2008

The Effects Test: Extraterritoriality’s Fifth Business

Austen L. Parrish

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

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub

Part of the International Law Commons, and the Jurisdiction Commons

Recommended Citation


http://www.repository.law.indiana.edu/facpub/893

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
The Effects Test: Extraterritoriality’s Fifth Business

Austen Parrish*

INTRODUCTION ........................................................................................................1456

I. THE HISTORICAL CONTEXT .............................................................................1462
   A. An Era of Territoriality ..............................................................................1463
   B. Territoriality’s Demise .............................................................................1467
   C. The Rise of the Effects Test .......................................................................1470

II. THE DANGERS OF EXTRATERRITORIALITY ...............................................1478
   A. The Effects Test Examined .......................................................................1478
   B. Extraterritoriality’s Difficulties ...............................................................1482
      1. Irreconcilability with Democratic Principles .........................................1483
      2. Other Incipient Harms .........................................................................1489

III. AN APPROACH: A RETURN TO TERRITORIALITY ..................................1493
   A. Embracing Territoriality and Constraining Effects ...............................1493
      1. Determining Courts’ Prescriptive Jurisdiction ..................................1493
      2. The Scope of Congress’s Legislative Jurisdiction ..............................1499
      3. Conflict of Laws and International Comity .......................................1501
   B. Responding to Critics ............................................................................1501

* Vice Dean for Academic Affairs and Professor of Law, Southwestern Law School. J.D., Columbia University School of Law, 1997; B.A., University of Washington, 1994. The author is the Director of Southwestern’s Summer Law Program in Vancouver, B.C., Canada, where he teaches courses in international and comparative law at the University of British Columbia. For their helpful comments and insights, the author is grateful to Ron Aronovsky, William Dodge, Paul Dubinsky, Ashley Parrish, Kal Raustiala, Christopher Whytock, and Dennis Yokoyama, as well as to participants at faculty workshops at UCLA Law School and Southwestern Law School. Ongoing conversations with Neil Craik, Noah Hall, Duncan Hollis, and Shi-Ling Hsu over extraterritoriality in the Canada-U.S. context helped focus the Article. The ideas in this Article were further refined during discussions at the 2007 International Law Association’s International Law Weekend, and the 2008 joint annual meetings of the Law and Society Association and the Canadian Law and Society Association. The author thanks Eric Geier and Jessica Priel for their excellent research assistance.
INTRODUCTION

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


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”).


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).

the trend, finding the notion that law should be tied to territory to be an archaic remnant of a preglobalized world. In an age of globalization, the argument goes, law should find national and political borders of little significance. 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. Developed at a time when legal realism captivated legal academia, 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

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


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. Academics have embraced the effects test (albeit in slightly different forms) as a panacea to all extraterritorial jurisdictional dilemmas. And although once condemned abroad, other countries have started to follow suit, permitting jurisdiction over activities that have effects within their territory. 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

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).


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 “vigorou and repeated protest” from other countries).


[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.

legislative jurisdiction, courts rarely apply it appropriately. 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 and the intensity of these disputes has escalated. To solve these disputes, plaintiffs increasingly seek to apply U.S. laws to foreign conduct. Yet as U.S. courts apply domestic laws extraterritorially, other countries have not only periodically retaliated, but have also begun to accept extraterritoriality and use it for their own ends. Indeed, as

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).


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, has driven the plot. And the mischief it has caused has displaced the “golden voices” 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, 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, a patchwork of incompatible rules presently governs

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 Brunnee, 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 Déjà 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
Some scholars go so far as to describe the Court's extraterritoriality decisions as patently inconsistent, if not hopelessly confused. Not surprisingly, without sufficient direction, lower courts have been ill-equipped to decide the scope of Congress's legislative jurisdiction. In some instances, courts have reached contrary results on nearly identical facts. 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


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, 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. 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. 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


law beyond U.S. borders. Congress's power to do so is nearly unconstrained. 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. 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; 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. A concept theorized by Dutch scholars, territoriality was a defining

---


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).


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”).

feature of public international law. In international law, territoriality—and the related concept of sovereignty—implied external and internal independence. 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. For international law, territorial borders limited and defined the state.

Conflicts-of-law doctrine shared international law's commitment to territoriality. Associated most famously with Joseph America, 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.”).

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):


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] by choice of law analysis.”\(^{50}\) 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).


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

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).
55. Id. at 357.
jurisdiction, sought to accommodate the competing policies of independent sovereigns.\textsuperscript{56} With the world carved up into separate jurisdictional regions, territoriality became an easily applied principle to decide whose law should govern.\textsuperscript{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.\textsuperscript{.....} 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."\textsuperscript{56}

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

\textbf{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."\textsuperscript{59} An underlying assumption was that "law is a closed, logical system."\textsuperscript{60} From a formalistic perspective, territoriality fit nicely with this assumption.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{56} Kramer, \textit{supra} note 6, at 188–89.
\item \textsuperscript{57} See Gerber, \textit{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").
\item \textsuperscript{58} Kramer, \textit{supra} note 6, at 189 (citing ULRICH HUBER, \textit{DE CONFLICTU LEGUM}, translated in D.J. Llewelyn Davies, \textit{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, \textit{supra} note 19, at 193–202 (describing the development of the jurisdictional paradigm).
\item \textsuperscript{59} Terry S. Kogan, \textit{A Neo-Federalist Tale of Personal Jurisdiction}, 63 S. CAL. L. REV. 257, 316 (1990) (citing MORTON HORWITZ, \textit{THE TRANSFORMATION OF AMERICAN LAW 1780–1860} 259 (1977)).
\item \textsuperscript{60} GRANT GILMORE, \textit{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 adoption 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.
\item \textsuperscript{61} RAUSTIALA, \textit{supra} note 34 (describing how territoriality fits with classical legal thought).
\end{itemize}
Legal realists attacked the formalist assumptions that undergirded territorial approaches to law. The power to regulate, realists argued, did not follow "naturally and inevitably from some self-evident theory" like territoriality. As they did with judicial jurisdiction, realists deconstructed the law and pushed for "reasonableness" as the touchstone of any jurisdictional analysis. Territoriality—as a concept limiting law's geographic application—lost some of its potency.

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. In the United States, the rise of the modern administrative state meant the


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").


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).


68. Gerber, supra note 17, at 293.
dramatic expansion of comprehensive regulation. As economies became more interdependent, the pressure to regulate cross-border activity increased. For many, "an increasingly interdependent and globalized world . . . rendered strict territorial limits on jurisdiction increasingly unworkable." 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, its pedigree was also tainted. 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. 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).


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 and indigenous rights.\textsuperscript{75} Liberal internationalists disliked territoriality, preferring, as a descriptive matter, to disaggregate the state and focus on interests, not territorial power.\textsuperscript{77} International realists,\textsuperscript{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.\textsuperscript{79} For realists, only politics and power—not international legal norms tethered to territoriality theories—should constrain state action.\textsuperscript{80} Extraterritorial laws were thus acceptable only so long as they served American hegemonic interests.\textsuperscript{81}

\textbf{C. The Rise of the Effects Test}

As territoriality lost its hold over law,\textsuperscript{82} the prohibition against extraterritoriality weakened to a mere presumption.\textsuperscript{83} Congress had

\begin{itemize}
\item \textsuperscript{76} Austen Parrish, \textit{Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights}, 31 AM. INDIAN L. REV. 291, 297–302 (2007); see also S. JAMES ANAYA, \textit{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).
\item \textsuperscript{77} David G. Post, \textit{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).
\item \textsuperscript{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).
\item \textsuperscript{80} HANS J. MORGENTHAU, \textit{IN DEFENSE OF THE NATIONAL INTEREST} 36 (1951); see also Parrish, supra note 1 (listing sources).
\item \textsuperscript{81} Tonya Putnam's empirical work traces how extraterritorial laws have been used for instrumental ends. See Tonya Putnam, \textit{Courts Without Borders: The Domestic Sources of U.S. Extraterritorial Regulation} (Mar. 4, 2007) (on file with the Vanderbilt Law Review).
\item \textsuperscript{82} International law now recognizes several bases of jurisdiction that are decoupled from territory. \textit{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, \textit{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. 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. In that case, a French ship collided with a Turkish ship, causing several of the Turkish passengers to drown. 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).

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. In Alcoa, the Court held that the Sherman Act applied to foreign conduct impacting the United States, even when...

---

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... ").


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. Judge Hand declared that "it is settled law . . . 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 . . . ." 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. The decision "ushered in [a] new era and marked a dramatic and undeniable break with" the tradition of territoriality. Coincidentally, 1945 was also the year the Supreme Court decided *International Shoe Co. v. Washington*—a case that interred territoriality in the related adjudicative jurisdiction context.

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

---

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").


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").


Relations Law stated that federal statutes apply to "conduct occurring within, or having an effect within, the territory of the United States." 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. And although other countries first challenged the effects test as an illegitimate expansion of U.S. economic and political hegemony—particularly in the 1950s through 1970s—by the 1990s most countries had come to accept the doctrine as a valid basis to exercise legislative jurisdiction.


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).


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.\(^{106}\)

\(^{102}\) Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co. (\textit{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)); \textit{see also} Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) (describing the presumption against extraterritoriality).

\(^{103}\) \textit{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)))


\(^{105}\) \textit{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"); \textit{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); \textit{see also} Dodge, \textit{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).

\(^{106}\) \textit{See} Bradley, \textit{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"); \textit{see also} Kramer, \textit{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, \textit{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 force¹¹⁰—the Ninth Circuit concluded

---

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. 261, 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).


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))).

recently that U.S. environmental laws can regulate Canadian companies operating solely in Canada in accordance with Canadian law.\(^1\) 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.\(^1\)

Certainly, at times, courts have attempted to pull back from the effects test. The Supreme Court has suggested that international comity\(^1\) may limit the extraterritorial application of U.S. laws.\(^1\) Drawn from conflicts-of-law doctrine—referred to alternatively as the balancing, rule of reason, or interest approach—courts have attempted to temper the effects test and infuse comity into the jurisdictional analysis.\(^1\) In some ways, comity became a substitute

---

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. But even then, the Court has found international comity to apply in only the rarest of circumstances. And when comity does apply, significant questions exist as to whether courts are able to evaluate foreign interests meaningfully or do so in a way that does not inevitably favor U.S. interests. 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
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. As famously once said in the antitrust...
context, "everything affects everything." The effects test thus gives license for near universal jurisdiction. In so doing, it has "dramatically expanded the potential for concurrent jurisdiction and its accompanying conflict potential." In other words, the effects test has permitted precisely what legislative jurisdiction is designed to prevent: conflicts with foreign states.

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. 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. But significant forces—and what

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 & POLY 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.\textsuperscript{131} This is not only
because of the vagaries of what those interests entail,\textsuperscript{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."\textsuperscript{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.\textsuperscript{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."\textsuperscript{135} Second, many commentators have explained how basing
jurisdiction on effects creates a slippery slope once indirect injuries
are sufficient to constitute an effect.\textsuperscript{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.\textsuperscript{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."\textsuperscript{138} Indeed, no

“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,
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
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{141} But deciding

Mark D. Rosen, \textit{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, \textit{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, \textit{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).

\textsuperscript{139} BORN & RUTLEDGE, \textit{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); \textsc{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, \textit{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).

\textsuperscript{140} See, e.g., \textit{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); \textit{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."); \textit{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); \textit{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).

\textsuperscript{141} Gibney, \textit{supra} note 24, at 307:

\begin{quote}
[The 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 ... .]
\end{quote}

Courts have sometimes admitted the legislative nature of the analysis. \textit{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."); \textit{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. 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." If a new era of global extraterritoriality has not already dawned, then it is certainly near. But extraterritorial laws are deeply problematic: they are inconsistent with democratic governance and lead to other harms.

---

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, is the inherently undemocratic nature of extraterritorial laws. Under basic democratic principles and norms, government must rest upon the consent of the governed. Outsiders may not dictate the law to a political community that has not consented to it.

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).

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. 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.”

Foreigners are by definition outsiders with no vote and presumably little formal ability to influence domestic political processes. The decisionmakers—the domestic courts—are politically unaccountable to the foreign defendants and apply laws to which the foreigners have not consented. For these reasons, extraterritorial laws are an affront to democratic sovereignty.

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


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. Extraterritorial laws are just “a step away from the ‘taxation without representation’ that so vexed our country’s forefathers.” 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. Extraterritoriality is also in tension with modern U.S. aspirations to encourage democracy and self-rule worldwide. 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 and the right to self-determination. Why should American courts—without clear congressional approval—impose American regulatory policy on the European Union, Canada, Japan, Mexico, and others?158 It is equally

154. See Parrish, supra note 1.
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.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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.\textsuperscript{164} Extraterritorial laws ignore all of this.\textsuperscript{165}

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?").


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).

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.* The U.S. Constitution has no formal extraterritorial effect. Outside U.S. territorial borders, aliens are not protected by the Constitution, and U.S. actors are not bound by constitutional constraints. Based on the idea of a social contract and self-government, current doctrine finds that outsiders have no claim to invoke constitutional rights.

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 ....").


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

---

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").


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. And, not surprisingly, as demonstrated by Europe's recent extraterritorial regulation of Americans, Americans are not fond of other countries' extraterritorial laws either.

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. In many contexts, such ad hoc and unilateral approaches run counter to conventional wisdom that global problems require international solutions.

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. 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 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, if not the reality, of favoring local interests. 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." In short, foreign

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").
defendants are concerned that extraterritoriality permits plaintiffs to illegitimately forum shop for favorable law in the United States or to otherwise impose greater costs upon them. 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." 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. 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, nonrecognition of judgments, and enactment 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).
of blocking\textsuperscript{192} or claw-back statutes.\textsuperscript{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.\textsuperscript{194} U.S. foreign relations are 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").


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. 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." 

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).

legislative intent. 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. Certainly this is true in the international context. In the domestic context, too, routinely courts require clear evidence of legislative intent prior to finding that legislation might impose on state sovereign prerogatives. The clear or plain statement rule is an acknowledgment that Congress will not readily interfere with the


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.").


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

To the extent a presumption and a clear statement rule make sense in the domestic context, 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, 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 those thorny


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. Feilmy, 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).

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.

---

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’n’s 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."\textsuperscript{211} The presumption does not implicate conflict of laws or try to resurrect the long-dead theory of vested rights.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{215} Clear benefits would inure from this approach. It would not only reduce possible conflicts and increase predictability in law,\textsuperscript{216} but would also insulate the judiciary from claims that it is usurping

\begin{itemize}
\item \textsuperscript{211} Kramer, \textit{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. \textit{Currie, \textit{supra} note 67, at 81–121.}
\item \textsuperscript{212} Lea Brilmayer has made the point well that rules respective of territoriality and political rights need not involve a return to vested rights. \textit{Brilmayer, \textit{supra} note 44, at 247–59.}
\item \textsuperscript{213} The Court has repeatedly asserted the need to be cognizant of foreign retaliation and potential foreign embarrassment in a range of contexts. \textit{See, e.g.,} Sosa \textit{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 \textit{v. Altmann,} 541 U.S. 677, 689 (2004) (noting need for international comity in foreign sovereign immunity context); Asahi Metal Indus. Co. \textit{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 \textit{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).
\item \textsuperscript{214} \textit{See, e.g.,} Spector \textit{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").
\item \textsuperscript{215} American industry certainly believes that this benefit would exist. \textit{See, e.g.,} Brief of the Nat'l Mining Ass'n et al. as Amici Curiae Supporting Petitioners at 5, Pakootas \textit{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 \textit{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 \textit{v. Teck Cominco Metals Ltd.,} 452 F.3d 1066 (9th Cir. 2006) (2007 WL 1318990) (fearing "tit for tat" retaliation by foreign jurisdictions).
\item \textsuperscript{216} \textit{Cf.} Laycock, \textit{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.").
\end{itemize}
legislative authority. More importantly, the approach would undermine the growing global assumption that extraterritorial laws are an appropriate way to resolve global challenges—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.

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. 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. 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

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.
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 Empagran, where the Court strictly construed an antitrust statute to avoid extraterritorial application when foreign conduct did not directly affect U.S. markets.\textsuperscript{221} The Court should continue that trend.\textsuperscript{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).\textsuperscript{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

\textsuperscript{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”).


\textsuperscript{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. And states must take into account other states' interests when exercising their own sovereignty. The landmark Trail Smelter arbitration, in its now famous proclamation of the “no-harm principle,” explained it this way:

[No 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.]

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. Moreover, international

---


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.”).


THE EFFECTS TEST

law now plainly accepts the effects test as a basis for legislative jurisdiction. 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.

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. 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). Although politically unpopular, it may

(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").


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").


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. 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. 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 (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.


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. Literally thousands of such agreements exist. 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. Those who support extraterritorial laws then have the burden of explaining why international law is not equipped to address transboundary harms. 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

---


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


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. 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. 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.