deciding issues involving foreign affairs); Jack I. Garvey, *Judicial Foreign Policy-Making in International Civil Litigation: Ending the Charade of Separation of Powers*, 24 LAW & POL'Y INT'L BUS. 461, 462 (1993) (arguing that courts lack the ability to adjust to diplomatic nuance and timing to respond to international politics); Jack L. Goldsmith, *Federal Courts, Foreign Affairs and Federalism*, 83 VA. L. REV. 1617, 1668 (1997) (explaining why courts are poorly equipped to address questions involving foreign relations); Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 567 (1966) (arguing that many constitutional questions regarding foreign policy are nonjusticiable political questions); John Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 HASTINGS INT'L & COMP. L. REV. 747, 772–75 (1997) (arguing that implementing foreign policy through the courts is harmful to American interests because the judiciary lacks a strong unitary voice, and that the federal judiciary, when compared to the executive branch, is "decentralized, slow, and at times irrational"). Judges have made similar observations. *See, e.g.*,

may be considered American xenophobia in certain contexts—pressure courts to give short shrift to foreign interests.[131] This is not only because of the vagaries of what those interests entail,[132] but because "[t]he objections of other nations are likely only to become clear after the commitment to the expansionist mode of statutory interpretation has been made."[133]

The ease with which courts employ the effects test is troublesome for two other reasons. First, an excessive assertion of jurisdiction is not easily remedied.[134] Because the assertion is "ostensibly premised on a legislative intent, judges lack the freedom to take corrective action which they enjoy in dealing with the common law."[135] Second, many commentators have explained how basing jurisdiction on effects creates a slippery slope once indirect injuries are sufficient to constitute an effect.[136]

These failings alone condemn the effects test, but it suffers from other failings too: the test is difficult to apply and lacks doctrinal clarity.[137] Case law "tend[s] to reflect the confusion as to what standard should be applied to determine not only what an 'effect' is, but also to what degree such an effect must be present."[138] Indeed, no

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Baker v. Carr, 369 U.S. 186, 211 (1962) (noting that resolution of foreign policy issues "frequently turn[s] on standards that . . . involve the exercise of a discretion demonstrably committed to the executive or legislature"); Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) (noting that the conduct of foreign relations is committed by the Constitution to the executive and legislative branches); Laker Airways Ltd. v. Sabena, 731 F.2d 939, 949–50 (D.C. Cir. 1984) (stating that courts are neither qualified, nor capable of properly balancing foreign policy interests).

131. *Cf.* Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 82 (2004) ("The arguments for categorical ignorance of international law in constitutional adjudication play on exaggerated fears: fear of foreign domination, fear of judicial activism, fear of the unknown.").

132. *See supra* notes 120–21.

133. Brilmayer, *supra* note 33, at 20.

134. *Id.* at 16 (describing the role of courts in determining whether Congress intended American law to apply extraterritorially and how "[p]resumptions of legislative intent are something of a Frankenstein monster: Easy to create, but hard to control.").

135. Friedrich K. Juenger, *Constitutional Control of Extraterritoriality?: A Comment on Professor Brilmayer's Appraisal*, 50 LAW & CONTEMP. PROBS. 39, 39 (1988).

136. Jennings, *supra* note 126, at 159 (describing the "very slippery slope"); *see also* BORN & RUTLEDGE, *supra* note 24, at 573 (questioning whether the "effects doctrine" provides "almost limitless legislative jurisdiction").

137. Commentators have described the development of doctrine under the effects test as so confused as to be a "Great Grimpen Mire." Fortenberry, *supra* note 26. For general discussions of the lack of clarity in the law addressing legislative jurisdiction, see *supra* notes 25–28. Congress once noted the many different variations of the effects test employed by the courts. H.R. REP. NO. 97-686, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2490 (describing six different variations of the *Alcoa* effects test).

138. Samie, *supra* note 87, at 24; *see also* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 610–11 (9th Cir. 1976) (summarizing cases adopting different versions of the effects test);

consensus exists among courts and commentators on just how far jurisdiction should extend.[139] Courts are tempted to reach the perceived "right result" instinctively in a particular case, no matter the cost to doctrinal clarity and predictability. Any effect, even an insubstantial one, in some contexts is sufficient.[140] The effects test has thus encouraged the judiciary to take on an essentially legislative function by approaching each case on an ad hoc basis.[141] But deciding

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Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 871–72 (2004) (explaining that "there is a significant difference of opinion across countries with regard to how serious the effects must be and whether there is some additional 'reasonableness' requirement"). For discussions of the inconsistent application of the effects test, see Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 310–13 (2007) (describing confusion over the effects test and Congress's attempt to cure the problem by amending the antitrust statute); Edward L. Rholl, Comment, *Inconsistent Application of the Extraterritorial Provisions of the Sherman Act: A Judicial Response Based upon the Much Maligned "Effects" Test*, 73 MARQ. L. REV. 435, 443–51, 471 (1990) (describing how the effects test now has several versions with courts splintered over the type of conduct and degree of domestic effects necessary).

139. BORN & RUTLEDGE, *supra* note 24, at 646–47 (describing the inconsistent application of the effects test, regarding both the magnitude and the character of the effects required, and citing cases); RUSSELL J. WEINTRAUB, INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICE AND PLANNING 342, 346 (3d ed. 2001) (describing the different expressions of the effects test and its inconsistent application and citing cases). For a recent discussion of the inconsistencies in applying the effects test, see Randall S. Abate, *Dawn of a New Era in the Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on the Continuum of Context*, 31 COLUM. J. ENVTL. L. 87, 97–102 (2006).

140. *See, e.g.*, Am. Rice, Inc. v. Ark. Rice Growers Coop. Ass'n, 701 F.2d 408, 414 n.8 (5th Cir. 1983) (rejecting the idea that the effects must be substantial before a court may exercise jurisdiction in trademark case); Dominicus Americana Bohio v. Gulf & W. Indus., Inc., 473 F. Supp. 680, 687 (S.D.N.Y. 1979) ("Indeed, it is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not De minimis."); *see also* Ocean Garden, Inc. v. Marktrade Co., 953 F.2d 500, 503 (9th Cir. 1991) (finding that the sales of trademark infringing goods in a foreign country may have a sufficient effect on commerce for the purposes of jurisdiction); Scotch Whiskey Ass'n v. Barton Distilling Co., 489 F.2d 809, 811–12 (7th Cir. 1973) (finding jurisdiction when bottles and labels originated from the United States, even though alcohol was produced and distributed in Panama).

141. Gibney, *supra* note 24, at 307:

> [T]he judicial branch has taken the lead in applying U.S. law extraterritorially. When doing so, the rationale that is always given is that the courts are merely carrying out Congressional intent. That rationale, however, has not fooled many, including judges themselves. . . . Beyond this, it is important to note that the objection is not simply that the judiciary has essentially taken on a legislative function; it is the fact that there has been no institutional check . . . .

Courts have sometimes admitted the legislative nature of the analysis. *See, e.g.*, Cont'l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc., 592 F.2d 409, 421 (8th Cir. 1979) ("We frankly admit that the finding of subject matter jurisdiction in the present case is largely a policy decision."); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975) ("We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled the [extraterritorial] conclusions, we would be unable to respond.").

whether a law should apply to foreign conduct entails a decision better left for Congress, not the courts.

In part, the root of these problems may be the effects test's uncertain doctrinal underpinnings. Although spurred on by legal realism in the postwar period, the effects test sits uncomfortably with a realist approach to jurisdiction. Nor does the effects test fit well with postrealist theories that brush aside territorial sovereignty. On one hand, the effects test represents the rejection of territoriality as a constraint on sovereign power. Yet the effects test is simultaneously a theory of jurisdiction dependent on, and defined by, territorial concepts.[142] Rather than considering interests of individuals, the test only provides a court with jurisdiction when something (the effect) occurs within a state's territorial boundaries. Ultimately, the effects test destroys territorial restraints while simultaneously reaffirming the necessity of territoriality as a means of determining jurisdiction.

B. Extraterritoriality's Difficulties

Unfortunately, the effects test is not just bad doctrine. It has impacted what is happening on the ground, helping contribute to the dramatic increase in the use of extraterritorial laws. "States today regularly and increasingly assert prescriptive jurisdiction beyond their territorial limits."[143] If a new era of global extraterritoriality has not already dawned, then it is certainly near.[144] But extraterritorial laws are deeply problematic: they are inconsistent with democratic governance and lead to other harms.

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142. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402, cmt. d ("Jurisdiction [based on effects felt within the United States] is an aspect of jurisdiction based on territory."); Buxbaum, *supra* note 124, at 940 (noting that "those cases based jurisdiction to prescribe on the existence of effects within the United States; in that sense, they too remained rooted in considerations of territory").

143. Raustiala, *supra* note 35, at 2511.

144. *See, e.g.*, VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 8.3 (2d ed. 2006):

> There are many laws of the United States that have or may have extraterritorial effect. A few of these laws that invited comment are the Foreign Corrupt Practices Act (dealing with bribery), the Export Administration Act of 1979 (dealing with boycotts), the Iranian Assets Control Regulations (dealing with response to the hostage crisis), the Civil Rights Act, the National Environmental Protection Act, and drug enforcement laws.

Philip B. Dye et al., *International Litigation*, 40 INT'L LAW. 275, 299 (2006) (listing cases in 2006 where U.S. courts have considered "extraterritoriality in disputes involving the federal habeas corpus statute, as well as intellectual property, antitrust, securities, employment, disabilities, tort claims, criminal law, and immigration issues").

1. Irreconcilability with Democratic Principles

The greatest problem, often downplayed or overlooked in the literature,[145] is the inherently undemocratic nature of extraterritorial laws.[146] Under basic democratic principles and norms, government must rest upon the consent of the governed.[147] Outsiders may not dictate the law to a political community that has not consented to it.[148]

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145. A notable exception is Lea Brilmayer, who considers these issues in her political rights or political theory approach to conflict of laws. *See, e.g.*, Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1280 (1989) ("This article attempts both to argue in favor of a general theory about why rights matter and to set out some basic principles, consistent with commonly held notions of political fairness, about what rights there are."). Admittedly, much greater attention has been given to democratic principles in the human rights context with the use of universal jurisdiction. *See, e.g.*, Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, DAEDALUS 47, 51 (Winter 2003) ("Because relevant constituencies cannot hold courts exercising universal jurisdiction accountable for the negative consequences of their rulings, the courts themselves will invariably be less disciplined and prudent than would otherwise be the case."); Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1065 (2004) ("[T]he task today is to identify democratic principles appropriate to transnational lawmaking phenomena.").

146. For the few notable exceptions, see Gibney, *supra* note 24, at 312–13 (describing the undemocratic nature of extraterritorial laws with regard to non-resident aliens); Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L.J. 123, 133 (1996) (explaining that extraterritorial application of the law is undemocratic and "represents a vastly different conception of the law than what we have in the domestic realm").

147. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed . . . ."); THE FEDERALIST NO. 39, at 254 (James Madison) (Jacob E. Cooke ed., 1961) (emphasizing that the Constitution's authority would derive from popular consent); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 362 (Peter Laslett ed., Cambridge Univ. Press 1988) (suggesting that government authority to tax can legitimately derive only from the consent of the governed); *see also* PAULINE MAIER, AMERICAN SCRIPTURE 128–40 (1997) (describing how the concept of consent of the governed derives from Lockean notions of social contract and other American writings).

148. David R. Johnson & David Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1369–70 (1996) ("We generally accept the notion that the persons within a geographically defined border are the ultimate source of law-making authority for activities within that border."); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1616 (2005) ("[I]t is violative of basic democratic principles for outsiders of the political community to dictate laws to the community."); J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos, and the German Maastricht Decision*, 1 EUR. L.J. 219, 222 (1995) ("[Democracy] is premised on the existence of a polity with members . . . by whom and for whom democratic discourse with its many variants takes place. The authority and legitimacy of a majority to compel a minority exists only within political boundaries . . . ."). A number of international instruments recognize this basic principle of democracy. *See, e.g.*, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 6th Comm., 25th Sess., Agenda Item 85, at 121 (1970); Declaration of the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131, U.N GAOR 1st Comm., 20th Sess., Agenda Item 107, at 11 (1965). The problems associated with the lack of democratic representation in legislation have been recently explored

But extraterritorial laws do exactly that: they force foreigners (i.e., those beyond the state's territorial borders) to bear the costs of domestic regulation, even though they are nearly powerless to change those regulations.[149] As Mark Gibney has forcefully argued, extraterritorial laws "represent[] such a vastly different conception of law than what exists under the norms and principles of democratic rule" because extraterritoriality permits "rulemakers in one country . . . to pick and choose which of their own rules they will apply in other countries."[150] Foreigners are by definition outsiders with no vote and presumably little formal ability to influence domestic political processes.[151] The decisionmakers—the domestic courts—are politically unaccountable to the foreign defendants and apply laws to which the foreigners have not consented.[152] For these reasons, extraterritorial laws are an affront to democratic sovereignty.[153]

Americans should be particularly concerned about the democratic legitimacy problems that extraterritorial laws pose now

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in the Puerto Rican context. *See, e.g.*, José R. Coleman Tió, *Six Puerto Rican Congressmen Go to Washington*, 116 YALE L.J. 1389, 1389 (2007) (describing attempts to address "the undemocratic status of another disenfranchised territory," that is Puerto Rico, which does not have congressional representation).

149. For a discussion of this, see Parrish, *supra* note 23, at 407 (discussing the undemocratic nature of extraterritorial laws in the Canadian-U.S. context).

150. Gibney, *supra* note 24, at 305.

151. Dodge, *Judicial Unilateralism*, *supra* note 11, at 153 (noting that "[f]oreign interests are virtually unrepresented in national legislative decisions" because "[t]hey can neither vote in elections nor contribute to political campaigns"); *cf.* Jeffery K. Powell, Comment, *Prohibitions on Campaign Contributions from Foreign Sources: Questioning Their Justification in a Global Interdependent Economy*, 17 U. PA. J. INT'L ECON. L. 957 (1996) (exploring efforts to curb foreign political influence by banning or restricting campaign contributions from foreign sources).

152. Post, *supra* note 77, at 542:

> However difficult it may be to argue that individuals or groups have consented to the application of a territorial state's exercise of power over them, it is far more difficult to make that argument in the context of the exercise of state *power against those who have no part in constituting the state's authority*.

cf. Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 346 (1996) ("Even assuming that the defendant-alien's country has consented to this law on the international plane, there is no evidence that this consent extends to domestic enforcement in the United States or any other country.").

153. T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 1993 (2004) (describing and criticizing the belief that "[t]o the extent that a state is subject to law made elsewhere, it has lost its sovereignty, and, perhaps, in some deep way, its right to call itself a 'state' "); David Post, *Against "Against Cyberanarchy,"* 17 BERKELEY TECH. L.J. 1365, 1385 (2002) (noting how the effects test provides a source of sovereign authority independent from the consent of the governed, and suggesting that the consent principle should trump the effects principle as a legitimate source of state power); *cf.* Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 464–69 (arguing that human rights litigation and its reliance on customary international law imposes costs on U.S. democracy).

that other countries increasingly seek to apply their laws to Americans.[154] Extraterritorial laws are just "a step away from the 'taxation without representation' that so vexed our country's forefathers."[155] The idea of legislative sovereignty—to be free from the control of others—was a "cornerstone of developing American political theory" at the time of independence.[156] Extraterritoriality is also in tension with modern U.S. aspirations to encourage democracy and self-rule worldwide.[157] The threat to American democratic sovereignty may be particularly acute if countries that are not liberal democracies construe their domestic laws to regulate conduct occurring in the United States.

The democratic legitimacy problem can be viewed in even simpler terms though. Extraterritorial laws are at odds with common notions of independent self-governance[158] and the right to self-determination.[159] Why should American courts—without clear congressional approval—impose American regulatory policy on the European Union, Canada, Japan, Mexico, and others?[160] It is equally

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154. *See* Parrish, *supra* note 1.

155. Rosen, *supra* note 148, at 1616.

156. David G. Post, *The 'Unsettled Paradox': The Internet, the State, and the Consent of the Governed*, 5 IND. J. GLOBAL LEGAL STUD. 521, 529 (1998) (citing GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC 1776–1789, at 346–53 (1969)).

157. *See* Thomas M. Franck, *The Democratic Entitlement*, 29 U. RICH. L. REV. 1, 1–2 (1994) (describing a possible global movement towards democracy); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 47 (1992) (describing a newly emerging law "which requires democracy to validate governance," and that is "becoming a requirement of international law, applicable to all and implemented through global standards"). For a discussion of how international law can promote U.S. interests in promoting democracy, see Anne-Marie Slaughter, *Building Global Democracy*, 1 CHI. J. INT'L L. 223 (2000).

158. A universal right exists to self-government. *See, e.g.*, American Convention on Human Rights art. 23, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; International Covenant on Civil and Political Rights art. 25, Dec. 16, 1966, S. EXEC. DOC. 95-2, 999 U.N.T.S. 171; Universal Declaration of Human Rights, G.A. Res. 217A, at 75, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

159. International law recognizes a right to self-determination at least within the framework of the existing state system. *See* U.N. Charter art 2, para. 7 (noting that the UN's purpose is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"); International Covenant on Civil and Political Rights (1976), art 1, 6 ILM 368, 369 (1967) (explaining that "[a]ll peoples have the right of self-determination . . . to freely determine their political status and freely pursue their economic, social and cultural development"); *cf.* Reference re: Secession of Quebec, [1998] 2 S.C.R. 218 (Can.) (describing self-determination as "a people's pursuit of its political, economic, social, and cultural development within the framework of an existing state"). For an insightful discussion of the interplay of self-determination and democratic theory, see Russell A. Miller, *Self-Determination in International Law and the Demise of Democracy?*, 41 COLUM. J. TRANSNAT'L L. 601 (2003).

160. In *Empagran*, the Court was sensitive to these issues when the effects test was not clearly implicated. F-Hoffmann-LaRoche, Ltd. v. Empagran S.A., 542 U.S. 155, 165 (2004) ("Why should American law supplant, for example, Canada's or Great Britain's or Japan's own

offensive to think that the European Union, Canada, Japan, Mexico, and others should set economic, environmental, or other regulatory policy for the United States. Each country has its own interests, needs, and regulatory objectives.[161]

A related fairness concern also exists. People cannot obey the law unless they know which law to learn. If one is to know "the law that governs an actor or transaction, [one] must be able to identify, before act[ing], the one state empowered to govern."[162] It is no answer that the person "can usually comply with the more restrictive rule, because that eliminates the political authority of the more permissive states."[163] In sum, if democracy means anything, those whose conduct is to be controlled by a particular law must have some voice (directly, or through some form of representation) in determining the substance of those laws.[164] Extraterritorial laws ignore all of this.[165]

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determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?").

161. Eric Posner has made this point recently in the context of climate change litigation. Eric A. Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal* 14 (Univ. of Chicago Law & Econ., Olin Working Paper No. 329, 2007), *available at* http://ssrn.com/abstract=959748.

162. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 319 (1992).

163. *Id.*; *see also* Brief of the Government of Canada as Amicus Curiae Supporting Petitioners at 2–3, F-Hoffmann-Laroche, Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (2004 WL 226389) (expressing Canada's interest in extraterritorial application of U.S. law); Brief of the Government of Japan as Amicus Curiae Supporting Petitioners at 6–7, F-Hoffmann-Laroche, Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (2004 WL 226390) (discussing the rise of the nation-state and sovereignty); Brief of the United Kingdom of Great Britain et al. as Amicus Curiae Supporting Petitioners at 2, F-Hoffmann-Laroche, Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (2004 WL 226597) (opposing the use of extraterritorial jurisdiction in antitrust cases).

164. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed."); *cf.* THE FEDERALIST NO. 52 (James Madison) (arguing that greater exercises of power require more frequent voter participation). The Supreme Court's voting cases underscore the importance of the right to have a voice. Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."). *But see* David R. Johnson & David G. Post, *The New "Civic Virtue" of the Internet: A Complex Systems Model for the Governance of Cyberspace*, *in* THE EMERGING INTERNET 23 (1998), *available at* http://www.temple.edu/lawschool/dpost/Newcivicvirtue.html (determining that representative democracy is not an appropriate model for cyberspace governance).

165. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000, *available at* http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm (involving the American corporation Yahoo!). David Post has made this point. *See* Thomas E. Baker, *A Roundtable Discussion with Lawrence Lessig, David G. Post, and Jeffrey Rosen*, 49 DRAKE L. REV. 441, 444 (2001) (quoting Professor Post's response to a question regarding the Yahoo! situation).

That the democracy deficit extraterritorial laws open up has not created a greater stir is surprising given how strictly our Constitution is tied to territory. Contrary to the dramatic growth of extraterritorial laws, constitutional interpretation has become increasingly wedded to territory, at least since the Supreme Court's landmark decision in *United States v. Verdugo-Urquidez*.[166] The U.S. Constitution has no formal extraterritorial effect.[167] Outside U.S. territorial borders, aliens are not protected by the Constitution,[168] and U.S. actors are not bound by constitutional constraints.[169] Based on the idea of a social contract and self-government, current doctrine finds that outsiders have no claim to invoke constitutional rights.[170]

166. United States v. Verdugo-Urquidez, 494 U.S. 259, 269–71 (1990) (explaining that "aliens receive constitutional protections [only] when they have come within the territory of the United States and [have] developed substantial connections with this country"); *see* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 912 (1991) (describing the different approaches to Constitutional interpretation and explaining how the "principles determining the Constitution's coverage have been sharply controverted during [the last] two hundred years, and different approaches have been dominant at different times").

167. *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 768–69 (1950) (rejecting claim that aliens are entitled to Fifth Amendment protections outside of U.S. sovereign territory); Fong Yue Ting v. United States, 149 U.S. 698, 738 (1893) (resonating in United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens.")). For cases decided by the Supreme Court more recently, see Demore v. Kim, 538 U.S. 510, 543 (2003) (holding that aliens within U.S. territory are "persons" entitled to Due Process Clause protections); Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (noting that "certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders"); *see also* Raustiala, *supra* note 35, at 2506 ("[T]he protections of the Bill of Rights are not untethered from the territory of the United States. Rather they are spatially bound: operative only within the fifty states and other territories unequivocally possessed by the United States.").

168. *Cf.* ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 53 (1985) ("Once aliens are within the territorial jurisdiction of the United States, however, the situation changes dramatically: They are then entitled to most of the rights guaranteed in the Constitution. The importance of 'territorial presence' is thus overriding . . . .").

169. *See, e.g.*, *Verdugo-Urquidez*, 494 U.S. at 274–75 (explaining that the Fourth Amendment does not constrain government action abroad). Gerald Neuman has perhaps been the most prolific scholar on these issues. *See, e.g.*, GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 108 (1996) ("[T]he mutuality of obligation approach affords the express protections of fundamental law, to the extent that their terms permit, as a condition for subjecting a person to the nation's law."); Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After* Rasul v. Bush, 153 U. PA. L. REV. 2073, 2076–77 (2005) (noting how the Court has rejected a mutuality of obligation approach); Neuman, *supra* note 166, at 981–92 (explaining how the U.S. Supreme Court has rejected a mutuality of obligation approach).

170. Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 487 (1987) ("To the extent that the Constitution is a social contract establishing a system of self-government, permanent outsiders . . . seem to have little claim to invoke constitutional 'rights.' "); Neuman, *supra* note 166, at 984–86 (describing the Rehnquist Court's reliance on a restrictive social contract theory as a Hobbesian approach to the Constitution).

Indeed, that courts have steadfastly refused in recent years[171] to extend constitutional rights outside U.S. territory is another reason why courts should be nervous about subjecting foreigners to U.S. laws.[172]

The democratic legitimacy issue cannot be shrugged off easily. Other countries' laws are different than ours and often conflict with our conception of justice.[173] A few examples underscore the point. While U.S. antitrust laws are interpreted to "protect competition, not competitors," other nations often support protectionist measures.[174] Other nations also do not always embrace free speech in quite the same way as our First Amendment requires.[175] Americans hardly

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171. In recent cases alleging torture and illegal detention at Guantánamo Bay, courts that have found detainees entitled to fundamental constitutional rights have done so because "Guantánamo Bay must be considered the equivalent of a U.S. territory . . . ." *In re* Guantánamo Detainee Cases, 355 F. Supp. 2d 443, 464 (D.D.C. 2005); *see also* Almurbati v. Bush, 366 F. Supp. 2d 72, 80 n.6 (D.D.C. 2005) (citing *In re Guantánamo Detainee Cases*). *See* Neuman, *supra* note 169, at 2073 (noting that the U.S. Supreme Court's *Rasul* opinion "strongly suggests in a footnote that foreign nationals in U.S. custody at Guantánamo Bay Naval Base . . . possess constitutional rights"). Prior to the Supreme Court's decision in *Rasul v. Bush*, lower courts denied Guantánamo Bay detainees the right to file habeas petitions because they were detained outside the territories of the United States and therefore lacked legal protection. Al Odah v. United States, 321 F.3d 1134, 1140–42 (D.C. Cir. 2003); Coal. of Clergy v. Bush, 189 F. Supp. 2d 1036, 1045 (C.D. Cal. 2002); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 461, 481–82 (2002); *see also* Cuban Am. Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1417, 1428–29 (11th Cir. 1995) (finding that Haitian and Cuban aliens outside U.S. territory could not assert various statutory and constitutional rights).

172. Gerald Neuman makes the reverse point, arguing that because U.S. laws are applied abroad, constitutional protections must apply as well. Neuman, *supra* note 169, at 2077. The Court has consistently rejected Neuman's invitation to embrace a mutuality of obligation approach to constitutionalism. *Cf.* United States v. Verdugo-Urquidez, 494 U.S. 259, 288 (1990) (Brennan, J., dissenting) (urging the Court to use a mutuality principle); Raustiala, *supra* note 7, at 225–26 (examining the Supreme Court's decision in *In re Ross* that the Constitution's reach was limited to U.S. territory).

173. That law is embedded in the culture and history of a nation and its peoples is beyond debate. *See, e.g.*, 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 46 (Phillips Bradley ed., 1945) (1835) (explaining that social condition is the source of laws); Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1995–99 (2004) (arguing that Americans and Europeans have fundamentally different constitutional conceptions). Although perhaps overplayed, this point has been emphasized in the debate over using foreign law in U.S. Supreme Court decisions (i.e., that borrowing is problematic). *See* Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 ILL. L. REV. 637, 651–52 (explaining the argument that "citing foreign law is somehow inconsistent with sovereignty").

174. Kenneth W. Dam, *Extraterritoriality and Conflicts of Jurisdiction*, 77 AM. SOC'Y INT'L L. PROC. 370, 373 (1983) (describing differences in antitrust regulation in the United States and elsewhere).

175. For example, a French court ordered Yahoo.com to block access to websites selling Nazi memorabilia or otherwise assisting in the denial of the holocaust. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000, *available at* http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm; *see also* Berman, *Globalization of Jurisdiction*, *supra* note 7, at 337–42, 516–20 (describing the Yahoo! case).

should be shocked that other countries do not react well to extraterritorial laws that they perceive to be a form of American imperialism.[176] And, not surprisingly, as demonstrated by Europe's recent extraterritorial regulation of Americans,[177] Americans are not fond of other countries' extraterritorial laws either.[178]

2. Other Incipient Harms

Even if some form of democratic theory could support extraterritorial regulation of other nation's citizens, extraterritorial domestic laws have other problems. As an initial matter, they create piecemeal solutions to global problems. Instead of creating a comprehensive regulatory scheme through compromise and state-to-state negotiation, extraterritoriality inevitably leads to inconsistent adjudications as different courts from different countries approach international issues using different laws and procedures.[179] In many contexts, such ad hoc and unilateral approaches run counter to conventional wisdom that global problems require international solutions.[180]

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176. *See infra* notes 188–90 and accompanying text.

177. *See, e.g.*, Dick Armey, *European Regulations Tormenting U.S.*, CHI. TRIB., Apr. 26, 2006, at C23 (explaining how Europe is using regulations as anti-competitive tools to punish American companies like Microsoft and Apple); *Brussels Rules OK: How the European Union is Becoming the World's Chief Regulator*, ECONOMIST (U.S.), Sept. 22, 2007, at 66 (describing differences in American and European regulatory approaches and noting how the EU is setting global regulatory standards).

178. For recent examples of laws at which Americans have bristled, see Leigh Davison & Debra Johnson, *Multilateralism, Bilateralism, and Unilateralism: A Critical Commentary on the EU's Triple-Track Approach to the International Dimension of Competition Policy*, EUR. BUS. REV., Dec. 6, 2007 (describing the unilateral application of EU competition law through the effects doctrine); Graham Maher, *Cartel Conduct to be a Criminal Offence in Australia*, MONDAQ BUS. BRIEFING, Feb. 17, 2008 (describing proposed amended Trade Practices Act, which criminalizes conduct wholly outside of Australia); Proskauer Rose LLP's Labor & Employment Practice Group, *U.S. Companies with Operations in Europe Must Comply with Data Protection Laws*, MONDAQ BUS. BRIEFING, Jan. 3, 2008 (describing extraterritorial reach of EU data privacy laws, and how those laws are "completely alien to American companies").

179. For examples of how litigation can lead to patchwork solutions, see Paul L. Langer, *Significant Current Developments in Environmental Insurance Coverage*, 690 PRAC. L. INST. 129 (1994) (describing how a "litigation explosion" over the insurance coverage aspects of environmental liability has led to a "patchwork of inconsistent and often conflicting decisions"); *cf.* Abate, *supra* note 139, at 130 (noting that a drawback to climate change litigation may be the patchwork, rather than comprehensive, nature of litigation solutions); Jonathan Turley, *A Crisis of Faith: Tobacco and Madisonian Democracy*, 37 HARV. J. ON LEGIS. 433, 471–80 (2000) (describing problems created by the patchwork solutions caused by mass tort litigation and calling for national standards).

180. The move to harmonization laws underscores this point. *See supra* note 179 (discussing consequences of a lack of harmonization).

The costs of piecemeal solutions are significant. As states increasingly apply their laws extraterritorially, the overlapping jurisdictions lead not only to state-to-state conflict but also create expensive uncertainties for business and public institutions.[181] Global corporations must be aware of, and comply with, a wide variety of laws, sometimes from countries far removed from where their businesses operate. These patchwork laws encourage overregulation[182] and make compliance with regulations difficult. In short, extraterritorial laws are largely antithetical to the core functions of jurisdictional rules—to increase predictability and reduce transaction costs.

A related legitimacy concern exists. Foreigners rarely perceive extraterritorial laws to be legitimate (nor do U.S. citizens when other countries' laws are applied to them). Courts that try to regulate conduct occurring abroad are open to the accusation of having parochial biases with the appearance,[183] if not the reality, of favoring local interests.[184] Additionally, unique features of U.S. litigation—"juries, discovery, class actions, contingent fees, and often substantive American law"—are "perceived as pro-plaintiff and selected under similar pro-plaintiff choice of law rules."[185] In short, foreign

181. Gerber, *supra* note 17, at 288.

182. Guzman, *supra* note 44, at 906–09 (arguing that extraterritoriality always leads to systematic overregulation); *see also* BORN & RUTLEDGE, *supra* note 24, at 574 (describing the difficulties that concurrent jurisdiction can produce, including imposing conflicting legal obligations and causing "confiscatory or otherwise crippling results").

183. Some commentators have suggested that, in reality, foreigners fare well in U.S. courts. *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1121–22, 1143 (1996) (exploring reasons why foreigners fear U.S. courts, but concluding, based on empirical data, that foreign litigants do not fare badly); Christopher A. Whytock, Domestic Courts and Global Governance: The Politics of Private International Law 90 (2007) (unpublished Ph.D. dissertation, Duke University), *available at* http://dukespace.lib.duke.edu/dspace/bitstream/10161/452/1/D_Whytock_Christopher_a_200712.pdf (considering nationality as "a political factor that may influence how domestic courts allocate governance authority").

184. Born, *supra* note 6, at 95; Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 35 (1996) (describing perceived bias against foreign citizens in U.S. courts); Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1497, 1504 (2003) (describing the widespread perception that "American courts are hostile to foreign parties").

185. Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?*, 52 DEPAUL L. REV. 319, 320 (2002); *see also* Posch, *supra* note 16, at 373–74 (discussing European aversion to American legal fee structure and right to jury trial); Peter D. Trooboff, *Ten (and Probably More) Difficulties in Negotiating a Worldwide Convention on International Jurisdiction and Enforcement of Judgments: Some Initial Lessons*, *in* A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 263, 267 (John J. Barcelo, III & Kevin M. Clermont eds., 2002) (noting that "United States judgments are feared in the rest of the world," and that there exists "genuine concern over the

defendants are concerned that extraterritoriality permits plaintiffs to illegitimately forum shop for favorable law in the United States[186] or to otherwise impose greater costs upon them.[187] The perception that extraterritorial laws are illegitimate therefore frustrates judgment enforcement and harmonization of enforcement standards.

Of course, extraterritorial laws can also result in foreign retaliation. Other nations may view extraterritorial laws as "a symbol of humiliation" and are "extraordinarily sensitive to other countries' assertions of jurisdiction that seem to impinge on the sacred domain of national sovereignty."[188] To the extent that the United States is seen as aggressively using domestic law to assert its hegemony globally, we can expect that others will do the same.[189] Other states will often find it to their advantage to apply their laws extraterritorially—if only because failure to do so amounts to a kind of unilateral disarmament against U.S. extraterritorial laws. And at the logical extreme, each state will have incentives to regulate broadly, creating an anarchic free-for-all in which each nation will aggressively regulate so long as it can withstand the political risks. In fact, extraterritorial laws permit lesser powers to exert greater international influence than they would otherwise be able to through political processes.

Countries also have a wide range of options to try to prevent the effective extraterritorial application of U.S. laws, including: diplomatic protests,[190] nonrecognition of judgments,[191] and enactment

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assertion of jurisdiction by United States courts because of the size of the awards that juries in the United States are believed to grant in civil litigation").

186. *See* Friedrich K. Juenger, *The Internationalization of Law and Legal Practice: Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 554–56 (1989) (explaining how exorbitant jurisdictional practices in the United States provide an incentive to forum shop).

187. George Rutherglen, International Shoe *and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 372 (2001) ("Choosing between national legal systems creates greater risks of . . . impos[ing] costs upon the defendant . . . .").

188. Dam, *supra* note 174, at 371.

189.Bradley, *supra* note 153, at 461 (explaining how in the human rights context "other nations may retaliate by allowing suits against U.S. government actors"); Grundman, *supra* note 3, at 258 (explaining how because of retaliation, U.S. multinational corporations are left in a vulnerable position); Stephan, *supra* note 1, at 655 ("The problem lies in the unwillingness of foreign states, including their judiciary, to go along with our project and their ability to sabotage it."); *see also* Parrish, *supra* note 16, at 49–50 (describing retaliation when a "U.S. court provides a forum for a foreign plaintiff injured in his or her home nation"); Parrish, *supra* note 23, at 409–11 (discussing reciprocity and retaliation in the context of extraterritorial environmental laws).

190. For example, the European Community and the United Kingdom submitted protests when the United States amended its Export Administration Regulations to prohibit the export of oil or natural gas exploitation equipment to the Soviet Union. A.V. LOWE, EXTRATERRITORIAL JURISDICTION: AN ANNOTATED COLLECTION OF LEGAL MATERIALS 197, 201 (1983):

> The United States measures as they apply in the present case are unacceptable under international law because of their extra-territorial aspects. They seek to regulate companies not of United States nationality in

of blocking[192] or claw-back statutes.[193] The impact is concrete; retaliation interferes with U.S. regulatory objectives and destroys any "spirit of cooperation and common purpose in solving international economic problems" that might exist.[194] U.S. foreign relations are

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> respect of their conduct outside the United States and particularly the handling of property and technical data of these companies not in the United States.

(quoting diplomatic notes).

191. *See* ROBERT E. LUTZ, A LAWYER'S HANDBOOK FOR ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND ABROAD 2 (2007) (assisting lawyers "seeking to enforce a foreign judgment in the United States or a U.S.-rendered judgment abroad in navigating this lack of uniformity"). For a discussion of extraterritoriality and its connection to judgment enforcement, see Berman, *Dialectical Regulation*, *supra* note 7, at 944–45 (arguing that "it is clear that judgment recognition is increasingly the place where deterritorialized jurisdictional assertions meet the reality of territorial enforcement").

192. *See, e.g.*, Harry L. Clark, *Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 20 U. PA. J. INT'L ECON. L. 61, 81–92 (1999) (discussing blocking statutes); William S. Dodge, *Antitrust and the Draft Hague Judgments Convention*, 32 LAW & POL'Y INT'L BUS. 363, 363 (2001) (discussing blocking statutes); Dodge, *Judicial Unilateralism*, *supra* note 11, at 169 n.357 (noting that the Netherlands, the United Kingdom, Germany, France, Norway, Belgium, Sweden, Australia, Canada, and South Africa have all enacted blocking legislation to U.S. antitrust laws); Deborah Senz & Hilary Charlesworth, *Building Blocks: Australia's Response to Foreign Extraterritorial Legislation*, 2 MELBOURNE J. INT'L L. 69, 72–80 (2001) (describing Australian, as well as European and Canadian, responses to U.S. economic sanctions); *cf.* John W. Boscariol, *An Anatomy of a Cuban Pyjama Crisis: Reconsidering Blocking Legislation in Response to Extraterritorial Trade Measures of the United States*, 30 LAW & POL'Y INT'L BUS. 439, 442–50 (1999) (describing Canadian blocking legislation in response to U.S. extraterritorial measures); Michael A. Gerstenzang, *Insider Trading and the Internationalization of the Securities Markets*, 27 COLUM. J. TRANSNAT'L L. 409, 423 (1989) (explaining that French blocking laws "forbid[] nationals, and certain others with ties to France, from divulging economic, commercial, industrial, financial or technical matters to foreign authorities except as provided by international agreement").

193. A clawback statute "enables certain defendants who have paid a multiple damage judgment in an overseas country to recover the multiple portion of that judgment from the successful plaintiff." Joseph E. Neuhaus, Note, *Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law*, 81 COLUM. L. REV. 1097, 1097–98 (1981). For examples of blocking and clawback statutes in the Canadian context, see Foreign Extraterritorial Measures Act, R.S.C., ch. F-29 (1985); *see also* Andrew C. Dekany, *Canada's Foreign Extraterritorial Measures Act: Using Canadian Criminal Sanctions to Block U.S. Anti-Cuban Legislation*, 28 CANADIAN BUS. L.J. 210, 210–15 (1997); William C. Graham, *The Foreign Extraterritorial Measures Act*, 11 CANADIAN BUS. L.J. 410, 410–13 (1986); *cf.* Mitsuo Matsushita & Aya Iino, *The Blocking Legislation as a Countermeasure to the U.S. Anti-Dumping Act of 1916: A Comparative Analysis of the EC and Japanese Damage Recovery Legislation*, 40 J. WORLD TRADE 753, 762, 766–69 (2006).

194. Dam, *supra* note 119, at 324; *see also* President Thabo Mbeki, Statement to the National Houses of Parliament and the Nation, at the Tabling of the Report of the Truth and Reconciliation Commission (Apr. 15, 2003), *available at* http://www.thepresidency.gov.za/ (follow "Speeches" hyperlink; then follow "President" hyperlink; then follow "2003" hyperlink; then follow "15 Apr 2003" hyperlink) ("[W]e consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country . . . .").

burdened similarly.[195] An exorbitant jurisdictional assertion, or at least the appearance of it, "can readily arouse foreign resentment," "provoke diplomatic protests," "trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields."[196]

III. AN APPROACH: A RETURN TO TERRITORIALITY

To minimize the dangers of extraterritoriality, this Article advocates an approach that is both controversial and modest. Controversially, it takes a position that many scholars have rejected. Indeed, finding scholars who champion territorial limitations on legislative jurisdiction is difficult. Modestly, however, it seeks a return to those principles, based on territorial limits, that for centuries sensibly dictated the contours of legislative jurisdiction.

A. Embracing Territoriality and Constraining Effects

Courts should reembrace territoriality and reassess their overreliance on the effects test when determining legislative jurisdiction issues. A three-pronged approach commends itself to resolve legislative jurisdiction questions. This approach is informed both by pragmatic concerns—supporting long-term American interests—and also the desire for theoretical consistency focused on democratic legitimacy.

1. Determining Courts' Prescriptive Jurisdiction

The initial question is whether Congress intended to regulate extraterritorially—whether the court has prescriptive jurisdiction over the particular conduct. Courts should meaningfully apply the presumption of territoriality and continue to find that Congress has not regulated outside U.S. borders absent clear and unmistakable

195. *See* Bradley, *supra* note 153, at 472 (describing the costs to U.S. foreign relations that human rights litigation imposes); Gerber, *supra* note 19, at 187 (describing the negative impacts of extraterritorial laws); Slaughter & Bosco, *supra* note 18, at 106 (describing how domestic human rights litigation can impact foreign affairs).

196. Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 28-29 (1987); *cf.* Bradley, *supra* note 153, at 472 (describing how human rights litigation in the United States under the Alien Tort Statute can often cause "foreign relations damage" and retaliation); Holly A. Ellencrig, *Expanding Personal Jurisdiction Over Foreign Defendants: A Response to* Omni Capital Int'l v. Rudolf Wolff & Co., 24 CAL. W. INT'L L.J. 363, 368–69 (noting the need for uniformity in personal jurisdiction law "because of the implications of foreign relations").

legislative intent.[197] This would provide greater respect for the prerogatives of other nations. More importantly, it would serve long-term American interests by discouraging other nations from extraterritorially imposing their laws on Americans.

One way to ensure meaningful adherence to the presumption of territoriality would be to require a clear statement of congressional intent. A clear statement rule is hardly foreign to the Supreme Court when interests of other sovereigns are at stake.[198] Certainly this is true in the international context.[199] In the domestic context, too, routinely courts require clear evidence of legislative intent prior to finding that legislation might impose on state sovereign prerogatives.[200] The clear or plain statement rule is an acknowledgment that Congress will not readily interfere with the

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197. Notably, this is consistent with the language of many of the leading Supreme Court cases. *See, e.g.*, Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 120–21 (2005) (requiring a clear statement before a statute is found to apply to a foreign-flag vessel's internal affairs and operations); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 176 (1993) (requiring "affirmative evidence" that Congress intended an extraterritorial application of a statute); Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (requiring "clearly expressed" intent for a statute to apply beyond U.S. borders); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957) (holding that Labor Management Relations Act did not apply to labor dispute involving foreign-flagged ship because Congress had not "clearly expressed" its "affirmative intention" to reach conduct beyond U.S. territory).

198. The clear statement rule has often been invoked as a way to provide Congress with a set of canons of construction. *See, e.g.*, Finley v. United States, 490 U.S. 545, 556 (1989) ("Whatever we say regarding . . . a particular statute can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.").

199. The U.S. Supreme Court usually construes ambiguous statutes to avoid unreasonable interference with other nations' territorial sovereignty. *See, e.g.*, McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20–22 (1963) (involving application of National Labor Relations Act to foreign-flag vessels); Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 382–83 (1959) (involving application of Jones Act in maritime case); Lauritzen v. Larsen, 345 U.S. 571, 576–78 (1953) (same).

200. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55–56 (1996) (requiring "unmistakably clear" statement from Congress before finding Congress intended to abrogate state sovereign immunity); Cippollone v. Liggett Group, Inc., 505 U.S. 504, 518–20 (1992) (finding presumption against federal preemption of traditional state functions absent clear statement); Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (requiring particularly clear statement before finding federal regulation of core state functions); Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) (finding that a clear statement is required to compel states to entertain damages suits against themselves in state courts); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242–43 (1985) (finding that if Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute"); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24 (1981) (requiring clear statement of Congress before imposing conditions on the grant of federal monies to the states); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (finding Congress must make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States).

sovereign powers of others.[201] And in state-to-state relations, the extraterritoriality principle formally prohibits American states from regulating conduct of noncitizens occurring in other American states.[202]

To the extent a presumption and a clear statement rule make sense in the domestic context,[203] they make greater sense when dealing with foreign sovereigns. Although the degree to which states retain sovereignty in our federal system is a subject of debate,[204] certainly no one disputes that foreign countries have not idly relinquished sovereignty to the United States. Moreover, where any doubt lingers as to the appropriate limits of extraterritorial jurisdiction, the presumption permits courts to avoid[205] those thorny

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201. *Gregory*, 501 U.S. at 461. *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992) (cataloguing the vast areas of law in which the Court has used presumptions and clear statement rules); Thomas W. Merrill, *Rescuing Federalism after* Raich: *The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823 (2005) (describing the benefits of clear statement rules in the Commerce Clause context).

202. The extraterritoriality principle holds that a state "may not 'project its legislation into [other States].' " Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582–83 (1986) (alteration in original) (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935)); *see also* Peter C. Felmly, Comment, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467, 483–85 (2003) (describing the extraterritoriality principle and arguing that it should be separated from the Court's dormant Commerce Clause inquiries); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1520–21 (2007) (describing the general prohibition against extraterritorial regulation, but noting that it is formal in nature and not absolute and arguing that some extraterritoriality is inevitable and appropriate).

203. Admittedly, the states are different for constitutional reasons, so the analogy only goes so far. *Compare* Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1888 (1987) (describing the extraterritoriality prohibition as an inherent attribute of federalism), *with* Mark P. Gergen, *Territoriality and the Perils of Formalism*, 86 MICH. L. REV. 1735, 1735 (1988) (criticizing Regan's territorial approach).

204. *See* RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 418-604 (5th ed. 2003); Laycock, *supra* note 162, at 259–60 (explaining how the states gave up sovereignty and are forbidden to treat one another as foreign countries).

205. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *see also* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997) (describing different versions of the doctrine of constitutional avoidance); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1575–76 (2000) (describing constitutional avoidance doctrines). For a provocative article describing constitutional avoidance for executive branch actors, see Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006).

questions that the Fifth Amendment and foreign relations raise (the latter of which the courts may be least equipped to address).[206]

Yet the Supreme Court need not go so far as to embrace a clear statement rule to improve its current legislative jurisdiction jurisprudence, and there may be good reasons not to.[207] What is essential is that there be some indisputable evidence that Congress intended to regulate conduct occurring abroad. Even evidence of intent from legislative history or the statute's context might suffice.[208] What does not suffice, however, is an assumption of extraterritoriality based solely on the fiction that Congress inevitably intended to regulate if adverse effects are felt within U.S. territory.[209] Nor is it appropriate to assume the law applies extraterritorially based on generally broad statutory language unrelated to the law's geographic scope.[210] When congressional intent cannot be reasonably ascertained, the wise rule—given the perils of extraterritoriality—is to assume only a domestic application and reassert the continuing validity of the territoriality presumption.

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206. That due process restrictions apply to the extraterritorial application of U.S. jurisdiction was argued most famously in a 1992 article. Brilmayer & Norchi, *supra* note 2, at 1242. For one scholar's challenge to this argument, see Weisburd, *supra* note 32, at 379. For the courts ability to address questions implicating foreign relations, see Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (noting that the "Judiciary has neither aptitude, facilities nor responsibility" for decisions relating to international relations).

207. Clear statement rules have been criticized as the tool of an activist conservative court to construct barriers to change. Eskridge & Frickey, *supra* note 201, at 593; *see also* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 142 (Supp. 1992) ("Consistent with its move toward textualism, the Court has . . . transformed an old presumption . . . that could be rebutted by a contrary statutory purpose or legislative history, into a clear statement rule, rebuttable only by clear statutory text."); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 958–59 (1992) (noting the "extraordinary burdens" the clear statement rules put on the legislative process); Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959 (1994) (noting the criticism of clear statement rules, and describing the Court's federalism jurisprudence).

208. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 177 (1993) (examining "all available evidence" of congressional intent); *see also* Kollias v. D&G Marine Maint., 29 F.3d 67, 73 (2d Cir. 1994) (looking at non-textual sources, including legislative history); Gushi Bros. v. Bank of Guam, 28 F.3d 1535, 1548 (9th Cir. 1994) (looking for express statement of congressional intent in the language of the statute or its legislative history); Subafilms Ltd. v. MGM-Pathe Comm'ns Co., 24 F.3d 1088, 1096 (9th Cir. 1994) (en banc) (looking to legislative history).

209. Note how this departs dramatically from what many scholars have urged. *See, e.g.*, Dodge, *Understanding the Presumption*, *supra* note 11, at 124 (arguing that presumption is rebutted when effects are felt in the United States). For the response to critics, see *infra* Section III.B.

210. Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1077 (9th Cir. 2006) (finding law applied based on congressional intent to remedy harm, not based on language related to the statute's geographical application).

Notably, this is not—as some have mistakenly suggested—to prefer "the law of the place where the acts occurred."[211] The presumption does not implicate conflict of laws or try to resurrect the long-dead theory of vested rights.[212] The issue is not whether American law applies when in conflict with another nation's law, or whether a conflict even exists. The issue is whether American law was intended to govern the conduct at all. The idea is based much more on notions of legislative primacy and the practical considerations of avoiding foreign resentment.[213]

Reinvigorating the presumption against extraterritoriality would also serve more than the interests of comity, although other countries might welcome such a development. While often phrased in these terms, comity does not command the presumption.[214] Instead, it is self-interest (i.e., American interest) that drives this result. A presumption of territoriality serves American interests by creating a precedent that rejects the use of extraterritorial laws against Americans.[215] Clear benefits would inure from this approach. It would not only reduce possible conflicts and increase predictability in law,[216] but would also insulate the judiciary from claims that it is usurping

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211. Kramer, *supra* note 6, at 211. This mistaken suggestion is mirrored in arguments by Brainerd Currie when discussing the related, but different, area of conflict of laws. CURRIE, *supra* note 67, at 81–121.

212. Lea Brilmayer has made the point well that rules respective of territoriality and political rights need not involve a return to vested rights. BRILMAYER, *supra* note 44, at 247–59.

213. The Court has repeatedly asserted the need to be cognizant of foreign retaliation and potential foreign embarrassment in a range of contexts. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 695 (2004) (noting the potential implications for foreign relations in the Alien Tort Statute context and the need to be "particularly wary of impinging on the discretion of the Legislative and Executive branches"); Austria v. Altmann, 541 U.S. 677, 689 (2004) (noting need for international comity in foreign sovereign immunity context); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 103 (1987) (emphasizing the need to consider foreign relations policies in a personal jurisdiction analysis); Banco National de Cuba v. Sabbatino, 376 U.S. 398, 439 (1964) (noting how separation of powers and the need to avoid impinging on the executive prerogative in matters of foreign relations underpins the act of state doctrine).

214. *See, e.g.*, Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 120 (2005) (finding as "a matter of international comity, a clear statement of congressional intent is necessary before a general statutory requirement can interfere with matters that concern a foreign-flag vessel's internal affairs and operation").

215. American industry certainly believes that this benefit would exist. *See, e.g.*, Brief of the Nat'l Mining Ass'n et al. as Amici Curiae Supporting Petitioners at 5, Pakootas v. Teck Cominco Metals Ltd., 452 F.3d 1066 (9th Cir. 2006) (2007 WL 1319338) (expressing fear of retaliatory actions by foreign jurisdictions); Brief of the Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioners at 2, Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066 (9th Cir. 2006) (2007 WL 1318991) (noting the same fear as above); Brief of Consumer Elecs. Ass'n Supporting Petitioners at 2, Pakootas v. Teck Cominco Metals Ltd., 452 F.3d 1066 (9th Cir. 2006) (2007 WL 1318990) (fearing "tit for tat" retaliation by foreign jurisdictions).

216. *Cf.* Laycock, *supra* note 162, at 319 ("No set of choice-of-law rules has yet achieved a high degree of predictability in hard cases, but only territorial rules offer any hope.").

legislative authority. More importantly, the approach would undermine the growing global assumption that extraterritorial laws are an appropriate way to resolve global challenges[217]—an assumption that threatens American independence and democratic sovereignty. At minimum it would provide U.S. litigants and the U.S. government some credibility when complaining about other states' exorbitant jurisdictional assertions.[218]

Admittedly, courts would be hard pressed to overturn hundreds of decisions that have found legislation to apply extraterritorially in certain narrow contexts. For those few statutes that have long been interpreted as applying extraterritorially, the doctrine of legislative acquiescence may well control.[219] Under the doctrine of legislative acquiescence, if a court has interpreted a statute to apply extraterritorially, and the legislature has done nothing over an extended period of time, it can be assumed that the court achieved the correct interpretation.[220] But only in this extremely narrow category of cases, where stare decisis concerns override, should the court continue to apply the effects test as a basis for assuming legislative intent.

This approach, reinvigorating territoriality, is not too far from the Supreme Court's most recent pronouncements. The presumption

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217. See *supra* notes 82–122 and accompanying text for examples.

218. In the past, the United States has been successful in exporting U.S. jurisdictional rules abroad.

219. For a general discussion of the doctrine of legislative acquiescence and related doctrines, see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 400–01 (1991) (defending the Court's periodic reliance on legislative acquiescence); *see also* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 241–52 (1994) (describing significance of legislative inaction). *Compare* Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 183 (1989) (arguing against ever overruling statutory precedents), *with* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 426–29 (1988) (offering reasons why congressional inaction should not be interpreted as legislative acquiescence to a judicial decision).

220. As Justice Harlan Fiske Stone once wrote for the Court: "The long time failure of Congress to alter the Act after it had been judicially construed . . . is persuasive of legislative recognition that the judicial construction is the correct one." Apex Hosiery Co. v. Leader, 310 U.S. 469, 488 (1940); *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 599 (1983) ("Congress' awareness of the denial of tax-exempt status for racially discriminatory schools when enacting other and related legislation make out an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings."); Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) ("In considering whether to cut back or abandon [a rule], we must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."); Flood v. Kuhn, 407 U.S. 258, 283–84 (1972) (treating Congress's failure, over fifty years, to reject or adjust the Supreme Court's prior interpretation of antitrust law's application to major league baseball as ratifying that interpretation); Cleveland v. United States, 329 U.S. 14, 22 (1945) (Rutledge, J., concurring) (recognizing the recent tendency to interpret Congressional silence as acquiescence, but cautioning against an inflexible presumption).

against extraterritoriality was reembraced in *Empagram*, where the Court strictly construed an antitrust statute to avoid extraterritorial application when foreign conduct did not directly affect U.S. markets.[221] The Court should continue that trend.[222]

2. The Scope of Congress's Legislative Jurisdiction

The second inquiry relates to the scope of Congress's legislative jurisdiction. If Congress has spoken unmistakably and regulated extraterritorially, a court need only determine whether the regulation is constitutionally within congressional power (and valid under international law).[223] It is in this second prong that the effects test should come into play. Only when a substantial direct effect is felt within the United States does Congress have the power to regulate the conduct of noncitizens occurring abroad.

Using the effects test to define the outer limits of congressional action makes a great deal of sense under international law. Customary international law prohibits a country from causing

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221. F-Hoffmann-LaRoche, Ltd. v. Empagran S.A., 542 U.S. 155, 174 (2004) (instructing that as long as a "statute's language reasonably permits an interpretation" that avoids extraterritorial application, a court "should adopt it"); *cf.* Small v. United States, 544 U.S. 385, 394 (2005) (holding that a general term such as "any court" presumptively "refers only to domestic courts, not to foreign courts").

222. The Court has reaffirmed the continuing applicability of the presumption numerous times. For recent cases, see Microsoft Corp. v. AT&T Corp., 127 S. Ct. 1746, 1758 (2007) (applying the presumption against extraterritoriality); *Small*, 544 U.S. at 389 (reaffirming the presumption against extraterritoriality). *But see* Pasquantino v. United States, 544 U.S. 349, 373–75 (2005) (Ginsburg, J., dissenting) (arguing that the majority ignores the presumption against extraterritoriality). For cases from the 1990s applying the presumption, see Hartford Fire Ins. Co. v California, 509 U.S. 764, 814–15 (1993); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 173 (1993); Smith v. United States, 507 U.S. 197, 203–04 (1993); Lujan v. Defenders of Wildlife, 504 U.S. 555, 585–86 (1992).

223. The U.S. Supreme Court has traditionally been skeptical of international law playing any role in the legislative jurisdiction analysis. *See, e.g.*, Steele v. Bulova Watch Co., 344 U.S. 280, 285–86 (1952) ("The United States is not debarred by any rule of international law . . . . [T]here is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government." (quoting Skiriotes v. Florida, 383 U.S. 69, 73 (1941)); Commodity Futures Trading Comm'n v. Nahas, 738 F.2d 487, 495 (D.C. Cir. 1984) ("Federal courts must give effect to a valid, unambiguous congressional mandate, even if such effect would conflict with another nation's laws or violate international law."); United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945):

> [W]e are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it. That being so, the only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so: as a court of the United States, we cannot look beyond our own law.

substantial transboundary harm.[224] And states must take into account other states' interests when exercising their own sovereignty.[225] The landmark *Trail Smelter* arbitration, in its now famous proclamation of the "no-harm principle," explained it this way:

> [N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[226]

If another state has caused transboundary harm (i.e., its activities have caused a substantial effect outside its territory), then the harmed state can appropriately seek to remedy that harm through extraterritorial legislation if it so decides.

Effects jurisdiction can thus be valid, but it should be used cautiously, and not without considerable thought first by the political branches of government. A poorly considered policy could lead to unproductive tit-for-tat reciprocal actions. Of course, nothing in the Constitution prevents Congress from regulating extraterritorially—no Fifth Amendment or other due process concerns exist if substantial effects are felt within the United States.[227] Moreover, international

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224. EDITH BROWN WEISS ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY (2d ed. 2006). The international community has long recognized the importance of the no-harm rule. Rio Declaration on Environment and Development princ. 2, June 14, 1992, 31 I.L.M. 874 (recognizing the no-harm principle); Declaration of the United Nations Conference on the Human Environment princ. 21, June 16, 1972, 11 I.L.M. 1416 (recognizing the no-harm principle).

225. *See* Island of Palmas Case (Neth. v. U.S.), 2 R. Int'l Arb. Awards 829, 870 (Perm. Ct. Arb. 1928) (explaining that a state must consider the interests, and respect the rights, of other states). Many international cases recognize the no-harm and good neighbor principles. *See, e.g.*, Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20) (explaining duty to cause no harm); Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20) (explaining duty to cause no harm); Lake Lanoux Arbitration (Fr. v. Spain), 12 R. Int'l Arb. Awards 281 (Perm. Ct. Arb. 1957) (holding that a state can lawfully utilize the waters of an international river in its territory so long as it takes into account the interests of co-riparian states); Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9) (articulating the "well-recognized principle" that it is "every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states"); *see also* Günther Handl, *Territorial Sovereignty and the Problem of Transnational Pollution*, 69 AM. J. INT'L L. 50, 55–57 (1975) ("The emerging principle of *sic utere tuo ut alienum non laedas* constituted recognition of the fact that territorial sovereign rights in general were correlative and interdependent and were consequently subject to reciprocally operating limitations.").

226. *Trail Smelter Arbitral Decision*, 35 AM. J. INT'L L. 684, 716 (1941); *see also Trail Smelter Arbitral Decision*, 33 AM. J. INT'L L. 182, 182 (1939) (providing the *Trail Smelter* arbitral decision as reported on April 16, 1938 to the governments of the United States and Canada). For two good discussions of the arbitration and the no-harm principle, see Alfred P. Rubin, *Pollution by Analogy: The Trail Smelter Arbitration*, 50 OR. L. REV. 259, 259 (1971); Karin Mickelson, *Rereading* Trail Smelter, 31 CAN. Y.B. INT'L L. 219, 222–23 n.12 (1993). The seminal work on the arbitration is TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION (Rebecca M. Bratspies & Russell A. Miller eds., 2006).

227. Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. J. INT'L L. 121, 151 (2007)

law now plainly accepts the effects test as a basis for legislative jurisdiction.[228] But given that Congress should be nervous about other countries exporting their laws here, Congress should be exceedingly careful before exporting our laws into other countries.[229]

3. Conflict of Laws and International Comity

The final question is whether a federal statute found to cover the conduct at issue conflicts with a foreign law that also covers the same conduct. Only in the conflicts context should comity concerns (or interest balancing) enter the analysis.[230] The presumption against territoriality assures that U.S. laws are not applied extraterritorially unless Congress has clearly spoken. Therefore, comity concerns would arise only in determining which of two conflicting laws apply.

Exploring what principles should govern conflicts-of-law analysis in hard cases has been the subject of extended debate that will not be repeated here. This Article does not seek to envision a new theory of conflicts of law. Good reasons exist, however, to keep the conflicts-of-law analysis separate from the legislative jurisdiction analysis. Conflating the two bypasses the congressional role and unnecessarily risks assuming regulation of foreign acts. The threat of foreign extraterritorial laws and the undemocratic underpinnings of extraterritorial laws demand this caution.

B. Responding to Critics

Before proceeding, there is a point to underscore: advocating for a territorial approach to legislative jurisdiction and lamenting the increase of extraterritorial law does not compel the use of territoriality in other contexts. This Article is not arguing—nor intending to imply—that territoriality should necessarily constrain application of constitutional rights or the application of U.S. law to U.S. citizens (i.e., the nationality principle).[231] Although politically unpopular, it may

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(recognizing extraterritoriality but arguing that "absent this substantial effect, Congress's authority to extend U.S. law extraterritorially under the Clause is doubtful at best").

228. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987).

229. For an early warning of these problems, see Jennings, *supra* note 126, at 175 (asserting that extraterritorial laws "are an attempt to export into other countries and make operative there what are after all peculiarly American political notions").

230. *See supra* notes 113–14, 117–23 and accompanying text (discussing comity and its relevance to jurisdictional analysis).

231. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) & cmt. G (1987); *see also* Reid v. Covert, 354 U.S. 1, 74–78 (1957) (Harlan, J., concurring)

well be appropriate for U.S. laws to limit U.S. action abroad.[232] Citizens and domestic corporations should not be able to escape national regulatory objectives by simply moving certain activities offshore. States have a legitimate interest in preventing such easy circumvention of their laws. And the problems with ignoring territoriality do not apply in situations where the United States holds its own citizens, and its own government, to domestic standards abroad.[233] This kind of extraterritoriality is not the subject of this Article.

The conventional condemnation of territorial limits to legislative jurisdiction usually takes one of two forms. Neither is convincing. The first is to portray extraterritorial jurisdiction as an essential response to wrongdoing for which no other remedy is available. To embrace territorial limits—the argument goes—would create an intolerable situation where corporate misconduct and other malfeasance are ignored. In a globalized world, scholars assert, territoriality makes little sense.[234] But the premise is wrong. Embracing territorial limits to domestic laws (or a presumption of territorial limits) is not to advocate for no regulation. Far from it. In a modern, global economy, transnational activities usually require some level of regulation, if not comprehensive regulation. But there is no

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(recognizing application of constitutional protections to U.S. citizens abroad while recognizing and attempting to balance potential limitations); Neuman, *supra* note 166, at 965–70 (discussing the competing rationales of the plurality in *Reid v. Covert* and its subsequent effect on extraterritorial jurisdiction).

232. In fact, the Court can be criticized in how it has made it more difficult for "Congress to subject United States companies to new duties and obligations when they are acting transnationally." Eskridge & Frickey, *supra* note 201, at 616–17. For a discussion of applying laws to U.S. citizens and thereby competitively disadvantaging local persons, see BRILMAYER, *supra* note 44, at 257.

233. This Article is not intending, and does not take, any position on the propriety of limiting U.S. action abroad. Nor should this Article be perceived as speaking in any way on the actions taken in Guantánamo Bay. Good reason exists to criticize the handling of Guantánamo Bay detainees. *See, e.g.*, Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 263 (2004) (examining the propriety of "special tribunals" and the constitutionality of extraterritorial detentions of suspected terrorists); Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 HASTINGS INT'L & COMP. L. REV. 303, 303 (2002) (exploring why current U.S. executive policy toward judicial handling of suspected terrorists "pursue[s] a highly problematic armed conflict alternative to the criminal law paradigm"); Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2654 (2005) (arguing that law of armed conflict principles should limit presidential war powers as currently applied to "enemy combatants").

234. *See supra* note 6 and accompanying text (asserting that the notion that law should be tied to territory is "an archaic remnant of a preglobalized world"). The assertion is widespread. For a recent example where a scholar assumes, without analysis, that territorial limits are nonsensical in a globalized world, see Laura Maranchek Hussain, *Enforcing Treaty Rights of Aliens*, 117 YALE L.J. 680, 707 (2008).

reason to assume that the regulation must be, or is appropriately, unilateral and domestic in nature.

A remedy can exist for wrongs occurring outside of a state's territory, without the need for domestic regulation—that is exactly what international law is for. When the effects test was first conceived in cases like *S.S. Lotus* and *Alcoa*, it may well have been true that international law was largely unavailable. Now, however, countries are well accustomed to entering into bilateral or multilateral treaties to regulate international and transnational activity.[235] Literally thousands of such agreements exist.[236] And in recent years—in part because of the problems created by piecemeal, inconsistent extraterritorial laws—a renewed interest in harmonized international regulation has developed.[237] Those who support extraterritorial laws then have the burden of explaining why international law is not equipped to address transboundary harms.[238] But they have not. In fact, with some notable exceptions, international law considerations are almost entirely missing from conflicts-of-law scholarship.

Ultimately, few academics have directly addressed why territoriality is no longer a viable theory for determining jurisdiction in international cases. The hostility towards territoriality in the legislative jurisdiction context often mirrors criticism of territoriality in other contexts. But just because territoriality may be moribund in conflicts of law and adjudicative jurisdiction, does not mean that it is outdated as a limitation on legislative jurisdiction. In fact, given the problems with extraterritorial laws described above, the opposite is true.

A second common response to critics of territorial limits on legislative jurisdiction is to suggest that the default rule should be reversed until Congress steps in. This position asserts that, in a globalized world, the courts should assume Congress intended to regulate conduct occurring outside the United States so long as that

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235. JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESSES 37–38 (2d ed. 2006) (describing how "bilateral and multilateral treaties have multiplied at almost exponential pace").

236. *Id.* at 37 (explaining that the United Nations Treaty Series contains over "400,000 treaties and related instruments, covering almost every conceivable subject").

237. *See* Dubinsky, *supra* note 49, at 312–14 (discussing renewed attempts at harmonization). Discussion of harmonization is prevalent in both the antitrust and securities contexts. *See, e.g.*, Sharon E. Foster, *While America Slept: The Harmonization of Competition Laws Based upon the European Union Model*, 15 EMORY INT'L L. REV. 467, 498 (2001) (discussing "U.S. opposition to competition law harmonization" and subsequent foreign reaction).

238. While not the focus of this Article, it is worth emphasizing that international law has far fewer problems than extraterritorial laws as a way to solve global challenges. *See* Parrish, *supra* note 1.

conduct causes effects in U.S. territory, unless Congress clearly states otherwise.[239] If the courts err in finding a law applies extraterritorially, scholars argue, Congress can always change it. The reversal is appealing because it always provides a remedy for a harm.

But reversing the default rule to presume extraterritoriality is highly problematic. First, institutional constraints suggest that Congress is in a far better position to speak clearly when it intends its laws to regulate abroad than to change a law that has been mistakenly applied extraterritorially. As described above, foreigners operating abroad are in the worst position to meaningfully petition Congress to change the law.

Second, the short-term benefits of extraterritorial laws are more visible than their significant costs, which are often disguised. When one state regulates for its own benefit, and to the detriment of others in the world, each state bears a fraction of the costs of the regulation. The benefits, however, are concentrated entirely in the regulating state.[240] Yet the costs of foreign regulation are difficult to account for, as the impact of that foreign regulation is often unknown until after the regulation occurs. Nor is the impact of American extraterritorial laws immediately obvious. Rather, the impact is creeping, as other nations slowly begin to embrace extraterritoriality through the guise of the effects test and apply their laws to regulate American conduct in the United States.

CONCLUSION

The world has seen a tremendous growth of extraterritorial laws in recent years. The growth, in large part, is attributable to the rise of the effects test as the core doctrinal principle that presently determines the scope of a court's prescriptive jurisdiction. Academics have mostly encouraged these changes, but this encouragement is unwise. The effects test has caused significant confusion in the courts, and the growth of extraterritoriality is deeply problematic. As this Article has shown, extraterritorial laws are a significant threat to

239. *See, e.g.*, Dodge, *Understanding the Presumption*, *supra* note 11, at 104 (arguing that when an effect is felt in the United States, the presumption against extraterritoriality is rebutted and regulation should be assumed).

240. This point has been made in recent federalism literature, criticizing the lack of federal controls on state regulation. *See, e.g.*, Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL. 93, 95 (2002) (arguing that federalism must "protect states from aggression and exploitation by other states," and protect against regulatory balkanization); *cf.* Gardbaum, *supra* note 70, at 491 (arguing for a re-thinking of the zero-sum conception of state and federal power).

long-term American interests and represent a fundamentally undemocratic method of regulation.

These conclusions break sharply with current scholarship. But this Article's vision is not far-fetched. It merely seeks greater respect for basic territorial principles that have long provided sensible limits on legislative jurisdiction. Contrary to what many theorists suggest, territoriality is not an outdated concept. Rather, in a globalized world, territorial limits matter even more. Determinate, territorial rules are essential to maintaining sovereign independence and democratic legitimacy. And enacting territorially bounded domestic legislation is a way to prevent other countries from imposing their visions of the world on us.

Courts would be wise to revisit their overreliance on the effects test. The effects test should, at most, apply as a limitation on congressional power, not as a doctrinal command that reverses the presumption of territoriality. Courts should find that laws regulate outside U.S. territory only when Congress clearly intends them to. Congress, however, should be substantially more restrained than it has been in enacting extraterritorial laws. Unilaterally attempting to regulate international conduct through domestic rather than international law is unwise, because it invites other countries to do the same, threatening American interests. In short, though it presently captivates courts and commentators alike, one can only hope that the effects test will fade into obscurity.