
Article

**Dual Illegality and Geoambiguous Law: A
New Rule for Extraterritorial Application
of U.S. Law**

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INTRODUCTION

Time was when U.S. law was thought to stop at its borders. Not so anymore. The modern view posits a nation-state system in decline and a corresponding need for shared and flexible jurisdiction to account for our increasingly interconnected, Internet-centric world—a world that ostensibly defines interests, community, and allegiance by criteria other than the clear lines of a nation-state’s borders.¹ “The ‘borderless’ nature of some activities, the near-global nature of others—all of this seems to demand regulatory solutions freed from territorial underpinnings.”²

The United States might well like it this way. A superpower no longer bent on conquering more territory stands to benefit when it instead can unilaterally project its law and corresponding enforcement resources to regulate what people do in other countries. As law accommodates self-interest, the past century of U.S. legal doctrine has bypassed traditional territorial limits in favor of extraterritorial jurisdiction under various doctrinal banners.³ Sometimes it’s “effects jurisdiction” to justify protecting the U.S. economy from foreign actors who don’t play by our regulatory rules.⁴ Sometimes it’s “protective jurisdiction” to

1. See Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1230 (2007) [hereinafter Berman, *Global Legal Pluralism*] (contending that “territorial formalisms” are anachronistic and “simply cannot provide a rational framework for making jurisdictional judgments”); Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 817 (2009) [hereinafter Parrish, *Reclaiming*] (“Buoyed by concepts of universal jurisdiction and loosened constraints on territoriality, the modern Internationalists find the traditional view of international lawmaking as the exclusive business of nation-states to be anachronistic.”).

2. Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631, 668 (2009) [hereinafter Buxbaum, *Territory*].

3. See *infra* Part I.B (describing the evolution of U.S. extraterritorial jurisdiction jurisprudence and the Restatement of Foreign Relations Law).

4. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 769–70 (1993) (interpreting the Sherman Act’s antitrust liability provisions to apply to British companies in the United Kingdom); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285 (1952) (holding that the Lanham Act for the protection of trademarks applies extraterritorially against a U.S. citizen’s use of the Bulova watch trademark on watches in Mexico).

combat offshore drug traffickers or to safeguard U.S. government property from a foreign fraud or influence.⁵ And sometimes it's "universal jurisdiction" for the worst-of-the-worst global crimes.⁶ By whatever label, such doctrines of unilaterally imposed extraterritorial jurisdiction afford the United States a strategic middle ground of control between, at one extreme, conquering more countries and, at the other, cooperating by treaty with them. This, then, "enabl[es] the United States to unilaterally manipulate legal difference so as to better serve its interests" while "enhancing American power and interests on the world stage."⁷

Yet, despite its own track record of extraterritorial adventurism,⁸ the United States bristles when foreign states seek to extend their laws to the territorial United States. The recent controversy sparked by a Spanish magistrate's investigation of former U.S. officials for the treatment of terrorism detainees is but one example.⁹ "What next?," quipped a headline in the *Wall*

5. See, e.g., *United States v. Bowman*, 260 U.S. 94, 102 (1922) (applying U.S. law to an extraterritorial conspiracy aimed at defrauding a shipping company owned in part by the U.S. government); *United States v. Vilches-Navarrete*, 523 F.3d 1, 22 (1st Cir. 2008) (Lynch & Howard, JJ., concurring in part) (stating that the protective principle justifies enforcing laws against offshore drug trafficking); *United States v. Yousef*, 327 F.3d 56, 110 (2d Cir. 2003) (holding that the protective principle justified prosecution of an extraterritorial plot to destroy U.S. aircraft in an effort to influence U.S. government policy).

6. See, e.g., 18 U.S.C. § 831 (2006) (describing federal criminal law against unauthorized use of nuclear material, and allowing prosecution in any U.S. court of an alleged offender if, "after the conduct required for the offense occurs, the [alleged offender] is found in the United States, even if the conduct required for the offense occurred outside the United States"); *Yousef*, 327 F.3d at 104, 108–10 (holding that although "the indefinite category of 'terrorism' is not subject to universal jurisdiction," a foreign plane bombing plot is prosecutable under U.S. law in accordance with the protective principle and the multilateral hijacking convention); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987) [hereinafter RESTATEMENT] (listing "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism" as universal jurisdiction crimes).

7. KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* 7, 224 (2009); see also *id.* at 230 (noting that "the legal differences [between countries] in the Westphalian system of territorial sovereignty create strong incentives for extraterritoriality" and that "extraterritoriality should consequently be understood as an important yet underappreciated alternative to more familiar forms of managing difference across jurisdictions, whether more consensual, such as the negotiation of treaties, or more coercive, such as colonization").

8. See *infra* Appendix pt. B (listing a broad range of U.S. federal statutes that apply to conduct outside the United States).

9. See Douglas J. Feith, Op-Ed., *Spain Has No Right to Try U.S. Officials*, WALL ST. J., Apr. 3, 2009, at A17, available at <http://online.wsj.com/article/>

Street Journal, “Prosecutions for bad advice on global warming?”¹⁰

Well, exactly why not? Faced with foreign regimes that won’t agree to limits on greenhouse gases,¹¹ why can’t the United States announce that its own carbon emission limits apply to all people and companies worldwide? Faced with a new breed of post-9/11 terrorism,¹² why can’t the United States prohibit anyone worldwide from supporting or harboring any terrorists? Faced with foreign regimes that filter political content on the Internet,¹³ why can’t the United States globally criminalize political censorship anywhere on the worldwide web?

Such new-age scenarios raise age-old questions about the legal authority of one state to apply its laws to acts that occur in the territory of another.¹⁴ As legislator, Congress sometimes

SB123871971773584991.html (“The Spanish magistrate apparently believes that it can be a crime for American officials to offer the wrong kind of advice to a [P]resident of the United States and, furthermore, it can be a crime punishable by a Spanish court. This is a national insult with harmful implications.”).

10. *Id.*

11. See, e.g., Edward Wong & Jonathan Ansfield, *China Insists that Its Steps on Climate Be Voluntary*, N.Y. TIMES, Jan. 30, 2010, at A5, available at 2010 WLNR 1981188 (“China is banding with other major developing nations to stress that only wealthier countries need to make internationally binding commitments.”).

12. See Edward Rothstein, *In a Changing World, an Ever-Evolving Terrorism*, N.Y. TIMES, May 9, 2008, at E38 (reviewing PHILIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY (2008)), available at 2008 WLNR 8714405 (describing a new account of terrorism in the twenty-first century as an ideology “not interested in national liberation or mercantile success,” but in “break[ing] down the established order of states and enthron[ing] another form of authority (overseen by Islamic jihadists),” with “groups [that] are global and decentralized, prepared to ‘outsource’ their attacks and readily trade weaponry and secrets”).

13. See, e.g., Siobhan Gorman, *Web Access Is New Clinton Doctrine*, WALL ST. J., Jan. 21, 2010, at A3 (“The U.S. will make unrestricted access to the Internet a top foreign-policy priority.”); Hillary Rodham Clinton, U.S. Sec’y of State, Remarks on Internet Freedom (Jan. 21, 2010), available at <http://www.state.gov/secretary/rm/2010/01/135519.htm> (noting that “[w]e stand for a single [I]nternet where all of humanity has equal access to knowledge and ideas,” but warning that “[s]ome countries have erected electronic barriers that prevent their people from accessing portions of the world’s networks”).

14. Different considerations may apply when the issue is what nation’s law should govern a transnational dispute about private law (such as a contract) between private parties. This Article focuses on “public law” disputes concerning choice of *public* law regulation in the transnational context. And it focuses on the application of U.S. law to conduct that occurs in the territory of foreign nation-states, not on the high seas or other areas like Antarctica that are not subject to one nation’s sovereignty.

speaks to whether its laws should apply abroad.¹⁵ More often it does not. Congress enacts what I will call “geoambiguous” laws—laws that proscribe or regulate conduct but that remain silent about whether they apply to acts that occur outside of the United States.¹⁶

When confronted with geoambiguous laws, the Supreme Court sometimes invokes a presumption against extraterritorial jurisdiction, solemnly avowing not to apply U.S. law beyond U.S. borders absent clear direction from Congress to do so.¹⁷ Very recently, for example, the Court relied on the presumption to decline to apply SEC Rule 10b-5 to foreign securities transactions, despite the fact that the fraudulent conduct alleged to have tainted these transactions occurred in the United States.¹⁸ At other times, however, the Court applies geoambiguous laws to extraterritorial conduct despite any clearly stated intent of Congress.¹⁹

Scholars scold the Court’s inconsistency but are themselves deeply divided about how U.S. courts should construe geoambiguous laws. The scholars generally fall into one of three camps that I will refer to as “judicial unilateralism,” “judicial territorialism,” and “judicial interests-balancing.”²⁰ Among the judicial unilateralists, Professor William Dodge broadly argues that

15. See, e.g., *infra* Appendix pts. A, B (listing federal criminal statutes that either expressly allow or expressly disallow extraterritorial application).

16. See *infra* notes 69–71 and accompanying text.

17. See *infra* notes 81–100 and accompanying text (explaining important Supreme Court decisions that discuss the United States’ presumption against extraterritorial application of its laws).

18. See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2888 (2010).

19. See *infra* notes 107–13, 123–29 and accompanying text.

20. The debate about the geographic scope of U.S. statutory law can be seen as part of a larger conflict among judges and scholars about how U.S. law in general should intersect with and account for foreign and international law. See, e.g., Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 52–53 (2004) (contrasting “nationalist jurisprudence,” which “is characterized by commitments to territoriality, extreme deference to national executive power and political institutions, and resistance to comity or international law as meaningful constraints on national prerogatives,” with “transnationalist jurisprudence,” which “assumes America’s political and economic interdependence with other nations operating within the international legal system” and in which, “[i]n Justice Blackmun’s words, U.S. courts must look beyond narrow U.S. interests to the ‘mutual interests of all nations in a smoothly functioning international legal regime’ and, whenever possible, should ‘consider if there is a course that furthers, rather than impedes, the development of an ordered international system’” (quoting *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 555, 567 (1987) (Blackmun, J., concurring in part))).

“a court should apply a statute extraterritorially whenever doing so appears to advance the purposes of the statute and should not worry about resolving conflicts of jurisdiction with other nations.”²¹ According to Dodge, wide leeway for the application of U.S. law abroad will counteract systemic underregulation of globally harmful activity.²² Moreover, he contends, a clash of U.S. and foreign laws may well spur advantageous diplomatic negotiation to attain a preferred, mutual resolution in place of warring, unilateral legal regimes.²³

In similar fashion, Professor Phillip Trimble asserts that “in a world compressed by technology, the imperative of effective governmental regulation of private behavior is increasingly paramount.”²⁴ Therefore, he argues for an “unqualified ‘effects’ doctrine”—that courts should apply U.S. statutes to extraterritorial conduct whenever that conduct is intended to or does have a substantial effect within the United States.²⁵ To the same effect, Professor Jonathan Turley argues for a reversal of the traditional presumption against extraterritoriality to reflect “the contemporary realities of the world economy and environment in the late twentieth and early twenty-first century.”²⁶ All these views are but a subset of “the growing literature on jurisdiction and globalization [that has moved] away from territory,

21. William S. Dodge, *Extraterritoriality and Conflicts-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 104–05 (1998) [hereinafter Dodge, *Extraterritoriality*]; see also William S. Dodge, *An Economic Defense of Concurrent Antitrust Jurisdiction*, 38 TEX. INT'L L.J. 27, 34 (2003) [hereinafter Dodge, *An Economic Defense*] (“When Congress is silent about the extraterritorial reach of a statute, a court concerned with effectuating congressional intent ought to apply that statute extraterritorially to any conduct that causes substantial effects in the United States.”).

22. See Dodge, *Extraterritoriality*, *supra* note 21, at 152 (“Unilateralism is the better approach to extraterritoriality, not because it advances the interests of the United States at the expense of other nations but because it is more likely to benefit all nations by avoiding underregulation and encouraging international agreement.”).

23. *Id.*; see also Dodge, *An Economic Defense*, *supra* note 21, at 34–35 (arguing that “Congress may fail to correct the problem of underregulation that the presumption against extraterritoriality creates . . . because the consumers who would benefit from greater regulation are too disorganized compared with industry,” and that “judicial efforts to prevent overregulation of foreigners through the presumption against extraterritoriality reduce the incentives of foreign governments to negotiate”).

24. Phillip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT'L L. 53, 57 (1995).

25. *Id.*

26. Jonathan Turley, “When in Rome”: *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 602–03 (1990).

and territory-based concepts of regulatory power, as the basis for defining the scope of lawmaking authority.”²⁷

By contrast, judicial territorialists counsel courts to refrain from applying U.S. law abroad absent the very clear intent of Congress or the express consent of affected foreign states. Professor Austen Parrish, for example, has recently argued that “territoriality as a constraint on state power should be reinvigorated,” and to do so he suggests that U.S. courts raise the bar for when they will extend U.S. law abroad to consistently require either a “clear statement” or “clear and unmistakable . . . intent” of Congress.²⁸ Without adopting Professor Parrish’s more traditional territorialist position, Professor Hannah Buxbaum nonetheless urges that “territorial factors be reintegrated” into transnational economic regulatory systems.²⁹ Consistent with territorial concerns, she further contends that U.S. courts—when faced with claims seeking to apply U.S. regulatory standards to foreign-based conduct—should seek formal consent of foreign states to adjudication of these claims in the U.S. court system.³⁰

Judicial territorialists can rightly point to the diminishing dominance of the United States in the global economy and hence the waning efficacy of efforts to impose U.S. law abroad.³¹ Other nations may vitiate U.S. extraterritorialism

27. Buxbaum, *Territory*, *supra* note 2, at 634; *see also* John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351, 388–90 (2010) (contending that courts should interpret the geographical scope of law not in light of whether a law is “extraterritorial” but whether it is “extrajurisdictional” in the sense of exceeding background limits of the customary international law of legislative jurisdiction).

28. Austen Parrish, *The Effects Test: Extraterritoriality’s Fifth Business*, 61 VAND. L. REV. 1455, 1493–94 (2008) [hereinafter Parrish, *Effects Test*].

29. Hannah L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance*, 42 VA. J. INT’L L. 931, 934 (2002) [hereinafter Buxbaum, *Conflict of Economic Laws*]; *see also* Buxbaum, *Territory*, *supra* note 2, at 674 (“The use of territoriality as a mechanical standard used to link particular conduct with a particular country’s law—rightly rejected—must be distinguished from the use of territoriality as an expression of a specific understanding about fairness and legitimacy in cross-border regulation.”).

30. *See* Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT’L L. 251, 308–09 (2006) [hereinafter Buxbaum, *Transnational Regulatory Litigation*] (contending that “[f]or transnational litigation to become an effective element in global economic regulation, the consent of the other countries involved . . . is necessary,” and that “[t]ransnational litigation initiated by private claimants . . . requires a procedural mechanism to obtain the consent of foreign states”).

31. *See* Larry Kramer, Comment, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and*

with countermeasures (e.g., blocking or clawback statutes).³² And the U.S. unilateralist example may well embolden emerging powers to “go on the offensive” and extend their own laws abroad to seek to regulate the domestic affairs of the United States.³³

More broadly, judicial territorialists worry that unilateralism will tend to crowd out international rulemaking by multilateral consensus. As Professor Parrish contends, “the disassembling of the nation-state and the declining salience of territorial borders—to the extent it manifests itself in extraterritorial domestic actions—is a troubling, not a positive, development,” because “human rights and environmental rights are better protected when international problems are solved internationally, not unilaterally (or even surreptitiously) through domestic litigation.”³⁴

Straddling the unilateralist and territorialist positions are the interests balancers, led by Professor Andreas Lowenfeld and memorialized in part in section 403 of the American Law Institute’s Restatement (Third) of Foreign Relations Law (Restatement).³⁵ The interests balancers come to the fray with no

Trimble, 89 AM. J. INT’L L. 750, 756 (1995) (noting that “[w]e have seen in recent years how such action invites retaliation and subverts U.S. interests,” and that “[t]here may have been a time when the United States was powerful enough to dictate terms with impunity,” but “that time has long since passed, and to do so today would be futile and counterproductive, as well as inappropriate”).

32. See Parrish, *Reclaiming*, *supra* note 1, at 864–65; see also Harry L. Clark, *Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 25 U. PA. J. INT’L ECON. L. 455, 475–81 (2004) (describing the wide range of foreign blocking and clawback countermeasures that certain countries have taken in response to extraterritorial U.S. sanctions).

33. See, e.g., GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 569 (4th ed. 2007) (“[A] number of European states have begun to apply selected national regulatory statutes extraterritorially, with rigor approaching that of the United States, arousing complaints from both the United States and international businesses.”); RAUSTIALA, *supra* note 7, at 125 (“Some version of the effects principle has been adopted by most major powers around the world, including Germany, Japan, Canada, and the United Kingdom.”); Parrish, *Reclaiming*, *supra* note 1, at 855–56 (“[F]rom Internet and cyber-cases, to criminal prosecutions, to prominent human rights cases, other countries have started to use their laws as a way to advance their own foreign policies and to respond to the perceived U.S. aspiration of special legal status. As the United States has stepped up its claims to extraterritorial jurisdiction, other countries claim ‘me too.’”).

34. Parrish, *Reclaiming*, *supra* note 1, at 820.

35. See RESTATEMENT, *supra* note 6, §§ 402, 403 (setting forth potential grounds for a state to assert jurisdiction to prescribe law and describing multiple “reasonableness” factors to be balanced and weighed when more than one state has an interest in regulating conduct at issue); Andreas F. Lowenfeld,

predilection for extending or restricting the geographical scope of U.S. law. Instead, they borrow from modern choice-of-law rules to have judges balance the competing interests of the United States and foreign states in deciding whether any particular U.S. law should apply abroad.³⁶ As the interests balancers see it, strict territoriality is not sufficiently responsive to harms from foreign-based conduct, while “a naked or unmodified effects doctrine fails to respect legitimate sovereignty interests abroad and magnifies and encourages conflicts in an ever more interdependent international economic arena.”³⁷ Their solution—broad interests balancing—would enlist courts in the assessment of no fewer than eight factors or “interests” when deciding whether a U.S. law should apply abroad. Such balancing would include not only “the likelihood of conflict with regulation by another state” and “the extent to which another state might have an interest in regulating the activity,” but also the “importance of the regulation to the regulating state” and the more general “importance of the regulation to the international political, legal, or economic system.”³⁸

Although each of these three scholarly positions has come under mutual cross fire, surprisingly little attention has focused on theorizing alternative frameworks. In the meantime, the conflicted approach of U.S. courts to extraterritoriality re-

Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case, 89 AM. J. INT'L L. 42, 48–50 (1995) (advocating the Restatement's interests-balancing approach). Gary Born advances a similar test, based in part upon a blend of section 403 and private international conflicts-of-law principles, concluding that U.S. law should trump the law of the territorial state only if a court decides that the United States has “the most significant relationship” to the conduct in question. Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 86–90, 100 (1992).

36. See William S. Dodge, *The Public-Private Distinction in the Conflict of Laws*, 18 DUKE J. COMP. & INT'L L. 371, 382 (2008) [hereinafter Dodge, *The Public-Private Distinction*] (“[T]he presumptions about legislative intent to which courts often resort when construing [the potentially extraterritorial] regulatory statutes might be characterized as external choice-of-law rules in disguise. . . . Modern choice-of-law rules tend to give great weight to governmental interests.”).

37. Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 11 (1992).

38. RESTATEMENT, *supra* note 6, § 403; see also Alford, *supra* note 37, at 16 (conceding that “the jurisdictional rule of reason has its weaknesses,” but noting that “it represents the only genuine, though inexact, attempt by courts to fashion a jurisdictional test which incorporates the legitimate sovereignty interests of foreign nations”).

mains more troubling than ever, as globalization explodes and a staggering number of U.S. laws are and remain geoambiguous.³⁹

It is time for a new approach, and this Article proposes one that I will call the dual-illegality rule. The dual-illegality rule would require that U.S. courts decline to interpret geoambiguous laws to penalize or regulate conduct that occurs in the territory of another state unless the same conduct is also illegal or similarly regulated by the law of the foreign territorial state. If, however, a U.S. statute or regulation forbids or regulates conduct that is already similarly outlawed or regulated by a foreign state, then U.S. courts should construe U.S. law to apply to the extraterritorial conduct, provided that there exists some other *prima facie* U.S. interest in having its regulation apply (such as under traditional prescriptive jurisdictional principles of nationality, effects, protective, or universal jurisdiction).

The dual-illegality rule sensibly blends the best of judicial unilateralism with judicial territorialism. First, it preserves the central tenet of territorial jurisdiction—to let each nation-state definitively decide which acts that take place on its own territory it should deem illegal or subject to regulation. This is not just nostalgia for the old way of doing things. To the contrary, territoriality corresponds to a nation-state's exercise of actual physical control. Additionally, it is more definitionally stable in its application than traditional prescriptive jurisdictional principles that rely on courts to assess intended or actual harm from extraterritorial conduct or to make judgments about whether certain acts fall within an indefinite and expanding list of “universal” crimes.

Dual illegality is far from a novel concept. Most of our international extradition agreements require “dual criminality” as a basis for one state to surrender an accused to another.⁴⁰ Just as they have been doing for decades in the extradition context, judges are well-suited to make dual-illegality determinations, because they are purely legal determinations that do not draw judges into making value judgments about the wisdom or need for extraterritorial regulation. That is why a dual-illegality principle is preferable to the judicial unilateralist approach (which turns on judges' highly subjective assessments of harms or effects inside the United States from extraterritorial

39. See *infra* Appendix pt. C (listing scores of geoambiguous federal criminal statutes).

40. See *infra* notes 240–40, 268–66 and accompanying text.

activity), and why it is also preferable to the judicial interests-balancing approach (which enmeshes judges in policy considerations of the significance of interests at stake for the United States and foreign states).

The greatest concern for political conflict arises when judges decide to apply U.S. law to extraterritorial conduct that is not prohibited or regulated in the same manner under the law of the territorial state. On the other hand, when judges allow extraterritorial application of U.S. law to conduct that is simultaneously prohibited or similarly regulated by the territorial state, then there is far less reason (or, at least, legitimate reason) for the territorial state to complain. The dual-illegality rule accommodates the need for some extraterritorial application of U.S. law while reducing the likelihood of political conflict when the United States seeks to regulate foreign-based activity. In short, the response to increasing global transactional complexity should be *less* jurisdictional contestability and *greater* reliance on rules that do not invite judges to engage in policy-like assessments of the needs or interests of the United States in having its law applied to activity abroad. Our courts should employ the dual-illegality rule to decide the scope of geoambiguous laws.

To be sure, the Supreme Court may be unwilling to adopt a dual-illegality rule in place of its present approach that shifts back and forth from unilateralism to territorialism. Congress itself could address this by means of a general interpretive statute instructing courts to apply geoambiguous law abroad when consistent with the dual-illegality rule. At the least, if neither the Court nor Congress is prepared to adopt a dual-illegality rule, the arguments set forth in this Article may warrant greater judicial and legislative awareness of the significance of incompatibilities between U.S. and foreign law.

Part I provides a background on the concepts of “territoriality” and “extraterritoriality,” the landmark decisions of U.S. courts considering the extraterritorial application of U.S. law, and the customary international law of jurisdiction. Part II critiques the current extraterritorial jurisdictional framework as generally applied by U.S. courts today. It focuses on how the uneven application of the presumption against extraterritoriality ends up ensnaring judges in a highly subjective interpretive process that is inconsistent with the certainty and predictability needs that largely justify having jurisdictional rules. Part III sets forth the case for a rule of dual illegality to govern U.S.

courts in deciding whether—in the absence of instruction from Congress—U.S. law should apply to criminalize or regulate conduct that occurs in foreign states. It demonstrates how a dual-illegality rule can work as it already has in the extradition context and responds to potential objections.

I. BACKGROUND

A. DEFINING TERRITORIAL AND EXTRATERRITORIAL LAWS

This Article focuses on concepts of territorial and extraterritorial law, presupposing the foundation of our global political and legal order in a nation-state system. Under this view, which is often associated with the Treaty of Westphalia of 1648, the world is divided into individual nation-states consisting of permanent populations of people who live within defined geographical areas and who are subject to national governments that not only regulate internally but also speak for the nation-state in dealing with other nation-states.⁴¹ One can point to a handful of “failed” states,⁴² but most nation-states today are soundly intact as political and governing units, with little, if any, of their definitional characteristics of territory, population, and government subject to serious dispute.⁴³ No, we don’t have a single world-governing body. Instead, practically all nation-states of the world have chosen to join the United Nations to

41. RESTATEMENT, *supra* note 6, § 201 (“Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”); RAUSTIALA, *supra* note 7, at 5 (“At the core of contemporary statehood is the idea, often associated with the Treaty of Westphalia in 1648, that each sovereign state has its own discrete and exclusive territory.”); John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT’L ORG. 139, 151 (1993) (“[T]he distinctive feature of the modern system of rule is that it has differentiated its subject collectivity into territorially defined, fixed, and mutually exclusive enclaves of legitimate dominion.”).

42. See, e.g., Leo Abruzzese, *The Worst Country on Earth*, ECONOMIST, Nov. 21, 2009, at Supp. 71 (“Calling Somalia a country is a stretch. It has a president, prime minister and parliament, but with little influence outside a few strongholds in the capital, Mogadishu. . . . Most of the country is controlled by two armed, radical Islamist factions, al-Shabab (the Youth) and Hizbul Islam (Party of Islam), which regularly battle forces loyal to the government.”).

43. Andreas Wimmer & Yuval Weinstein, *The Rise of the Nation-State Across the World, 1816 to 2001*, 75 AM. SOC. REV. 764, 765 (2010) (“The once revolutionary template of political legitimacy—self-rule in the name of a nation of equal citizens—is now almost universally adopted. This framework is recognized as the essence of modern statehood, so much so that the terms ‘nations’ and ‘states’ are often used interchangeably.”).

facilitate cooperation among individual nation-states.⁴⁴ Indeed a core principle of the UN Charter is reciprocal recognition and preservation of the sovereignty and territorial integrity of individual nation-state members.⁴⁵ After all, “it would be impossible to have a society of sovereign states unless each state, while claiming sovereignty for itself, recognized that every other state had the right to claim and enjoy its own sovereignty as well.”⁴⁶

Many scholars herald the decline of the nation-state system, positing the emergence of globally pluralistic and cosmopolitan legal regimes that invest power in varied international and transnational organizations, as well as with non-state actors.⁴⁷ But the fact remains that even today multilateral institutions are “relatively underdeveloped compared to the private and public domains of any reasonably functioning sovereign country,” while “[t]he nation-state remains the prevalent organizational source of authority and to variable extents the dominant one.”⁴⁸ The European Union, for example, is an immensely important international institution but employs fewer people

44. See *UN at a Glance*, UNITED NATIONS, <http://www.un.org/en/aboutun/index.shtml> (last visited Oct. 19, 2010).

45. U.N. Charter art. 2, paras. 1, 4 (noting that the UN “is based on the principle of the sovereign equality of all its Members,” and that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”).

46. Ruggie, *supra* note 41, at 162 (quoting MARTIN WIGHT, *SYSTEMS OF STATES* 135 (1977)).

47. See, e.g., Berman, *Global Legal Pluralism*, *supra* note 1, at 1169–79; Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 501–12 (2002); William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963, 969–70 (2004); Buxbaum, *Conflict of Economic Laws*, *supra* note 29, at 943–44.

48. SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS* 1, 419 (2006). Rather than subscribing to a view that “nothing has much changed in terms of state power” or focusing on “the proposition of the declining significance of the state,” Sassen advances the existence of an “intermediate zone” in which individual nation-states remain primary decisional loci but have changed—such as through the concentration of executive power, the recognition of privatization, and the joining of transgovernmental networks—in response to the forces of globalization. *Id.* at 269–71, 401, 419; see also Paul Schiff Berman, *Dialectical Regulation, Territoriality, and Pluralism*, 38 CONN. L. REV. 929, 940, 952 (2006) (discussing how “deterritorialized effects and affiliation combine with the persistent territoriality of coercive enforcement,” and urging that “we should conceptualize legal jurisdiction and the assertion of regulatory authority more capaciously as jurispersuasion, focusing not so much on the [territorial] power to enforce legal norms, but the [nonterritorial] ability to articulate them”).

(30,000) than the state of West Virginia (44,000).⁴⁹ International legal norms and institutions will grow and develop in many complex ways, yet nation-state governments will retain for the foreseeable future an essential and primary role in world governance, if only to consent to and enforce rules that others may decide to propose.⁵⁰

Just as the nation-state system is fundamental to our political worldview, “the organizing principle of modern government is *territoriality*,” which refers to “the organization and exercise of power over defined blocs of space” within a nation-state’s borders.⁵¹ Territorial jurisdiction connotes the application of legal rules within territorial space, and it is the most widely accepted source of a nation-state’s authority to make, enforce, and adjudicate legal rules.⁵²

This Article defines a nation-state’s law to be territorial if it prohibits or regulates a human act or conduct that occurs within the nation-state’s borders.⁵³ By contrast, a law is extraterritorial if it governs acts that occur outside the nation-state’s borders, even if committed by the nation’s own citizens.⁵⁴ The

49. BARRY E. CARTER ET AL., INTERNATIONAL LAW 538 (Aspen Publishers 5th ed. 2007).

50. RAUSTIALA, *supra* note 7, at 8–9 (contending that despite claims that the world is “flat” and that “political boundaries matter little and economic and social forces move freely,” “[t]hese claims [in fact] contain elements of truth, but are strongly overstated” because “[s]overeign borders still matter greatly for economic and political life,” while “territoriality even rules the virtual world; the Internet is subject to the control of sovereign states and increasingly ‘bordered’ in its structure”).

51. *Id.* at 5.

52. *See id.*; *see also* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 921 (D.C. Cir. 1984) (emphasizing that “[t]he prerogative of a nation to control and regulate activities within its boundaries is an essential, definitional element of sovereignty,” and that “the territoriality base of jurisdiction is universally recognized” and “is the most pervasive and basic principle underlying the exercise by nations of prescriptive regulatory power”).

53. Buxbaum, *Territory*, *supra* note 2, at 636; Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 181 (1992) [hereinafter Kramer, *Vestiges of Beale*]; Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT’L L. 905, 946 (2009).

54. *Cf.* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85, 87–88 (1998) [hereinafter Dodge, *Understanding the Presumption*] (noting that “[f]or regulatory purposes, one may distinguish between the conduct of an activity and the effects of an activity,” and that “[w]hen both the conduct and the effects of an activity occur entirely within a single state, one may safely characterize that state’s regulation of the activity as ‘territorial,’” but that when “the conduct, the effects, or both occur outside the regulating state, the regulation may be characterized as ‘extraterritorial’ to at least some degree”).

territorial/extraterritorial distinction in the law focuses on the location of the acts or conduct that a law explicitly controls, regardless of where any effects or consequences of such acts might be felt and regardless of any purpose, intent, or motive of the regulation to influence second-order conduct.⁵⁵ If, for example, a U.S. law prohibits consumers in the United States from purchasing African elephant tusks, this is a territorial regulation of consumer conduct within the United States, despite its apparent purpose or effect in part to discourage killing of endangered elephants in Africa.⁵⁶ By contrast, if a U.S. law were to expressly prohibit people in Canada from firing guns, this would be an extraterritorial law, whether applied to a polar bear hunter at the Arctic Circle or to an assassin in Canada who aims across the border to murder someone in the United States.

Two more caveats need to be considered. First, this is an article about the geographical scope of federal statutory law, not the geographical scope of the U.S. Constitution—whether citizens or non-citizens of the United States should have rights

55. This focus on the place of the act rather than the place of its eventual effect (if different) is consistent with the general approach taken for evaluating where criminal acts take place. *See, e.g.*, 18 U.S.C. § 3236 (2006) (“In all cases of murder or manslaughter, the offense shall be deemed to have been committed at the place where the injury was inflicted, or the poison administered or other means employed which caused the death, without regard to the place where the death occurs.”). Federal appeals courts do not agree about what it means for a law to be “extraterritorial” in scope. *Compare* *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 690 (7th Cir. 2008) (en banc) (“Congress has the power to impose liability for acts that occur abroad but have effects within the United States, but it must make the extraterritorial scope of a statute clear.” (internal citation omitted)), *cert. denied*, 130 S. Ct. 325 (2009), *with* *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1130 (D.C. Cir. 2009) (“Because conduct with substantial domestic effects implicates a state’s legitimate interest in protecting its citizens within its borders, Congress’s regulation of foreign conduct meeting this ‘effects’ test is ‘not an extraterritorial assertion of jurisdiction.’” (quoting *Laker Airways*, 731 F.2d at 923), *cert. denied*, 130 S. Ct. 3501 (2010)).

56. Meyer, *supra* note 53, at 957 (“If . . . a U.S. sanctions law prohibits U.S. companies in the United States from doing business with a French arms merchant that trades with Iran, then it cannot be said that the U.S. law regulates the French merchant at all[, because although t]he U.S. law may disadvantage the merchant, perhaps severely so in hopes of effectuating a change by the French company in its business conduct[,] . . . the law still does not regulate the French merchant, as he faces no consequences at the hands of the U.S. government for failure to conform.”). As I have argued elsewhere, a regulation may have multiple purposes—both inward- and outward-looking—such that it makes little sense to judge a law’s jurisdictional validity by its “extraterritorial” intent or purpose. *See id.* at 957–60.

under the U.S. Constitution arising from U.S. governmental activity in foreign countries.⁵⁷ Nor is this an article about the power of U.S. troops and police to invade other countries to enforce what may be called U.S. extraterritorial law. Instead, this Article focuses on the far more common scenario of the U.S. courts' territorial enforcement of extraterritorial law—in which a U.S. court interprets U.S. law to apply to extraterritorial acts and, as a result, enforces this law territorially against persons, companies, or property in the United States over which the U.S. court otherwise has personal jurisdiction. This can happen by means of a U.S. governmental prosecution or civil enforcement action in a U.S. court, or by means of a suit between private parties for enforcement of a U.S. statute. Thus, as Jack Goldsmith has noted, “the concept of extraterritoriality can be misleading,” because “[i]t does not (usually) mean that a nation enforces its law abroad,” but rather that “a nation uses the threat of force against local persons or property to punish, and thus regulate, extraterritorial acts that cause local harms.”⁵⁸

B. EXTRATERRITORIALITY AND U.S. LAW

It is now well-established that if Congress chooses to do so, it is free to regulate conduct outside the United States and in disregard of any limits posed by international law.⁵⁹ Although

57. For excellent analyses of issues raised by claims that the U.S. Constitution applies abroad, see generally José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660 (2009), and Chimène I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT'L L. (forthcoming 2011), available at <http://ssrn.com/abstract=1480886>.

58. Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL LEGAL STUD. 475, 479 (1998); see also RAUSTIALA, *supra* note 7, at 229 (noting that the rise of U.S. extraterritorialism “required that the relevant actors have some valuable asset or stake in the jurisdiction-asserting state that made them vulnerable to suit,” and that “for an enormous market like the United States this was often true”).

59. *United States v. Yousef*, 327 F.3d 56, 86 (2d Cir. 2003); see also *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (“Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.”); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (Marshall, C.J.) (noting that while courts are “bound by the law of nations which is a part of the law of the land,” Congress may “manifest [its] will” to apply a different rule “by passing an act for the purpose”); *Yousef*, 327 F.3d at 93 (“If a statute makes plain Congress’s intent (instead of employing ambiguous or ‘general’ words), then Article III courts, which can overrule Congressional enactments only when such enactments conflict with the Constitution, must enforce the intent of Congress irrespective of whether the statute conforms to customary international law.” (internal citation omitted)).

specific international rules may be given domestic effect by U.S. courts,⁶⁰ the Constitution does not subrogate our government or citizenry to the dictates of international law.⁶¹ To the contrary, the Constitution has numerous provisions authorizing the President and Congress to regulate matters affecting foreign affairs,⁶² and the national government may use that lawmaking authority to transcend or extend the scope of any specific structural limit on the power of the political branches under the Constitution.⁶³ Absent a rare showing that a particular extraterritorial application of U.S. law would be arbitrary and unfair in violation of constitutional due process,⁶⁴ or that it

60. Treaties have formal status as U.S. law under the Constitution's Supremacy Clause, *see* U.S. CONST. art. VI, cl. 2, and the Supreme Court has otherwise concluded that customary international law is a part of U.S. law to the extent not superseded by domestic U.S. law. *See, e.g.*, *The Paquete Habana*, 175 U.S. 677, 700, 714 (1900) (applying customary international law to protect a Cuban fishing smack from capture as a prize of war, because "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination," but only for cases "where there is no treaty, and no controlling executive or legislative act or judicial decision").

61. The Supremacy Clause references "treaties" (one form of international law) along with the Constitution itself and federal statutes as supreme to the law of individual states. U.S. CONST. art. VI, cl. 2. This does not elevate treaties, however, over domestic law in general, as Congress may enact laws superseding "the law of nations" if "the affirmative intention of the Congress [is] clearly expressed." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21–22 (1963) (internal quotations omitted). Thus, a later-in-time federal statute may trump a formal international treaty, *see Breard v. Greene*, 523 U.S. 371, 376 (1998), and treaties may not be given effect by courts as U.S. domestic law unless deemed to be self-executing or implemented by a later act of Congress, *see Medellín v. Texas*, 552 U.S. 491, 504–05 (2008).

62. *See, e.g.*, Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 136–58 (2007) [hereinafter Colangelo, *Constitutional Limits*] (discussing at length the foreign affairs powers granted under the Constitution to the political branches).

63. *See, e.g.*, *Perez v. Brownell*, 356 U.S. 44, 57 (1958) ("The States that joined together to form a single Nation and to create, through the Constitution, a Federal Government to conduct the affairs of that Nation must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations."); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318–20 (1936) ("As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations." (quoting *Burnet v. Brooks*, 288 U.S. 378, 396 (1933))).

64. *See, e.g.*, *United States v. Perlaza*, 439 F.3d 1149, 1160 (9th Cir. 2006) (noting that for the criminal prosecution of an offshore drug trafficker "due process requires the Government to demonstrate that there exists 'a sufficient

would otherwise exceed the subject-matter authority of Congress's power under Article I of the Constitution,⁶⁵ Congress is generally free to regulate conduct in foreign countries, and U.S. courts in turn are free to enforce and adjudicate congressional laws against individuals who are otherwise properly subject to their personal jurisdiction.⁶⁶

If Congress's general power to regulate foreign conduct is clear, the next question is whether, in a specific instance, Congress actually intends to do so. At times, Congress carefully delimits its laws to apply only to conduct that occurs within the United States.⁶⁷ At other times, Congress directs that its laws

nexus between the conduct condemned and the United States' such that the application of the statute would not be arbitrary or fundamentally unfair to the defendant" (quoting *United States v. Medjuck*, 48 F.3d 1107, 1111 (9th Cir. 1995)); *id.* at 1161 n.14 (citing contrary cases that decline to require such a nexus); *see also* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1260–63 (1992) (describing possible due process limits on the extraterritorial application of U.S. law); Colangelo, *Constitutional Limits*, *supra* note 62, at 158–76 (same); *cf.* *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413–19 (1984) (stating that adjudicative due process requires "minimum contacts" for a U.S. court to have personal jurisdiction over foreign-based defendants in a civil action). This Article focuses on what U.S. courts may do as to criminal or civil defendants over whom they otherwise have personal jurisdiction to enforce Congress's regulation of conduct that occurs abroad. The limitations that the Constitution may place on U.S. governmental enforcement of conduct that takes place outside U.S. borders is beyond the scope of this Article. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 766–71 (2008) (recognizing the constitutional right of habeas corpus for enemy combatant aliens detained at Guantánamo Bay, Cuba); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265–75 (1990) (declining to apply the Fourth Amendment warrant requirement to the search and seizure—directed by U.S. agents—of property owned by a nonresident alien and located in a foreign country); *Reid v. Covert*, 354 U.S. 1, 7–14 (1957) (recognizing the right to a jury trial for U.S. citizen defendants charged with capital murder on a foreign military base).

65. *See, e.g.*, Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 972–85 (2010) [hereinafter Colangelo, *Foreign Commerce Clause*] (arguing in favor of certain limits on Congress under the Foreign Commerce Clause to extend its law to foreign-based conduct); Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1194 (2009) (arguing that "the Define and Punish Clause does not generally authorize Congress to regulate foreign conduct with no demonstrable U.S. connection," and therefore "Congress cannot punish dog-fighting by Indonesians in Java because Congress has not been authorized by the Constitution to make such laws"). This Article does not address such arguments for constitutional constraints on the extraterritorial extension of U.S. law.

66. *See, e.g.*, Colangelo, *Foreign Commerce Clause*, *supra* note 65, at 950–57.

67. *See infra* Appendix pt. A (listing federal criminal laws that Congress has restricted to conduct occurring within the United States).

be applied extraterritorially or, for criminal statutes, does the functional equivalent by instructing courts to apply the law against any defendant who may later be found in the United States.⁶⁸ Most often, however, Congress says nothing at all about its laws' geographical limits.⁶⁹ Scores of federal criminal statutes, for example, say nothing about whether they apply to conduct that occurs wholly in foreign countries.⁷⁰ Other major federal civil regulatory statutes often lack geographical precision.⁷¹

68. See *infra* Appendix pt. B (listing federal criminal laws with express extraterritoriality provisions).

69. Born, *supra* note 35, at 7 (“In the overwhelming majority of cases, however, federal statutes are couched in the most general terms and suggest no meaningful geographic limits.”); Dodge, *The Public-Private Distinction*, *supra* note 36, at 379 (observing that “[s]ometimes Congress speaks directly to the extraterritorial scope of its regulatory laws,” but “[f]requently, though, Congress does not specify the extraterritorial reach of its regulatory laws”); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2237 (2002) (“[L]egislatures (and certainly Congress) rarely think about the extraterritorial application of their statutes.”); Kramer, *Vestiges of Beale*, *supra* note 53, at 183 (explaining that not only may Congress “find it difficult to specify extraterritorial scope in detail,” but “the need for international application may not be apparent at the time of enactment and . . . will often be overlooked anyway”); Ellen S. Podgor, *A New Dimension to the Prosecution of White Collar Crime: Enforcing Extraterritorial Social Harms*, 37 MCGEORGE L. REV. 83, 95–96 (2006) (describing the range of federal statutes that are not clear about geographical scope).

70. See the Appendix to this Article for a listing of federal geoambiguous laws. *Infra* Appendix pt. C. Many of these statutes presumably rely upon the Foreign Commerce Clause of the Constitution by expressly referencing conduct relating to “foreign commerce.” U.S. CONST. art. I, § 8, cl. 3. Yet, as Professor Anthony Colangelo has recently described, such invocation of the Foreign Commerce Clause may be “inward-looking” to govern activity inside the United States or “outward-looking” to govern conduct in foreign countries. See generally Colangelo, *Foreign Commerce Clause*, *supra* note 65.

71. See, e.g., Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 286–87 (2007) (Sherman Act, even as amended in 1982 by the Foreign Trade Antitrust Improvements Act); see also *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878–79 (2010) (Securities Exchange Act of 1934); *McBee v. Delica Co.*, 417 F.3d 107, 117 (1st Cir. 2005) (Lanham Act—federal trademark law); *ARC Ecology v. U.S. Dep’t of Air Force*, 411 F.3d 1092, 1096 (9th Cir. 2005) (Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as the “Superfund” law)); *Env’tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 529 (D.C. Cir. 1993) (National Environmental Policy Act (NEPA)); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 672–76 (S.D.N.Y. 1991) (Resource Conservation and Recovery Act (RCRA)). But see *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454–56 (2007) (noting that Congress has expressly limited application of patent law to the territorial United States with one exception).

And so courts are left to decide the geographical scope of federal law in the face of an uncertain congressional intent. At times, the Supreme Court pays homage to 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.”⁷² The Court justifies this principle on the assumption that Congress “is primarily concerned with domestic conditions,”⁷³ acting “to protect against unintended clashes between our laws and those of other nations which could result in international discord.”⁷⁴ Other times, however, the Court frequently overlooks the presumption against extraterritoriality and applies U.S. law abroad despite any clearly stated intent of Congress.⁷⁵ In short, as Professor Einer Elhauge has noted, the presumption “has been strongly critiqued both normatively and for its inconsistent application.”⁷⁶

The current debate about the extraterritorial application of U.S. law is best understood in light of the past two centuries of precedent and the background principles of the customary law

72. *Morrison*, 130 S. Ct. at 2877 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

73. *Arabian Am. Oil Co.*, 499 U.S. at 248 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)); see also *Morrison*, 130 S. Ct. at 2877 (explaining that the presumption “rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters”).

74. *Arabian Am. Oil Co.*, 499 U.S. at 248.

75. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 769–70 (1993) (affirming extraterritorial application of U.S. antitrust law, but doing so without mentioning the presumption against extraterritoriality); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 206 (1993) (Blackmun, J., dissenting) (stating that despite the presumption against extraterritoriality, “generally worded laws covering varying subject matters are routinely applied extraterritorially” in the absence of expressed intent of Congress that a law be applied as such); RAUSTIALA, *supra* note 7, at 99 (noting that “the presumption is frequently overcome, . . . sometimes because courts simply soften the test,” and sometimes because “judges have [] ignored the presumption entirely.”).

76. Elhauge, *supra* note 69, at 2235–36 (“[C]ourts tend to apply the canon to nonmarket statutes (like nondiscrimination, labor, or environmental law) but not to market statutes (like antitrust, securities, or trademark law), which instead are interpreted to extend to extraterritorial conduct having substantial effects within the enacting nation.”); see also Dodge, *Understanding the Presumption*, *supra* note 54, at 86–91 (discussing varying meanings of the presumption against extraterritoriality and proposing that “the presumption should not be considered a clear statement rule and should be deemed rebutted when there is good reason to think that Congress was focused on something other than domestic conditions”).

of international jurisdiction.⁷⁷ Part I.B.1 below traces the evolution of significant court rulings that reveal a shift from strict territorialism to broad extraterritorialism. Part I.B.2 then outlines the contemporary U.S. view of the customary law of international jurisdiction as set forth in the Restatement.⁷⁸

1. The Evolving U.S. Law of Extraterritorial Jurisdiction

The evolution of the American law of extraterritorial jurisdiction has been well told by leading scholars.⁷⁹ The story often starts with the reign of strict territorial jurisdiction from the early days of the republic.⁸⁰ In the 1812 case of *The Schooner Exchange v. M'Faddon*, Chief Justice John Marshall observed that “[t]he world [was] composed of distinct sovereignties, possessing equal rights and equal independence.”⁸¹ According to Marshall, “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute.”⁸² Marshall noted that this “full and absolute territorial jurisdiction” was the

77. See RESTATEMENT, *supra* note 6, §§ 402, 403. The Restatement claims not only that its jurisdictional rules “reflect development in the law as given effect by United States courts,” but also that “[i]ncreasingly” its rules “have been followed by other states and their courts and by international tribunals, and have emerged as principles of customary law.” *Id.* pt. IV, introductory note.

78. Although the Supreme Court has relied on the Restatement as a rule of customary international law, *see, e.g., Hartford Fire*, 509 U.S. at 799, considerable dispute exists over whether the Restatement is properly deemed a “source” of international law and whether it accurately describes the customary law of international jurisdiction. *See also* United States v. Yousef, 327 F.3d 56, 99–100, 104 (2d Cir. 2003) (declining to rely on the Restatement’s definition of “universal jurisdiction”).

79. *See generally* RAUSTIALA, *supra* note 7, at 93–125; Dodge, *Extraterritoriality*, *supra* note 21, at 121–43; Parrish, *Effects Test*, *supra* note 28, at 1462–78.

80. One might imagine a world not too long ago when law ran with the person, rather than the territory in which a person lives. *See, e.g.,* MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* 7 (1994) (describing the pre-Modern Europe era of “personal law” in which “the law of the community to which a person belong[ed] determine[d] the law applied to the person and his or her transactions,” distinguishable “from a principle of ‘territoriality’ in which the laws or customs of a place govern all those who reside there”).

81. *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812). In *Schooner Exchange*, the Supreme Court concluded that the United States had implicitly consented not to exercise its jurisdiction to enforce a libel claim against a French war ship in the port of Philadelphia. *Id.* at 145–47. Although this case involved the limits of a court’s adjudicative jurisdiction, the opinion speaks in terms that do not distinguish between adjudicative and prescriptive jurisdiction in the territorial context.

82. *Id.* at 136.

“attribute of every sovereign” and was altogether “incapable of conferring extra-territorial power.”⁸³ Put differently, no nation could purport to regulate acts in another absent the consent of the territorial state. Any exceptions to the “full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself” and may “flow from no other legitimate source.”⁸⁴

True enough, it was thought that a nation-state might also regulate on the basis of citizenship. But, according to Marshall, a nation’s territorial jurisdiction trumped even the jurisdiction of foreign states to decide what their own citizens may do abroad.

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, . . . it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country.⁸⁵

Sounding the same tune of territorial triumphalism, Justice Joseph Story wrote for the Court in *The Apollon* in 1824 that “[t]he laws of no nation can justly extend beyond its own territories” and “[t]hey can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction.”⁸⁶ A unanimous Court in *The Apollon* accordingly declined to allow a U.S. duties law to apply to cargo traversing Spanish territorial waters.⁸⁷

Several decades later, the Supreme Court in 1880 summarized three interlocking rules of strict territorial jurisdiction as set forth by Justice Story in his leading treatise on conflicts of laws. First, “every nation possesses an exclusive sovereignty and jurisdiction within its own territory,” such that “the laws of every state affect, and bind directly all property, whether real or personal, within its territory; and all persons who are resident within it, whether naturalborn subjects, or aliens; and al-

83. *Id.* at 137.

84. *Id.* at 136.

85. *Id.* at 144.

86. *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824). To be sure, Justice Story suggested the possibility of an exception to the lack of power of one state to apply its law to acts in another state in the case of regulation of its own citizens. *Id.* He did not, however, suggest that the law of the citizen-regulating state would prevail over the law of the territorial state of conduct.

87. *Id.*

so all contracts made, and acts done within it.”⁸⁸ The second rule stated that “no state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein.”⁸⁹ The third rule acknowledged the power of one state to consent to the application in its own territory of the law of another state by asserting that “whatever force and obligation the laws of one country have in another, depends solely upon the laws of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.”⁹⁰

With the dawn of a new century, territoriality held steadfast as the paramount rule governing the authority of one state to apply its law to acts occurring in another. As the Supreme Court acknowledged in 1901, U.S. law could not protect U.S. citizens from liability for their acts done in a foreign country. “When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people”⁹¹ Correlatively, as the Court would acknowledge twelve years later, the United States could regulate foreigners who ventured into U.S. territory. “If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations.”⁹²

Strict territoriality meant that U.S. law could not regulate acts in other countries. In the landmark 1909 case, *American Banana Co. v. United Fruit Co.*, the Supreme Court, through Justice Oliver Wendell Holmes, declined to apply the Sherman Act to alleged market-predatory practices in Central America.⁹³

88. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC 19 (Boston, Hilliard, Gray, & Co. 1834).

89. *Id.* at 21.

90. *Id.* at 24.

91. *Neely v. Henkel*, 180 U.S. 109, 123 (1901); *see also* *Munaf v. Geren*, 553 U.S. 674, 694–95 (2008) (relying upon *Schooner Exchange* and *Neely* to deny a habeas claim of a prisoner in U.S. custody in Iraq in which the prisoner claimed that the United States lacked authority to transfer the prisoner to Iraqi custody for criminal prosecution; the Court reasoned that exclusive territorial jurisdiction holds “true with respect to American citizens who travel abroad and commit crimes in another nation whether or not the pertinent criminal process comes with all the rights guaranteed by our Constitution”).

92. *United States v. Pac. & Arctic Ry. & Navigation Co.*, 228 U.S. 87, 106 (1913).

93. *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 358–59 (1909).

Despite the fact that both the plaintiff and defendant companies were U.S. companies, Holmes derided the plaintiff's case for its reliance on some "rather startling propositions" of extraterritorial jurisdiction, as "the acts causing the damage were done . . . outside the jurisdiction of the United States and within that of other states."⁹⁴ He thought "[i]t [wa]s surprising to hear it argued [by the plaintiff] that [the acts outside the United States] were governed by the act of Congress."⁹⁵

Justice Holmes then famously declared it to be the "general and almost universal rule" 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."⁹⁶ He noted the likelihood of individual injustice as well as diplomatic friction that might result from a contrary rule allowing extraterritorial application of U.S. law:

For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.⁹⁷

In light of the background principle of strict territoriality, Justice Holmes suggested that "[a]ll legislation is *prima facie* territorial," and that "in case of doubt," a statute such as the Sherman Act should be construed "as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."⁹⁸ For Holmes, "the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious," and it was "entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned."⁹⁹ He added that "not only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place, and therefore were not torts at all, however contrary to the ethical and economic postulates of that statute."¹⁰⁰

94. *Id.* at 355.

95. *Id.*

96. *Id.* at 356.

97. *Id.* (citing *Phillips v. Eyre*, [1869] 4 L.R.Q.B. 225, 239 (Cockburn C.J.)).

98. *Id.* at 357 (internal quotation omitted).

99. *Id.*

100. *Id.*

Despite the nearly strict-territorial view of *American Banana*, only two years later Holmes himself surprisingly shifted to embrace a far broader vision of extraterritorial jurisdiction when considering whether the law of one U.S. state might be applied to conduct occurring in another U.S. state. In *Strassheim v. Daily*, Holmes wrote on behalf of the Court that “[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.”¹⁰¹ It followed that Michigan could permissibly apply its law to fraudulent acts that occurred in Illinois. This “effects” principle was, in Holmes’s view, consistent with the “usage of the civilized world,”¹⁰² and he did nothing to suggest that the effects principle ought not to apply with equal force in the international context.

Sixteen years later the Supreme Court again narrowed its territoriality jurisprudence in a pair of cases involving crimes that took place in part within the United States. In *United States v. Sisal Sales Corp.*, the Court considered once again the transnational application of the Sherman Act—this time involving two U.S. companies and a Mexican company alleged to have monopolized the market and trade for a Mexican-grown plant fiber known as sisal, which was used to make most of the binder twine then used for the harvesting of grain crops in the United States.¹⁰³ Concluding that the facts were “radically different” for jurisdictional purposes from *American Banana*, the Court observed that the conspiracy occurred within the United States and involved some overt acts taken inside the United States (in addition to others in Mexico).¹⁰⁴ Also, the conspirators’ “own deliberate acts, here and elsewhere[,] . . . brought about forbidden results within the United States,” and thus were properly subject to U.S. antitrust law.¹⁰⁵ Similarly, in *Ford v. United States*, the Court affirmed application of U.S. law against illegal liquor traffickers who were on a ship on the

101. *Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

102. *Id.* at 284.

103. *United States v. Sisal Sales Corp.*, 274 U.S. 268, 271–72 (1927).

104. *Id.* at 275–76.

105. *Id.* at 276. *See also* *Pasquantino v. United States*, 544 U.S. 349, 371 (2005) (holding that the statute prohibiting a scheme to defraud Canadian liquor importation taxes was not given improper extraterritorial effect where it was applied solely to the conduct of schemers inside the United States).

high seas but who conspired with persons in the United States to smuggle liquor into the United States.¹⁰⁶

While the outcome in *Ford* and *Sisal Sales* could be reconciled with *American Banana* because of the difference in where some of the conduct took place, already there was some indication by the 1920s of the Supreme Court's willingness to relax territoriality concerns if practical needs seemed to demand it. In 1922, the Court announced in *United States v. Bowman* what amounted to an exception to the usual rule of strict territoriality for cases of crimes victimizing the U.S. government.¹⁰⁷ At issue in *Bowman* was the validity of a criminal charge against a group of U.S. citizens arising from a conspiracy that started on board a ship on the high seas heading from the United States toward Brazil and that continued after the ship reached port in Brazil.¹⁰⁸ The plotters sought to defraud the owner of the ship by fraudulently overbilling for the fuel oil that was to be loaded on the ship in Brazil.¹⁰⁹ Although neither the hatching of the plot nor any of its overt acts occurred in the United States, the men were eventually arrested and charged in a New York federal court for conspiracy to defraud a corporation in which the U.S. government was a stockholder.¹¹⁰ Despite the fact that the text of the federal fraud statute did not expressly apply to acts outside U.S. territory, the Supreme Court rejected the defendants' arguments that the statute did not apply to them. Contrasting the strict territoriality rule applied in the civil antitrust context in *American Banana*, the Court observed:

[T]he same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents.¹¹¹

The Court acknowledged that the same extraterritorial principle ought not to apply for ordinary crimes against "private individuals or their property" and that ordinary crimes like murder, larceny, or fraud "which affect the peace and good order of the community, must of course be committed within

106. *Ford v. United States*, 273 U.S. 593, 619–24 (1927).

107. *United States v. Bowman*, 260 U.S. 94, 101–03 (1922).

108. *Id.* at 95–96.

109. *Id.*

110. *Id.* at 96.

111. *Id.* at 98.

the territorial jurisdiction of the government where it may properly exercise it.”¹¹² Yet for crimes victimizing U.S. government interests (even pecuniary, non-national-security interests), the *Bowman* Court seemed to say that territoriality no longer mattered.

The Court in *Bowman* stood willing to infer a statute’s extraterritorial applicability despite the absence of statutory text to suggest that it should apply outside the United States. Perceived necessity seemed to justify this leap because “to limit the[] *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute [penalizing fraud against the U.S. government] and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home.”¹¹³ The Court strayed from deciding what Congress *actually* intended to surmising what Congress *might* have intended.¹¹⁴

Bowman is best viewed in its emerging international law context. The case was decided shortly before the Permanent Court of International Justice (PCIJ)—the League of Nations’ predecessor to the United Nations International Court of Justice—articulated a broadly unilateralist view of the power of one state to assert its regulatory authority over conduct occurring beyond its borders.¹¹⁵ In *The Case of the S.S. “Lotus,”* a French sea captain had been arrested and charged in a Turkish court following a deadly collision at sea between the French captain’s ship and a Turkish ship, after which the French sea captain sailed his damaged ship into port in Turkey.¹¹⁶ Viewing the Turkish prosecution of the French sea captain as an infringement on the sovereignty of a French-flag ship, France and Turkey agreed to have the matter heard by the PCIJ. The PCIJ was to determine whether Turkey had a basis in international law for subjecting the French sea captain to the Turkish legal process.¹¹⁷ The court concluded that Turkey was under no obli-

112. *Id.*

113. *Id.*

114. *See id.* at 102 (“We cannot suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the Government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intended to include them in the section.”).

115. S.S. “*Lotus*” (Fr./Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 25–33 (Sept. 7).

116. *Id.* at 10.

117. *Id.* at 5.

gation in the first instance to justify its assertion of jurisdiction; instead, the burden fell on France to explain how international law forbade Turkey from asserting jurisdiction over a French citizen in Turkish territory.¹¹⁸ The resulting rule—commonly known as the “*Lotus* principle”—made clear that states may unilaterally and without affirmative justification assert their jurisdiction over conduct abroad, subject only to such prohibitory limits that other states might show to exist.¹¹⁹

Back in the United States, the Supreme Court soon ruled on another exception to strict territoriality, this time to make clear the authority of the United States to subject its own citizenry to certain obligations of U.S. law even when they ventured abroad. In *Blackmer v. United States*, the Court ruled that a U.S. citizen could be required to comply with a subpoena requiring his return from France to testify in a U.S. criminal court proceeding.¹²⁰ “By virtue of the obligations of citizenship,” the Court explained, “the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country.”¹²¹

It was not long before the jurisdictional focus more explicitly shifted from considering where troublesome acts occurred to where those acts ended up having their effects. As Professor Kal Raustiala has suggested, “[t]he conceptual evolution was one of ‘territorial commission,’ morphing into ‘territorial security,’” such that “[t]he *act* became less important than the *effect*.”¹²² In 1945, Judge Learned Hand of the Second Circuit issued the landmark ruling that embraced the “effects principle” in *United States v. Aluminum Company of America (Alcoa)*, a case involving claims against Alcoa for global monopolistic business practices.¹²³ Among the many issues in the case was

118. *Id.* at 25–26, 31.

119. *Id.* at 19 (“Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.”).

120. *Blackmer v. United States*, 284 U.S. 421, 438–40 (1932).

121. *Id.* at 436.

122. RAUSTIALA, *supra* note 7, at 180.

123. *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 421 (2d Cir. 1945). The case was certified to the Second Circuit for decision by the Supreme Court because of the lack of a quorum of nonrecused justices to decide the matter. The Supreme Court would later cite and expressly approve of the

whether U.S. antitrust laws should apply to agreements made abroad by a group of foreign aluminum companies that were associated with Alcoa and that restricted aluminum production in a manner that could affect U.S. markets.¹²⁴ Framing the inquiry as one of Congress's presumed intent concerning the geographical scope of the antitrust law's coverage, Judge Hand foreswore attributing to Congress an intent to regulate foreign-based conduct that had no effect at home: "We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States."¹²⁵ But still, Judge Hand noted, "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."¹²⁶

Several years after *Alcoa*, the Supreme Court was confronted in 1952 with whether the trademark protections of the Lanham Act should be extraterritorially applied to forbid a U.S. citizen from stamping and selling watches in Mexico with a brand name that had trademark protection under U.S., but not Mexican, law. The Court decided in *Steele v. Bulova Watch Co.* to apply the Lanham Act extraterritorially because the allegedly unlawful conduct had "some effects" within the United States and because of the Lanham Act's "broad jurisdictional" reach to "all commerce which may lawfully be regulated by Congress."¹²⁷ The Court distinguished *American Banana* on the ground that "the holding in that case was not meant to confer blanket immunity on trade practices which radiate unlawful consequences here, merely because they were initiated or consummated outside the territorial limits of the United States."¹²⁸ The Court added that "[u]nlawful effects in this country, absent in the posture of the *Banana* case before us, are often decisive."¹²⁹

Alcoa decision's extraterritorial application of antitrust law. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004).

124. *Alcoa*, 148 F.2d at 442-45 (describing Alcoa's 1931 and 1936 production quota agreements).

125. *Id.* at 443.

126. *Id.*; see also *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8-9 (1st Cir. 1997) (holding that a criminal conviction for a Sherman Act conspiracy may be based solely on conduct in Japan that was intended to and caused effects inside the United States).

127. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 252 (1991) (describing and quoting *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285, 287 (1952)).

128. *Steele*, 344 U.S. at 288.

129. *Id.*

Nevertheless, with the “effects” doctrine now firmly rooted after *Alcoa* as a basis for applying U.S. law to acts in foreign countries, “territoriality’s heyday was over.”¹³⁰ Yet the question of what should be done when U.S. law clashed with the law of the foreign state where the acts took place remained unanswered. Rather than giving guidance for any conflict that might result from extending U.S. law abroad, *Alcoa* simply provided a unilateralist enabling principle for the effects doctrine.¹³¹

Following *Alcoa*, lower courts and commentators during the 1970s and 1980s grappled with whether effects-based extraterritorial application of U.S. law should be tempered by the countervailing interests of foreign states in applying their own law to acts within their own territory.¹³² This was the start of a judicial interests-balancing approach. Borrowing in part from principles of international comity and domestic conflict-of-laws doctrine, this burgeoning approach suggested that U.S. law might not apply abroad if it would not be reasonable to do so. A balancing of U.S. and foreign interests in regulating the same conduct determined what was reasonable. Some courts advanced multiple factors, including not only the degree of conflict between U.S. law and foreign law, but also the nationality and location of the parties, the expected efficacy of both states’ policies, the relative effects on the United States of the foreign conduct, the degree to which the foreign conduct was intended to or would foreseeably harm the United States, and the rela-

130. Parrish, *Effects Test*, *supra* note 28, at 1467; *see also* Lowenfeld, *supra* note 35, at 47 (noting that “the U.S. Supreme Court takes the *effects doctrine* for granted,” and there is “no doubt that a [nation] state may apply its law—i.e., exercise its jurisdiction to prescribe—on the basis of effects caused by the challenged activity in its territory, even when no part of the activity was carried out in its territory”).

131. Buxbaum, *Territory*, *supra* note 2, at 645 (“Thus, in *Alcoa* itself, conflicts law appears less to provide a limitation on the reach of U.S. laws than to articulate an enabling principle: conflicts law recognizes jurisdiction based on acts that occur elsewhere.”); Kramer, *Vestiges of Beale*, *supra* note 53, at 193 (“*Alcoa* thus did precisely what the territorial principle was designed to prevent: create conflicts with foreign nations that caused tensions in international relations.”).

132. “It is a settled principle of international and our domestic law that a court may abstain from exercising enforcement jurisdiction when the extraterritorial effect of a particular remedy is so disproportionate to harm within the United States as to offend principles of comity.” *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 263 (2d Cir. 1989); *see also* *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 609 (9th Cir. 1976); Buxbaum, *Territory*, *supra* note 2, at 646–50 (describing cases and commentary).

tive importance of any conduct that occurred in the United States that was associated with the foreign conduct at issue.¹³³

In 1993, however, the Supreme Court took a dim view of broad interests balancing when confronted with its next major case involving extraterritorial application of U.S. law. In *Hartford Fire Insurance Co. v. California*, the Court considered whether principles of international comity should delay application of the Sherman Act to British reinsurance companies that allegedly conspired in the United Kingdom to affect the U.S. insurance market in an anticompetitive way.¹³⁴ The sticking point was that the British companies' conduct was not illegal under the law of the United Kingdom where their acts took place.¹³⁵ The Court declined to curb the Sherman Act, deeming there to be no "true conflict" between British and U.S. law in the sense that the British companies could still comply with U.S. law without putting themselves in violation of British law.¹³⁶

The decision in *Hartford Fire* thus embraced a highly restrictive vision of comity and interests balancing in general—a vision largely consistent with the judicial unilateralist school. It allowed for displacement of U.S. extraterritorial regulation only in cases of a "true conflict" between laws—only if U.S. law required actors to violate foreign law. If U.S. law was otherwise inconsistent with foreign law (such as by adding regulation where foreign law had none or regulating to a degree that foreign law did not), then U.S. law would still apply. As the Court explained, "the fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws,' even where the foreign state has a strong policy to permit or encourage such conduct."¹³⁷ The Court added that "[n]o conflict exists, for these purposes, 'where a person subject to regulation by two states can comply with the laws of both.'"¹³⁸

133. See *Timberlane*, 549 F.2d at 614 (listing factors); see also *Mannington Mills*, 595 F.2d at 1297–98 (similar list of ten factors). But see *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948–50 (D.C. Cir. 1984) (declining to engage in interests balancing as suggested in *Timberlane* and *Mannington Mills*).

134. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 769–70 (1993).

135. *Id.* at 798–99.

136. *Id.*

137. *Id.* (quoting RESTATEMENT, *supra* note 6, § 415 cmt. j).

138. *Id.* at 799 (quoting RESTATEMENT, *supra* note 6, § 403 cmt. e); see also Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript*

More recently, the Court reaffirmed *Hartford Fire*, while also making clear that the effects doctrine could not justify regulating foreign-based conduct that does not in fact affect the U.S. market. In *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, the Court in 2004 again considered the foreign application of the Sherman Act, this time in a case involving allegations of a price-fixing conspiracy among foreign and domestic vitamin companies.¹³⁹ Without questioning the appropriateness of applying U.S. law to foreign-based conduct that actually causes effects inside the United States, the Court declined to apply antitrust law to segregable foreign-based conduct that affected only other foreign markets.¹⁴⁰ Writing for the Court, Justice Breyer rhetorically queried: “Why should American law supplant, for example, Canada’s or Great Britain’s or Japan’s own 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?”¹⁴¹ Answering this question, Justice Breyer noted that “where foreign injury is independent of domestic effects, Congress might have hoped that America’s antitrust laws . . . would commend themselves to other nations as well,” but that “if America’s antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.”¹⁴²

Outside the antitrust context, the Court has frequently invoked a presumption against extraterritorial application of U.S. statutes. In *Foley Bros. v. Filardo*, the Court in 1949 declined to apply a U.S. eight-hour labor law to constrain the employment of a U.S. citizen by a U.S. company on public works projects in Iraq and Iran.¹⁴³ Decades later, the Court would rely on *Foley* in 1991 to conclude in *EEOC v. Arabian American Oil Co.* that the antidiscrimination protections of Title VII of the Civil Rights Act of 1964 did not protect a U.S. employee of a U.S. company in Saudi Arabia.¹⁴⁴ In the last twenty years, the Court

on *Hartford Fire Insurance Co. v. California*, 34 VA. J. INT’L L. 213, 220–29 (1993) (making an extensive critique of *Hartford Fire*’s restrictive approach).

139. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 159 (2004).

140. *Id.*

141. *Id.* at 165.

142. *Id.* at 169.

143. *Foley Bros. v. Filardo*, 336 U.S. 281, 284–85 (1949).

144. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 246–47 (1991). Congress quickly amended Title VII to provide for its limited extraterritorial application

has cited or relied on the presumption to limit extraterritorial application of federal patent law,¹⁴⁵ federal criminal firearms law,¹⁴⁶ federal immigration law,¹⁴⁷ and the Federal Tort Claims Act.¹⁴⁸

Most recently, the Court in 2010 ringingly reaffirmed the presumption against extraterritoriality in *Morrison v. National Australia Bank Ltd.* In that case, the Court concluded that the principal antifraud provision of the federal securities laws did not apply extraterritorially to securities transactions in Australia, despite the fact that certain conduct that was alleged to have made the Australian transactions fraudulent occurred in the United States.¹⁴⁹ For lack of any “clear indication”¹⁵⁰ in the statute that the antifraud provision was meant to apply to foreign securities transactions, the Court concluded “that the focus of the [Securities Exchange Act of 1934] is not upon the place where the description originated, but upon purchases and sales of securities in the United States.”¹⁵¹ The Court repudiated a long line of lower court rulings that had looked to what was “reasonable” and “what Congress would have wanted” and that had applied the antifraud law to foreign securities transactions stemming from “significant conduct in the United States” or causing “some effect on American securities markets or investors.”¹⁵²

to U.S. employees of U.S. companies, provided that U.S. companies are not barred from complying with U.S. law. See 42 U.S.C. §§ 2000e(f), 2000e-1(a)–(c) (2006).

145. See *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454–55 (2007) (holding that federal patent law is not applicable to software installation in foreign countries).

146. *Small v. United States*, 544 U.S. 385, 394 (2005) (holding that federal felon-in-possession-of-a-firearm law is not applicable when felon’s conviction is obtained in a foreign court).

147. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173–74 (1993) (holding that a federal immigration law prohibition on the return of refugees to countries where they could face persecution is not applicable to Haitian refugees interdicted on the high seas outside of U.S. territorial waters).

148. *Smith v. United States*, 507 U.S. 197, 203–04 (1993) (holding that the Federal Tort Claims Act is not applicable to tortious conduct in Antarctica).

149. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010) (interpreting the scope of section 10(b) of the Securities Exchange Act of 1934 and of Rule 10b-5 promulgated thereunder).

150. *Id.* at 2878 (requiring “clear indication”); *id.* at 2883 (requiring “clear indication” in consideration of the entire statute and “context,” but not necessarily a “clear statement” in the statutory text itself).

151. *Id.* at 2884.

152. *Id.* at 2878–79 (describing and criticizing the longstanding approach of the Second Circuit and its “conduct” and “effects” tests).

2. Customary Law of International Jurisdiction

The customary law of international jurisdiction recognizes the bases and authority of sovereign states to prescribe, adjudicate, and enforce rules of law and also to resolve competing claims of more than one state about the power to regulate the same conduct or persons.¹⁵³ Although Congress is not bound by the confines of international law,¹⁵⁴ the customary law of international jurisdiction is not merely of academic concern. The Supreme Court has long presumed, under the “Charming Betsy” canon of statutory construction, that an act of Congress should not be read to violate international law if the statute is ambiguous and another interpretation of the statute is possible.¹⁵⁵ As the Court has noted, “[t]his rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.”¹⁵⁶ Accordingly, a primary consideration for U.S. courts when deciding whether to apply a geoambiguous law abroad is whether it would be consistent with the customary international law of jurisdiction.¹⁵⁷

The Restatement identifies four *prima facie* grounds for a nation-state’s assertion of power to prescribe its law: (1) *territorial jurisdiction*—the regulating state’s interest in governing conduct occurring in its own territory or, relatedly, conduct

153. See RESTATEMENT, *supra* note 6, pt. IV, introductory note, § 401; see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (noting that “[t]here is, however, a type of ‘jurisdiction’ relevant to determining the extraterritorial reach of a statute; it is known as ‘legislative jurisdiction,’ or ‘jurisdiction to prescribe,’ which refers to ‘the authority of a state to make its law applicable to persons or activities,’ and is quite a separate matter from ‘jurisdiction to adjudicate’” (internal quotations omitted)).

154. See *supra* notes 58–66 and accompanying text.

155. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”). The Supreme Court “ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations,” and “[t]his rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow.” *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).

156. *Empagran*, 542 U.S. at 164.

157. For some kinds of maritime crimes, Congress has explicitly instructed U.S. courts to assert jurisdiction only “[t]o the extent permitted by international law.” 18 U.S.C. § 7(8) (2006) (defining “special maritime and territorial jurisdiction of the United States” to include, “[t]o the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States”).

outside its territory that has or is intended to have a substantial effect inside its territory;¹⁵⁸ (2) *nationality jurisdiction*—the regulating state’s interest in governing conduct of its own nationals wherever they may be located;¹⁵⁹ (3) *passive personality jurisdiction*—the regulating state’s interest in governing conduct taken against or harming its nationals;¹⁶⁰ and (4) *protective jurisdiction*—the regulating state’s interest in governing conduct that threatens its security or essential government functions.¹⁶¹

In addition to these four primary grounds for prescriptive jurisdiction, the Restatement suggests that each state may assert universal jurisdiction over certain horrific crimes—that is, “to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, the slave trade, attacks on or hijacking of aircraft,

158. RESTATEMENT, *supra* note 6, § 402(1). The term “subjective territoriality” is commonly used to refer to a state’s authority “over acts that occur—even in part—within its territory,” and the term “objective territoriality” refers to acts that “may not occur but have an effect within its territory.” Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT’L L. 149, 159 (2006) [hereinafter Colangelo, *Legal Limits*].

159. RESTATEMENT, *supra* note 6, § 402(2); *see also* United States v. Clark, 435 F.3d 1100, 1106 (9th Cir. 2006) (ruling that a federal statute criminalizing a U.S. citizen’s involvement in child sex in Cambodia is consistent with the “nationality” principle of international jurisdiction); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 922 (D.C. Cir. 1984) (noting that “[t]he citizenship of an individual or nationality of a corporation has long been a recognized basis which will support the exercise of jurisdiction by a state over persons,” and that “a state has jurisdiction to prescribe law governing the conduct of its nationals whether the conduct takes place inside or outside the territory of the state”).

160. RESTATEMENT, *supra* note 6, § 402(2); *see also id.* cmt. g (commenting that “[t]he passive personality principle” is not “generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state’s nationals by reason of their nationality”); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 323 n.4 (2001) (noting the “substantial debate and uncertainty concerning the legitimacy of the passive personality category,” but that “this category has become increasingly accepted in recent years for certain kinds of conduct, such as terrorism”).

161. RESTATEMENT, *supra* note 6, § 402(3); *see also id.* cmt. f (noting application of “the protective principle” not only to “offenses directed against the security of the state” but also “other offenses threatening the integrity of governmental functions . . . *e.g.*, espionage, counterfeiting of the state’s seal or currency, falsification of official documents, as well as perjury before consular officials, and conspiracy to violate the immigration or customs laws”). The protective principle “refers to the safety and integrity of the state apparatus itself[,] . . . not its overall physical and moral well-being.” Kontorovich, *supra* note 65, at 1231.

genocide, war crimes, and perhaps certain acts of terrorism.”¹⁶² An assertion of universal jurisdiction depends solely on the nature of the alleged crime. In contrast to the other grounds for jurisdiction discussed above, universal jurisdiction requires no nexus at all between the acts in question and the territory, citizenry, or government of the state asserting jurisdiction.¹⁶³ Moreover, universal jurisdiction may extend beyond criminal penalties to civil remedies for torts in violation of universal norms,¹⁶⁴ and U.S. courts frequently entertain lawsuits seeking tort remedies for acts deemed universal crimes and torts.¹⁶⁵

In short, as Curtis Bradley has suggested, “[u]nless a nation’s extraterritorial law falls within one of five categories—territoriality, nationality, protective principle, passive personality, or universality—it is said, the nation violates international law rules governing ‘prescriptive jurisdiction.’”¹⁶⁶ Because more than one state may lay claim under one or more of the criteria above to govern the same conduct, how should this competition be resolved? According to the Restatement, except for universal jurisdiction cases, a state should refrain from asserting prescriptive jurisdiction if to do so would be “unreasonable” in light of the competing ties and interests of other states in regulating the actor or conduct at issue.¹⁶⁷ Section 403 of the

162. RESTATEMENT, *supra* note 6, § 404.

163. *See id.* cmt. a (“[I]nternational law permits any state to apply its laws to punish certain offenses although the state has no links of territory with the offense, or of nationality of the offender (or even the victim).”).

164. *Id.* cmt. b.

165. *See, e.g.,* John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT’L L. 1, 2 (2009) (“[W]e are now quite frequently occupied *domestically* with suits by foreign plaintiffs in U.S. courts—often arising from conduct that occurred in other countries and has no significant connection to the U.S., that may not be consistent with our government policies for promoting human rights.”); *see also* cases cited *infra* note 226.

166. Bradley, *supra* note 160, at 323 (footnote omitted).

167. RESTATEMENT, *supra* note 6, § 403 (describing “reasonableness” limitations on prescriptive jurisdiction); *see also* *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818 (1993) (Scalia, J., dissenting) (observing that “[u]nder the Restatement, a nation having some ‘basis’ for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction ‘with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable,’” and then listing “reasonableness” factors (quoting RESTATEMENT, *supra* note 6, § 403)). *But see* Bradley, *supra* note 160, at 324 n.5 (“There has been some debate over whether international law in fact imposes a reasonableness limitation.”). Although the Restatement’s “reasonableness” factors of section 403 are said to apply only to the first four grounds for prescriptive jurisdiction of section 402, it is not clear why the

Restatement sets forth a long list of reasonableness factors, including “the link of the activity to the territory of the regulating state”; other “connections” between the regulating state and the activity; the “importance” of the regulation to the regulating state as well as to “the international political, legal, or economic system”; the “existence of justified expectations that might be protected or hurt by the regulation”; and “the likelihood of conflict with regulation by another state.”¹⁶⁸ Many of these interests-balancing factors are redundant of the prima facie jurisdictional factors listed above, and the Restatement does not furnish further guidance about how to reconcile competing jurisdictional claims.

By advancing an open-ended, interests-balancing approach, the Restatement strives to diminish the role of traditional territorial jurisdiction. Although acknowledging territoriality as one of the primary grounds for the exercise of prescriptive jurisdiction, the Restatement’s commentary characterizes territoriality as a product of excessive formalism and outmoded concerns about individual nation-state sovereignty.¹⁶⁹ The commentary goes on to dismiss reliance on “rigid” territoriality and nationality concepts to control the outcome of a jurisdictional conflict. It notes that “[t]erritoriality and nationality remain the principal bases of jurisdiction to prescribe, but in determining their meaning rigid concepts have been replaced by broader criteria embracing principles of reasonableness and fairness to accommodate overlapping or conflicting interests of states, and affected private interests.”¹⁷⁰

To the same effect, the Restatement acknowledges that territoriality may “generally justif[y] the exercise of jurisdiction to prescribe,” but then cautions that “not all activities within a state’s territory . . . may reasonably be subjected to its legislation.”¹⁷¹ It accepts territoriality as merely the “normal” basis for the exercise of jurisdiction, while insisting that “in some

same reasonableness concerns would not come into play in cases of competing claims to redress a violation of international law warranting the exercise of universal jurisdiction.

168. RESTATEMENT, *supra* note 6, § 403(2); *see also Hartford Fire*, 509 U.S. at 818–19 (Scalia, J., dissenting) (listing several reasonableness factors).

169. RESTATEMENT, *supra* note 6, pt. IV, ch. 1, subch. A, introductory note, (“In the past, the jurisdiction of a state to make its law applicable in a transnational context was determined by formal criteria supposedly derived from concepts of state sovereignty and power.”).

170. *Id.*

171. *Id.* § 402 cmt. a.

situations” it may be that both territoriality and nationality must exist to make the exercise of jurisdiction reasonable.¹⁷² In short, the Restatement displaces territoriality with multi-factor reasonableness as the dispositive criteria for deciding what activities states have the power to regulate even within their own borders.

Just as the Restatement demotes territorial jurisdiction, it strives to legitimate the effects-jurisdictional principle by deeming it no less than “an aspect of . . . territoriality,” rather than by categorizing it as a distinct form of *extraterritorial* jurisdiction.¹⁷³ The Restatement casts territorial jurisdiction to include not only a state’s power to regulate conduct within its territory, but also a state’s power to regulate any extraterritorial conduct that has or is merely intended to have a substantial effect within the state’s territory.¹⁷⁴ The protective principle in turn is classified as “a special application of the effects principle,” such that invoking the effects or protective principles of jurisdiction becomes the equivalent of asserting territorial jurisdiction.¹⁷⁵ In short, the Restatement undermines territoriality while, ironically, legitimating the effects and protective principles of extraterritorial jurisdiction by equating them with territoriality.¹⁷⁶

What explains the Restatement’s attack on territoriality? It is best understood not only in light of the tide of Supreme Court cases discussed above, but also in light of the general interest of the United States to apply its law abroad. As Professor Raustiala has noted, “American notions and doctrines of territoriality were themselves drawn from international law,” but

172. *Id.* cmt. b (commenting that “[t]erritoriality is considered the normal, and nationality an exceptional, basis for the exercise of jurisdiction,” and that “[i]n some situations the existence of both links may be important to make the exercise of jurisdiction reasonable”).

173. *Id.* cmt. d (describing the “[e]ffects principle” as “an aspect of jurisdiction based on territoriality, although it is sometimes viewed as a distinct category”).

174. *See id.* § 402(1) (noting that a state has “jurisdiction to prescribe law with respect to (1)(a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things present within its territory; (c) *conduct outside its territory that has or is intended to have substantial effect within its territory*”) (emphasis added).

175. RESTATEMENT, *supra* note 6, § 402 cmt. f (“The protective principle may be seen as a special application of the effects principle . . . but it has been treated as an independent basis of jurisdiction.”).

176. *Cf.* Parrish, *Effects Test*, *supra* note 28, at 1482 (“[T]he effects test destroys territorial restraints while simultaneously reaffirming the necessity of territoriality as a means of determining jurisdiction.”).

“these notions and doctrines evolved over time to reflect American national interests.”¹⁷⁷ And thus, “in practice territoriality has neither been static nor treated as a given,” but “has been stretched and pulled over time in an effort to achieve national ends within the existing international order.”¹⁷⁸

This Article has defined the distinction between territorial and extraterritorial regulation to depend on the location of the human act or conduct that is actually subject to regulation, rather than the location of the effect of such an act or even the intent of the regulator to affect extraterritorial conduct. This distinction highlights the frequency with which Congress enacts geoambiguous laws, leaving it to judges to decide whether they should apply such laws to extraterritorial conduct. Judges over time have departed from principles of strict territoriality to broad principles of extraterritoriality, although recurring tension remains between judges’ invocations of a presumption against extraterritoriality and their application of extraterritoriality doctrines such as the effects principle.¹⁷⁹ This outline of the basic predicates of the customary international law of prescriptive jurisdiction, as set forth in the Restatement, reveals its allowance for certain kinds of extraterritorial regulation, even if misleadingly described as variants of territorial jurisdiction. The next Part identifies problems with the current framework used by U.S. courts to decide the extraterritorial scope of geoambiguous laws.

II. PROBLEMS WITH THE U.S. EXTRATERRITORIAL JURISDICTION FRAMEWORK

The current framework for U.S. courts to interpret the extraterritorial scope of geoambiguous laws is problematic in several respects. As an initial matter, it is far from clear what must exist for the presumption against extraterritoriality to be overcome and what should be the consequence of the presumption being overcome. Although insisting on a need for a clear showing of congressional intent to apply its law abroad, the

177. RAUSTIALA, *supra* note 7, at 7.

178. *Id.*; see also Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1793 (2009) (“[T]he content of international law often reflects the interests of powerful states. . . . [T]o the extent that international law diverges from those interests, powerful states often interpret it away or ignore it.”).

179. See Parrish, *Effects Test*, *supra* note 28, at 1474–76 (discussing the evolution of the effects test and the presumption against extraterritoriality and the conflicting nature of these judicial tools).

courts in practice sometimes follow the judicial unilateralist approach to allow extraterritorial application of U.S. law without explicit support in the text of the statute or legislative history.¹⁸⁰ As Professor Dodge contends, “the presumption should not be considered a clear statement rule and should be deemed rebutted when there is good reason to think that Congress was focused on something other than domestic conditions.”¹⁸¹ This means, to the dismay of judicial territorialists like Professor Parrish, that “the effects test is embraced as a way to reverse the presumption against extraterritoriality,” such that a “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.”¹⁸²

Moreover, even when the presumption against extraterritoriality is overcome, it is unclear what this means. If the presumption is overcome, should U.S. law automatically apply with full force extraterritorially? Or should courts still perform interests balancing or consider other factors to decide if U.S. law should apply abroad? Thus, as Professor Edward Swaine has noted, the presumption against extraterritoriality is “quite

180. See, e.g., *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 310 (1970) (holding that the Jones Act applies extraterritorially despite the Act’s general wording); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 (1952) (applying the Lanham Act extraterritorially); *Kawakita v. United States*, 343 U.S. 717, 732–33 (1952) (ruling that the treason statute applies extraterritorially); *Ford v. United States*, 273 U.S. 593, 602 (1927) (concluding that the National Prohibition Act applies extraterritorially to the high seas).

181. Dodge, *Understanding the Presumption*, *supra* note 54, at 90–91; see also *id.* at 87 (criticizing the Supreme Court in *Hartford Fire* for failing even to mention the presumption against extraterritoriality when considering the extension of U.S. antitrust law to Britain).

182. Parrish, *Effects Test*, *supra* note 28, at 1479; see also *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 206 (1993) (Blackmun, J., dissenting) (commenting that, despite the presumption against extraterritoriality, a wide range of laws are often applied extraterritorially, even in an expressed intent of Congress to that effect); *Tamari v. Bache & Co.*, 730 F.2d 1103, 1107 n.11, 1108 (7th Cir. 1984) (noting that “[u]nder the effects test, courts have looked to whether conduct occurring in foreign countries had caused foreseeable and substantial harm to interests in the United States,” that “[t]he underlying theory is that Congress would have wished domestic markets and domestic investors to be protected from improper foreign transactions,” and that “courts have looked to the nature of the conduct or effects in the United States to determine whether extraterritorial application would be consistent with the purposes underlying the statute”).

crude,” because when it is overcome, it “says very little about whether and how jurisdiction ought [to] be moderated.”¹⁸³

The presumption is also disingenuously agnostic about the relevance of any conflict between a U.S. law and a foreign law. On the one hand, the Court in *Morrison* declared that the “presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law.”¹⁸⁴ Yet pages later the Court took pains to stress that “[t]he probability of incompatibility [of the securities anti-fraud law] with the applicable laws of other countries is so obvious that if Congress intended such foreign application ‘it would have addressed the subject of conflicts with foreign laws and procedures.’”¹⁸⁵ The Court’s concern with justifying its result on the basis of a legal consideration that it had just deemed irrelevant is suggestive of its awareness of the presumption’s needless overbreadth to restrict the application of U.S. law in cases where no actual conflict ensues with foreign law.

One could argue that these shortcomings of the presumption are not significant, because, in cases of doubt about the presumption’s application, courts can look for guidance to background principles of the customary international law of prescriptive jurisdiction. But, as discussed in the following sections, this alternative is equally problematic, because customary jurisdictional principles are themselves lacking in principled criteria for their application. First, the effects and protective jurisdictional principles are readily susceptible to misapplication because of the inherent difficulty in neutrally ascertaining what foreign conduct causes the requisite harm within the United States. Second, the Restatement’s interests-balancing approach to the resolution of conflicts involving extraterritorial jurisdiction is not only unwieldy in its application, but also inappropriately draws judges into substantive balancing of the interests of one country against another. Finally, the concept of universal jurisdiction does not have a clearly defined scope with respect to the types of offenses and degree of an actor’s involvement in such offenses that are sufficient to warrant its invocation. Taken together, these doctrinal deficiencies open the door too widely for the United States to apply

183. Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 713 (2001).

184. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877–78 (2010).

185. *Id.* at 2885 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256 (1991)).

its law abroad and for other nation-states—perhaps unwelcomingly—to regulate activities in the United States. Each of these problems with customary jurisdictional principles is discussed immediately below.

A. PROBLEMS WITH THE EFFECTS AND PROTECTIVE PRINCIPLES

The effects principle allows the United States to exercise prescriptive jurisdiction over “conduct outside its territory that has or is intended to have substantial effect within its territory.”¹⁸⁶ In similar fashion, the protective principle—which the Restatement’s commentary deems to be “a special application of the effects principle”¹⁸⁷—allows the United States to regulate “certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.”¹⁸⁸ Both these tests in their application may end up virtually unbounded in scope. As Professor Paul Berman notes, “the growth of global communications technologies, the rise of multinational corporate entities with no significant territorial center of gravity, and the mobility of capital and people across borders mean that many jurisdictions will feel effects of activities around the globe, leading inevitably to multiple assertions of legal authority over the same act, without regard to territorial location.”¹⁸⁹

As “everything affects everything,” the effects test can be applied breathtakingly broadly.¹⁹⁰ As Professor Parrish has observed, “[a]t its inception in the 1940s, the effects test had a limited impact,” but in the modern world the effects test “gives license for near universal jurisdiction.”¹⁹¹ Indeed, U.S. courts have suggested that the effects or protective principles should apply to wholly foreign activity—like drug trafficking schemes—that never end up touching the territory of the Unit-

186. RESTATEMENT, *supra* note 6, § 402(1)(c).

187. *Id.* § 402 cmt. f.

188. *Id.* § 402(3).

189. Berman, *Global Legal Pluralism*, *supra* note 1, at 1159; *see also* RAUSTIALA, *supra* note 7, at 117 (stating that “in an interdependent world, acts undertaken in one place frequently generated effects that spilled over into other nations around the globe,” and that “[t]he effects test in principle encompassed any imaginable spillover”).

190. Parrish, *Effects Test*, *supra* note 28, at 1479 (quoting 1 PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* 255 (1978)).

191. *Id.* at 1478–79.

ed States.¹⁹² Because of its potential expanse, “the effects test has permitted precisely what [a theory of] legislative jurisdiction is designed to prevent: conflicts with foreign states.”¹⁹³

Perhaps such criticism of the potential scope of the effects and protective principles might ring hollow if competing jurisdictional grounds were equally manipulable. But in fact, the effects and protective principles are significantly more malleable in their application than their main counterparts—territoriality and nationality grounds of jurisdiction. Territoriality requires a court to decide if a specific act that is subject

192. See, e.g., *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999) (“[A]pplication of the [Maritime Drug Law Enforcement Act] to the defendants is consistent with the protective principle of international law because Congress has determined that all drug trafficking aboard vessels threatens our nation’s security.”); *United States v. Alomia-Riascos*, 825 F.2d 769, 771 (4th Cir. 1987) (commenting that “[t]he protective principle of international law permits a nation to assert subject matter criminal jurisdiction over a person whose conduct outside the nation’s territory threatens the national interest,” and therefore that “under international law the United States could exercise criminal subject matter jurisdiction over foreign nationals for possession of large quantities of narcotics on foreign vessels upon the high seas, even in the absence of a treaty or arrangement”); *United States v. Schmucker-Bula*, 609 F.2d 399, 403 (7th Cir. 1980) (affirming the conviction for extraterritorial conspiracy to import cocaine and stating that, “[l]ike the Fifth Circuit, we therefore might not be inclined to limit extraterritorial criminal jurisdiction over aliens whose intended actions, if successful, would compromise this sovereign’s control of its own borders”); *United States v. Manuel*, 371 F. Supp. 2d 404, 408–09 (S.D.N.Y. 2005) (holding that where leaders of a conspiracy knew that illegal drugs in Europe were intended for shipment to the United States, the U.S. drug trafficking statute, 21 U.S.C. § 841, allows the conviction of a drug dealer involved only in transporting drugs in Europe, despite the fact that the defendant did not know of or intend a U.S. destination). *But see* *United States v. Perlaza*, 439 F.3d 1149, 1162 (9th Cir. 2006) (“[T]he notion that [the] ‘protective principle’ can be applied to ‘prohibiting foreigners on foreign ships 500 miles offshore from possessing drugs that . . . might be bound for Canada, South America, or Zanzibar’—as suggested by the Government here—has been repeatedly called into question by our Court and others.” (quoting *United States v. Robinson*, 843 F.2d 1, 3 (1st Cir. 1988))); see also Kontorovich, *supra* note 65, at 1229–31 (discussing cases and contending that the protective principle should not extend to offshore drug trafficking); Ellen S. Podgor & Daniel M. Filler, *International Criminal Jurisdiction in the Twenty-First Century: Rediscovering United States v. Bowman*, 44 SAN DIEGO L. REV. 585, 589–92 (2007) (criticizing lower courts’ expansive reading of the Supreme Court’s decision in *Bowman* to allow unwarranted extraterritorial application of U.S. law).

193. Parrish, *Effects Test*, *supra* note 28, at 1479; see also Ellen S. Podgor, “Defensive Territoriality”: A New Paradigm for the Prosecution of Extraterritorial Business Crimes, 31 GA. J. INT’L & COMP. L. 1, 25 (2002) (observing that “[h]istorically, the view taken was that absent specific language for extraterritoriality, the presumption was against permitting an extraterritorial prosecution,” but that “[w]hat was initially a presumption against extraterritoriality in criminal cases, however, has in fact become a reality of allowing extraterritoriality”).

to regulation took place within a state's own territory.¹⁹⁴ For example, did someone on U.S. territory hit the "send" button to launch a computer virus or instruct a colleague to pay a bribe? Nationality requires a court to decide upon the citizenship or other fixed legal status or relationship to the United States.¹⁹⁵ Was the person who hit the "send" button or paid a bribe a U.S. citizen who has accepted the obligations of following U.S. law? Courts can usually apply these status-type inquiries into territoriality and nationality without legitimate controversy about their scope.¹⁹⁶ The underlying aspects of territory and citizenship are ordinarily fixed and easily ascertainable by reference to settled law and public record documentation.¹⁹⁷ John Doe is a U.S. citizen (nationality). His home in Idaho, where he sat down at his computer to unleash a global computer virus, is in part of the United States (territoriality).

Moreover, the exercise of prescriptive jurisdiction based on territoriality and nationality does not require for its jurisdictional justification that judges assess the reason, purpose, or

194. Federal statutes often define the "United States" in fixed geographical terms. *See, e.g.*, 26 U.S.C. § 3121(e)(2) (2006) (according to the tax code, "[t]he term 'United States' when used in a geographical sense includes the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa"); 42 U.S.C. § 1973ff-6(8) (2006) (according to the absentee-voting statute, "'United States,' where used in the territorial sense, means the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa").

195. *See, e.g.*, U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."); 8 U.S.C. § 1401 (2006) (defining the class of persons who are "nationals and citizens of the United States at birth" in immigration law). Most U.S. economic sanctions apply only to the activities of "United States persons" in their dealings with foreign targets of sanctions. The term "United States person" is typically defined in clear terms to include "any United States citizen, permanent resident alien, entity organized under the law of the United States (including foreign branches), or any person in the United States." *See Meyer, supra* note 53, at 925 (citing sanctions regulations).

196. Of course, rare exceptions can be cited, such as in recent litigation concerning the juridical and territorial status of the Guantánamo Bay navy base in Cuba where detainees of the war on terror have been housed. *See, e.g.*, *Rasul v. Bush*, 542 U.S. 466, 475 (2004) (addressing "whether the [federal] habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty'"); *cf. Boumediene v. Bush*, 553 U.S. 723, 754–55 (2008) (addressing constitutional implications stemming from the U.S. exercise of de facto sovereignty over Guantánamo Bay).

197. *See* RESTATEMENT, *supra* note 6, § 402 cmts. c, e (discussing how the principles of territoriality and nationality are generally applied).

motive for regulation.¹⁹⁸ Judges consider only *who* did something or *where* they did it. Unlike with the effects and protective principles, courts applying the territory or nationality principles need not explore or predict whether any given act caused, was intended to cause, or is likely to cause an effect somewhere else. And they need not decide what kinds of effects (once caused) rise to the level of “substantial” for purposes of the effects principle or what kind of harmful acts fall within the “limited class” of state interests said to be within the scope of the protective principle.¹⁹⁹ In short, when invoking territorial or nationality jurisdiction, courts have far less natural latitude to import substantive value bias than when invoking the effects or protective jurisdiction principles.

Indeed, the perils of this kind of effects/protective jurisdictional jurisprudence are clear from the long line of U.S. court decisions involving state’s rights or federalism challenges to the regulatory authority of the U.S. federal government. These challenges often turn on Congress’s power under the Commerce Clause and whether an activity subject to federal regulation ostensibly has a “substantial effect” on interstate commerce between the U.S. states.²⁰⁰ As scholars of U.S. constitutional law well know, the courts almost always validate Congress’s regulatory authority, often on the basis of preposterously attenuated claims that any given activity occasions a “substantial effect” on commerce.²⁰¹ Courts strain mightily to reach these results. For cases involving purely intrastate conduct (e.g.,

198. Of course, a U.S. criminal law that regulates conduct in the United States may well appropriately be subject to challenge on non-prescriptive-jurisdictional grounds (e.g., that it denies constitutional rights of free speech or due process or that it exceeds federalism limits on the power of the U.S. national government to regulate matters traditionally regulated by individual states of the United States). See RESTATEMENT, *supra* note 6, § 402 cmt. j.

199. See, e.g., Turley, *supra* note 26, at 645 (observing that “courts have suspiciously little trouble envisioning systemic, aggregate effects in antitrust and securities cases while concluding that employment and environmental disputes are largely aberrational or isolated in nature,” but that “[s]urely some environmental and employment cases [such as nuclear accidents or systematic discriminatory employment practices] present an aggregate domestic effect great enough to satisfy the effects doctrine”).

200. See, e.g., *United States v. Lopez*, 514 U.S. 549, 558 (1995) (noting that “Congress may regulate the use of the channels of interstate commerce,” “the instrumentalities of interstate commerce, or persons or things in interstate commerce,” and “those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce” (citations omitted)).

201. Meyer, *supra* note 53, at 941–45.

growing wheat or marijuana for one's own consumption at home), the courts label the activity as "economic" in nature and conclude that regulation of intrastate activity is derivatively necessary to a broader scheme of interstate market regulation.²⁰² If a court cannot plausibly label the regulated intrastate activity as economic or commercial in nature, the inquiry shifts to whether any objects or events associated with such noneconomic activity have ties to interstate commerce. For example, courts let Congress prohibit a felon from possessing a gun, provided that the gun has previously crossed a state line, even if it did so without the felon's involvement and by means of a perfectly lawful shipment by someone else many years before the felon's later purely intrastate possession of the gun.²⁰³

Similarly, courts let Congress prohibit purely intrastate possession or production of child pornography, not because the act of possession or production has any link to interstate activity, but merely because generic precursor materials, like a digital camera or blank photo paper, have previously crossed a state line before they got into someone's home to be used for viewing or making pornographic images.²⁰⁴ Links like this are

202. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (rejecting the as-applied challenge to federal law prohibiting the manufacture, distribution, or possession of marijuana to intrastate growers and users of marijuana for medicinal purposes, and concluding that "[w]hen Congress decides that the total incidence of a practice poses a threat to a national market, it may regulate the entire class" (internal quotation marks omitted)); *Wickard v. Filburn*, 317 U.S. 111, 130–32 (1942) (rejecting farmer's as-applied challenge to federal law prohibiting growing of wheat on farm for subsistence consumption); Robert Shapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 257–58 (discussing how for Commerce Clause cases "the distinction between commercial and noncommercial activity is difficult to define and employ"); Maxwell L. Stearns, *The New Commerce Clause Doctrine in Game Theoretical Perspective*, 60 VAND. L. REV. 1, 16–18 (2007) (summarizing the evolution of case law and the extension of Commerce Clause authority to regulate any part of a "class" of economic activity that in turn has an effect on interstate commerce).

203. 18 U.S.C. § 922(g)(1) (2006); see, e.g., *Scarborough v. United States*, 431 U.S. 563, 566–67 (1977) (affirming the felon-in-possession conviction on the basis of interstate travel of a firearm occurring possibly several years or more before the defendant's possession and despite the lack of any connection between the felon's possession and the firearm's crossing of a state line); *United States v. Patton*, 451 F.3d 615, 634–35 (10th Cir. 2006) (acknowledging the continuing validity of *Scarborough* in light of *Lopez* and more recent Commerce Clause cases, and affirming the conviction for intrastate possession by felon of a bulletproof vest on the basis of evidence that the vest the felon bought in Kansas had been manufactured in California).

204. See 18 U.S.C. § 2251(a) (2006) (proscribing the use of a minor for the production of a visual depiction of sexually explicit conduct "if that visual depiction was produced using materials that have been mailed, shipped, or

said to satisfy the “substantial effect” on commerce requirement. In the extraterritorial context, Congress might well criminalize Go Fish, gin rummy, or other family card games if played with cards made in China and therefore deemed to create a “substantial effect” on foreign commerce.²⁰⁵

Maybe this judicial acquiescence to domestic application of the Commerce Clause is not so troubling in the context of our highly developed domestic legal system. As dubious as the results may be, the courts stand ready to adjudicate and enforce

transported in interstate or foreign commerce by any means, including by computer”); *id.* § 2252A(a)(5)(B) (2006) (establishing criminal prohibition for the possession of “any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography . . . that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer”); *see also, e.g.*, *United States v. Betcher*, 534 F.3d 820, 823–24 (8th Cir. 2008) (ruling that there was a substantial effect on interstate commerce from the intrastate production of child pornography where it was shown that an Olympus camera that had been manufactured in Indonesia was used by defendant to take pornographic photos); *United States v. Smith*, 459 F.3d 1276, 1282 (11th Cir. 2006) (holding that although “[t]he Government did not attempt to demonstrate that the images either traveled in interstate commerce themselves or were produced with the intent that they would travel in interstate commerce,” proof of interstate commerce was sufficient on the basis of “evidence that some of the photographs were printed on Kodak paper that the developer in Florida received from New York and that some of the pictures were processed using equipment received from California and manufactured in Japan”); *cf.* *United States v. Evans*, 476 F.3d 1176, 1179 (11th Cir. 2007) (concluding that defendant’s purely intrastate acts of promoting prostitution “substantially affected” interstate commerce: “[E]ven though his actions occurred solely in Florida, [they] had the capacity when considered in the aggregate with similar conduct by others, to frustrate Congress’s broader regulation of interstate and foreign economic activity,” and his “use of hotels that served interstate travelers and distribution of condoms that traveled in interstate commerce are further evidence that Evans’s conduct substantially affected interstate commerce”).

205. Professor Colangelo highlights a similar problem with gauging what is a “substantial effect” for purposes of considering whether extraterritorial application of U.S. law may exceed Congress’s authority under the Foreign Commerce Clause. *See Colangelo, Foreign Commerce Clause, supra* note 65, at 1027–43. He concludes that this issue should be resolved by reference to whether the law would exceed the prescriptive authority of Congress under international law, *id.* at 1033, which, of course, is the very inquiry that this Article suggests is difficult to resolve in a principled manner. As a further limiting principle, Colangelo also contends that, because of the Foreign Commerce Clause’s scope being limited to the regulation of commerce “with” foreign nations and *not* “among” them, the Foreign Commerce Clause should not, in general, be construed in a manner that allows or presupposes the authority of Congress to regulate the international market “writ large.” *Id.* (“[A] comprehensive global regulatory power over international markets among the nations of the world is not within the scope of the [Foreign Commerce] Clause.”).

their judgments in particular cases. And when the courts stray too far, the democratic process of voting and electoral pressure may rein in an overbroad federal law on a regulatory matter best left to individual states. More broadly, the democratic process remains available (at least by law and theory, if not in actual practice) to change the Constitution and the scope of the Commerce Clause.

Not so when U.S. law is applied abroad. The foreign targets of a U.S. extraterritorial law have little potential democratic redress. Foreign nationals may not vote in the United States.²⁰⁶ Foreign nationals may not make political contributions to U.S. political candidates or parties.²⁰⁷ Foreign nationals who are not diplomats or registered agents may not act on behalf of their governments to lobby U.S. government officials, and they face criminal penalties for failure to register as required by law.²⁰⁸ When U.S. law applies abroad, it is undemocratic because law is imposed without the consent of those governed by it, and those so governed may well lack fair notice of what the law is.²⁰⁹ In short, extraterritorial laws “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.”²¹⁰

Although judicial unilateralists favor expansive application of the effects principle on the ground that it will compensate for underregulation,²¹¹ this view does not adequately account for the fact that foreigners have little or no say in making the law that imposes costs on them. A greater amount of regulation may be the result of unilateral application of U.S. law abroad, but without the input of all parties affected there is little rea-

206. See 18 U.S.C. § 611 (2006).

207. 2 U.S.C. § 441e(a) (2006) (codifying a prohibition on political contributions by foreign nationals); see also *Foreign Nationals*, FED. ELECTION COMMISSION (July 2003), http://www.fec.gov/pages/brochures/foreign_nat_brochure.pdf (describing federal election law restraints on political activities of foreign nationals).

208. 18 U.S.C. § 951(a) (2006); see also *United States v. Dumeisi*, 424 F.3d 566, 579 (7th Cir. 2005) (declining to uphold a First Amendment challenge to the application of an unregistered-foreign-agent law stemming from defendant’s publication of a news article).

209. Mark B. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT’L & COMP. L. REV. 297, 305–06 (1996); Parrish, *Effects Test*, *supra* note 28, at 1483–86.

210. Parrish, *Effects Test*, *supra* note 28, at 1484.

211. See *supra* notes 22–23 and accompanying text.

son to suppose that whatever rule U.S. officials choose will be the most globally efficient and optimal solution. This casts significant doubt on the contention that U.S. extraterritorialism is an appropriate response to redress systematic underregulation by other states.²¹²

B. PROBLEMS WITH INTERESTS-BALANCING REASONABLENESS

In theory, any troubles with overbroad application of the effects or protective principles could be redressed by application of interests balancing, as some commentators and cases have suggested and section 403 of the Restatement has embraced as a “rule of reason.”²¹³ But, the interests-balancing approach re-

212. See Dodge, *Extraterritoriality*, *supra* note 21, at 105 (“[I]n the short run, judicial unilateralism corrects for failures in the legislative process that lead to underregulation in areas like antitrust.”). Professor Dodge acknowledges that “[a] nation feeling the harmful effects of an activity will be inclined to prevent those harmful effects without taking into account the benefits of that activity that may be felt elsewhere.” *Id.* at 158. He suggests that this problem can be ameliorated by the likelihood that an aggressive unilateral assertion of extraterritorial legal authority will provoke multilateral negotiations to reach consensus on a compromise rule. *Id.* See also Elhauge, *supra* note 69, at 2242 (“[T]he default rule that is most likely to provoke international agreement is one that *creates* international discord requiring resolution.”). Without denying the possibility that aggressive extension of U.S. law abroad may prod some countries to the multilateral negotiating table and seems to have done so in the antitrust context, *see id.* at 2243, it seems equally likely across the full spectrum of lawmaking activities that aggressive extraterritorial application of U.S. law could prompt belligerency and countermeasures that stymie political agreement on a multilateral rule. See Parrish, *Reclaiming*, *supra* note 1, at 871–72 (acknowledging the “enticing” and apparently “logical” idea that “conflict between states will spur negotiations and provide incentives to cooperate multilaterally,” but contending that “little empirical support exists to suggest that extraterritorial laws lead to greater cooperation” and further suggesting that the United States itself will often be an unwilling treaty partner so long as it may achieve similar ends by unilateral extraterritorial extension of its law). Moreover, even assuming that hardball, unilateralist tactics catalyze multilateral negotiations, it is far from clear that the resulting “consensus” will be one untainted by unequal bargaining power and by threat of the United States to impose its will unilaterally.

213. See *supra* notes 35–38 and accompanying text. For present purposes, I do not wade into the debate about whether the Restatement’s “rule of reason,” interests-balancing approach is an aspect of discretionary comity or actually embodies a rule of customary international law. See RESTATEMENT, *supra* note 6, § 403 cmt. a (stating that the rule of reason represents not only a “requirement of comity” but also a “rule of international law”). Compare *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 950 (D.C. Cir. 1984) (“[T]here is no evidence that interest balancing represents a rule of international law.”), and Dodge, *Extraterritoriality*, *supra* note 21, at 139–40 (contending that “international law does not require comparative interest balancing, the *Restatement (Third)*’s assertions to the contrary notwithstand-

lies on an unwieldy list of no fewer than eight factors and is without guidance as to how one factor should be weighed against another.²¹⁴ As Professor Larry Kramer notes, “balancing tends not to work so well in practice,” because “[t]he considerations being weighed are usually imprecise enough to permit several answers, and to dictate none,” such that “there is no greater certainty about the correctness of particular outcomes—only more uncertainty about what these outcomes are likely to be.”²¹⁵

More troubling, several of the Restatement’s factors invite courts to indulge their substantive policy preferences by requiring them to assess “the importance of regulation to the regulating state”; determine “the degree to which the desirability of such regulation is generally accepted”; and find “the importance of the regulation to the international political, legal, or economic system.”²¹⁶ As the D.C. Circuit observed in *Laker Airways v. Sabena, Belgian World Airlines*, courts are “neither qualified to evaluate comparatively nor capable of properly balancing” the array of “purely political factors.”²¹⁷ Born as creatures of a domestic legal system, our national courts are accustomed to “follow international law only to the extent it is not overridden by national law,” and they “inherently find it diffi-

ing.”), and Swaine, *supra* note 183, at 690–91, 697 (leaving open the possibility that “reasonableness” in general might be a principle of customary international law, but noting the lack of evidence that Restatement section 403 was, as required for a rule of customary international law, “based on evidence of how states actually proceeded,” and thereby concluding “there is simply insufficient evidence” that the Restatement’s “factor-rich reasonableness norm” represents customary international law), with Alford, *supra* note 37, at 15 (disputing *Laker Airways*’s claim that there is “no evidence” that the jurisdictional rule of reason is a rule of international law).

214. RESTATEMENT, *supra* note 6, § 403 cmt. b (stating that the factors are “not exhaustive” and that “[n]ot all considerations have the same importance” and, as such, “the weight to be given to any particular factor or group of factors depends on the circumstances”).

215. Kramer, *Vestiges of Beale*, *supra* note 53, at 221; see also Swaine, *supra* note 183, at 689–90 (noting that the elaboration of multiple “factors for balancing may improve transparency, but not predictability,” as “individual factors will often point in different directions, placing a premium on the decision maker’s judgment, and opposing parties will still be able to claim credibly that the test supports each of their positions”).

216. RESTATEMENT, *supra* note 6, § 403(2)(c),(e).

217. *Laker Airways*, 731 F.2d at 949. Of course, *Laker Airways* predated the latest version of the Restatement, but its criticism was aimed at earlier iterations of the interests-balancing test. See *supra* notes 132–33 and accompanying text (discussing *Timberlane* and *Mannington Mills*).

cult neutrally to balance competing foreign interests.”²¹⁸ Thus, reasonableness “analysis has not resulted in a significant number of conflict resolutions favoring a foreign jurisdiction,” because “when push comes to shove, the domestic forum is rarely unseated.”²¹⁹

To be sure, the interests-balancing criteria of section 403 might well be useful as guideposts for legislators or policy makers when deciding whether to decree that U.S. law should apply extraterritorially. But when this balancing analysis is foisted upon judges, it undermines the appropriate role of courts as neutral interpreters of the law. Interests balancing has no proper role for U.S. courts in deciding the extraterritorial scope of geoambiguous laws.

C. PROBLEMS WITH UNIVERSAL JURISDICTION

Although the dangers are not nearly as great as with effects and protective jurisdiction, universal jurisdiction is also unduly susceptible to subjective manipulability that erodes the constancy and predictability that are valued by rules of allocation of legislative jurisdiction. It is, of course, hard to dispute that some crimes are worse than others and that the worst-of-the-worst crimes—such as genocide, war crimes, crimes against humanity, slavery, and piracy—all need to be effectively prosecuted. But the full range of crimes subject to universal jurisdiction remains open-ended and far from clear. The Restatement, for example, ambiguously suggests that universal jurisdiction may extend to “perhaps certain acts of terrorism.”²²⁰ Yet, the meaning of “certain acts of terrorism” is far from certain under U.S. law. Indeed, Congress has defined the “federal crime of terrorism” to incorporate by reference dozens of other federal crimes whenever committed in a manner “calculated to influ-

218. *Laker Airways*, 731 F.2d at 951.

219. *Id.* at 950–51; see also Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT’L L. 280, 317 (1982) (“The result of such interest balancing will usually reflect an understandable bias in favor of the forum’s policy, grounded in unsophisticated analysis, overt chauvinism, or erroneous perceptions of a constitutional duty to advance legislative policies described in broad language but designed primarily for use in a domestic context.”); Parrish, *Effects Test*, *supra* note 28, at 1477 & nn.120–21 (noting “significant questions exist as to whether courts are able to evaluate foreign interests meaningfully or to do so in a way that does not inevitably favor U.S. interests” and citing multiple similar critiques).

220. RESTATEMENT, *supra* note 6, § 404.

ence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”²²¹

The Restatement otherwise lists more definite examples of universal crimes—“piracy, slave trade, attacks on or hijacking of aircraft, genocide, [and] war crimes”—but in doing so it also makes clear that this list is nonexhaustive and asserts that there is an “expanding class of universal offenses.”²²² As Professor Anthony Colangelo warns, “[t]he near future may portend an increased rubric of universal crime that includes other characteristically transnational offenses which call out for a cooperative response from states, such as sex or drug trafficking, or which threaten the very stability of the international system, such as nuclear arms smuggling.”²²³

In any event, even assuming that the range of substantive crimes deemed subject to universal jurisdiction were static or readily definable, an additional area of manipulability arises from questions concerning whether jurisdiction for a universal crime should extend to inchoate or secondary liability conduct such as conspiracy, attempt, aiding and abetting, harboring, and accomplice- or accessory-after-the-fact. If universal jurisdiction lies for war crimes, does it also lie for mere conspiracy to commit war crimes? The Supreme Court has recently divided inconclusively on this question.²²⁴ If terrorism in general is a universal crime, is material support for terrorism—such as donating money to a political group that supports terrorism—also a universal crime?²²⁵

221. 18 U.S.C. § 2332b(g) (Supp. II 2008) (listing dozens of crimes).

222. RESTATEMENT, *supra* note 6, § 404 & cmt. a.

223. Colangelo, *Constitutional Limits*, *supra* note 62, at 130; *cf.* Abdullahi v. Pfizer, 562 F.3d 163, 183–84 (2d Cir. 2009) (recognizing that the prohibition of nonconsensual medical experimentation on human beings constituted a universally accepted norm of customary international law), *cert. denied*, 130 S. Ct. 3541 (2010); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993) (rejecting a due process claim relating to a conviction for narcotics trafficking on the high seas by concluding that “[i]nasmuch as the trafficking of narcotics is condemned universally by law-abiding nations, we see no reason to conclude that it is ‘fundamentally unfair’ for Congress to provide for the punishment of persons apprehended with narcotics on the high seas”).

224. *Hamdan v. Rumsfeld*, 548 U.S. 557, 602–13 (2006) (plurality opinion) (concluding that conspiracy is not an offense under the international law of war).

225. Colangelo, *Constitutional Limits*, *supra* note 62, at 185–86 (stating that universal jurisdiction includes various U.S. federal terrorism crimes that have been outlawed by multilateral antiterrorism conventions, but adding that “U.S. code offenses that are not the subject of widely ratified international legal prohibitions like providing material assistance to, or receiving military train-

More generally, the floodgates have opened in U.S. courts to human rights claims against multinational corporate defendants charging them with varying degrees of accomplice involvement with foreign regimes in severe human rights abuses.²²⁶ These cases turn not just upon whether the abuses at issue rise to the level of universal crimes, but also on the scope of secondary liability for those who did not directly perpetrate the abuses—whether corporate actors’ knowledge and association with primary perpetrators of abuses is sufficient to permit corporate actors to be held liable.²²⁷

ing from a foreign terrorist organization, are not—at least at the present stage of development of international law—universal crimes” (footnotes omitted)).

226. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (ruling that absent proof that a Canadian corporation provided substantial assistance to the government of the Sudan with the purpose—not just knowledge—of aiding the government’s unlawful conduct, the Canadian corporation could not be held liable under the Alien Tort Statute (ATS) for aiding and abetting the Sudanese government’s violations of the international norms prohibiting genocide, war crimes, and crimes against humanity); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009) (involving allegations of corporate collaboration with Colombian paramilitary forces to murder and torture trade union leaders and employees); *Sarei v. Rio Tinto*, 550 F.3d 822 (9th Cir. 2008) (en banc) (involving allegations of primary and secondary liability of a mining company for human rights abuses in Papua New Guinea); *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (ruling that aiding-and-abetting liability is permissible under the ATS to allow potential liability against companies associated with the apartheid regime of South Africa); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005) (concerning a lawsuit by Guatemalan labor unionists against the owner of a Guatemalan banana plantation under the ATS and Torture Victim Protection Act claiming defendant’s participation in torture and other human rights violations). These cases have proceeded in U.S. courts in part under the ATS, which provides a U.S. court with subject matter jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (2006). Although the Supreme Court has not expressly conditioned an action under the ATS upon an allegation of conduct constituting a universal crime, the Court has restricted the kind of international law violations amenable to an action under the ATS to the historically most clearly defined kinds of serious international law violations. See *Sosa v. Alvarez Machain*, 542 U.S. 692, 731–33 (2004) (holding that illegal detention for less than one day of a Mexican national in Mexico, allegedly at the instigation of the DEA, did not rise to the level of supporting a cause of action under the ATS); see also *Kiobel v. Royal Dutch Petroleum Co.*, Nos. 06-4800-cv, 06-4876-cv, 2010 WL 3611392, at *21 (2d Cir. Sept. 17, 2010) (holding that corporations may not be held liable under the ATS); *Abdullahi*, 562 F.3d at 173 (“ATS claims may sometimes be brought against private actors, and not only state officials, when the tortious activities violate norms of ‘universal concern’ that are recognized to extend to the conduct of private parties—for example, slavery, genocide, and war crimes.” (citations omitted)).

227. See Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cas-*

These problems stem from the nature of universal jurisdiction itself. It premises state authority to prescribe on a broadly defined and expanding type of crime, rather than on a far more definitionally stable concept such as territoriality or nationality. This results in deep uncertainty about exactly what conduct a U.S. court might deem a universal crime worthy of universal geographic coverage by extension of a geoambiguous U.S. law.

On top of these uncertainties about what crimes qualify as universal and about secondary liability must be added a question about what continuing value the customary international law of universal jurisdiction truly has as a reference point for U.S. courts to decide the extraterritorial application of U.S. law. Congress has already expressly provided for extraterritorial jurisdiction over the core crimes that the Restatement identifies as subject to universal jurisdiction (and in fact provided for extraterritorial jurisdiction over many other especially heinous crimes).²²⁸ And most nations of the world have joined multilateral conventions requiring the criminalization of the “core” universal offenses and imposing a duty to prosecute or extradite alleged offenders who are found within their borders.²²⁹

Accordingly, for the worst-of-the-worst crimes, our courts have little need to resort to customary international law to justify their authority to apply a geoambiguous federal statute to extraterritorial conduct. A rogue state that declined to recognize certain conduct as a crime would not be bound by any contrary multilateral convention that it did not ratify and would not, as a persistent objector, be bound by a claim of customary international law.²³⁰

Professor Colangelo has persuasively argued that “a single State cannot *unilaterally* and subjectively determine what

es, 60 HASTINGS L.J. 61, 62 (2008) (“A central unresolved question in ATS litigation is what standards govern the liability of accomplices to international law violations, rather than direct perpetrators of those violations.”); Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT’L L.J. 271, 273 (2009) (“The idea that investors are indirectly responsible for international law violations of their host governments has little basis in nations’ practice—indeed, in its modern form it appears to be chiefly a U.S. phenomenon, and even in the United States it remains controversial.”).

228. See *infra* Appendix pt. B.3 (listing federal universal crimes).

229. See, e.g., Colangelo, *Legal Limits*, *supra* note 158, at 169–82 (discussing major universal-crime treaties).

230. Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331; RESTATEMENT, *supra* note 6, § 102 cmt. d.

crimes are within its universal jurisdiction,” that the scope of universal jurisdiction “is a matter of international, not national, law,” and that “when individual States wish to implement their universal jurisdiction through domestic legislation and enforce it in domestic courts, they are constrained to determine the crimes they adjudicate as the crimes are determined under international law.”²³¹ True enough, it may well be that U.S. courts *should* conform their interpretation of universal jurisdiction to the international law norm, but it does not follow that they *must* do so, because U.S. courts are simply not bound by customary international law limits on jurisdiction.²³² Just as substantive legal differences about the full range of universal crimes remain at the international level, U.S. courts are still free in practice—by intention or even inadvertence—to interpret the customary law of universal jurisdiction overbroadly as grounds to allow the extraterritorial extension of U.S. geoambiguous law.

The current extraterritorial jurisdiction framework as applied by U.S. courts is problematic. The presumption against extraterritoriality is not only inconsistently invoked, but also is unclear in its meaning and what must be shown to overcome the presumption. The commonly cited principles of extraterritorial jurisdiction—including the effects, protective, and universal principles—can be applied in an unprincipled manner, and these difficulties are not adequately remedied by a multifaceted interests-balancing approach. These concerns give rise to this Article’s proposal for a new rule of “dual illegality” as discussed in the next Part, below.

III. DUAL ILLEGALITY

As noted above, when confronted with geoambiguous statutes, U.S. courts readily recite the presumption against extraterritoriality. They may, nevertheless, end up applying U.S. law abroad, even when Congress has not said they should do so. In line with the judicial unilateralist vision, U.S. courts have inconsistently applied the presumption against territoriality to give expression to ever-expanding theories of effects, protective,

231. Anthony J. Colangelo, *Universal Jurisdiction as an International “False Conflict” of Laws*, 30 MICH. J. INT’L L. 881, 890–91 (2009).

232. See *supra* notes 155–57 and accompanying text; see also *United States v. Yousef*, 327 F.3d 56, 91 (2d Cir. 2003) (“United States law is not subordinate to customary international law or necessarily subordinate to treaty-based international law and, in fact, may conflict with both.”).

and universal jurisdiction, while only occasionally tempering their interpretations with an interests-balancing inquiry into whether it would be reasonable for U.S. law to apply abroad.

Instead of invoking a highly uncertain presumption against territoriality, U.S. courts should instead apply a dual-illegality rule of interpretation as a limitation against overextension of *prima facie* jurisdictional interests under the nationality, effects, protective, or universal jurisdictional principles. Part III.A, below, describes the proposed dual-illegality rule, how it would work, and the reasons it is a better approach than the Supreme Court's current approach. Part III.B responds to potential objections.

A. THE DUAL-ILLEGALITY RULE

A dual-illegality rule would presume that, unless Congress has said so, Congress does not intend its law to apply abroad in a manner that is inconsistent with the law of the place where the conduct occurred. How would courts apply this rule? First, for any geoambiguous statute, a court would consider whether the United States has a *prima facie* jurisdictional interest in extraterritorial application of the law, such as by means of the effects, protective, or universal jurisdictional principles. Second, if the court answers this question in the affirmative, then the court would apply the dual-illegality rule—it would apply the statute extraterritorially only if the conduct would be prohibited or similarly regulated in the territory where it occurred.

The dual-illegality rule would operate as a precautionary limitation to ward off the dangers described above of over-expansive assertions of *prima facie* jurisdiction. For cases where the United States otherwise claims a *prima facie* interest in regulating the conduct, the rule would presume that Congress intended its geoambiguous law to apply only if it is consistent with the law of the state where the conduct takes place. U.S. courts should not presume geoambiguous U.S. law to apply to conduct that is perfectly legal or not regulated in a foreign state where the conduct takes place.

Consider, for example, a geoambiguous U.S. law that prohibits disposal of toxic waste.²³³ A company in Canada dis-

233. The principal U.S. hazardous waste laws are the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Both statutes prohibit unpermitted discharges of hazardous waste or releases of hazardous sub-

charges chemicals into a river that flows south across the border and pollutes a lake in the United States. Should the U.S. law apply to these facts? The judicial unilateralists say “yes,” because the discharge in Canada caused substantial effects in the United States (regardless of whether the discharge was legal under Canadian law).²³⁴ The judicial territorialists say “no” for lack of clear evidence that Congress intended the law to apply to discharges in other countries. The interests balancers say “maybe,” depending on such factors as the nationality of the defendant and the overall importance (however defined) of the U.S. environmental regulation. The dual-illegality rule says “yes” because the discharge causes substantial effects in the United States and because Canada (like the United States) prohibits companies from releasing hazardous chemicals into rivers and lakes.²³⁵

A dual-illegality rule would serve what the Supreme Court has said is the primary justification for the presumption against extraterritoriality—that is, “to protect against unintended clashes between our laws and those of other nations which could result in international discord.”²³⁶ Indeed, the dual-illegality rule more precisely serves this function because the presumption against extraterritoriality overbroadly prevents application of U.S. law to foreign-based conduct when there is no inconsistency at all between U.S. and foreign law.²³⁷ True, the presumption against extraterritoriality has also been justified on grounds that Congress is presumed to legislate only

stances but are geoambiguous. See *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 672 (S.D.N.Y. 1991) (holding that the RCRA is not extraterritorial in effect); Lee I. Raiken, *Extraterritorial Application of RCRA: Is Its Exportability Going to Waste?*, 12 VA. ENVTL. L.J. 573, 576 (1993) (arguing that Congress intended RCRA to have extraterritorial effect but that courts have frustrated this objective).

234. See, e.g., *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1078–79 (9th Cir. 2006) (ruling that the CERCLA could be applied to a Canadian company that disposed of heavy-metal slag waste in Canadian water that eventually contaminated a lake in the United States).

235. Libin Zhang, Comment, *Pakootas v. Teck Cominco Metals, Ltd.*, 31 HARV. ENVTL. L. REV. 545, 558 (2007) (“[T]he facts in *Pakootas* support the application of CERCLA to the [Canadian factory] since the outcome would likely have been very similar under the British Columbian CERCLA-inspired environmental statutes.”).

236. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

237. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877–78 (2010) (“The canon or presumption [against extraterritoriality] applies regardless of whether there is a risk of conflict between the American statute and a foreign law.”).

with “domestic concerns in mind.”²³⁸ But this “domestic concerns” rationale has no apparent application to cases where extraterritorial conduct creates domestic effects (“concerns”) or for the many geoambiguous statutes that expressly reference Congress’s power to regulate “foreign commerce.”²³⁹

Although a dual-illegality rule would be a new approach to deciding the extraterritorial scope of U.S. statutes, it is far from a novel concept in U.S. practice and international law. A “dual criminality” requirement is a long-established and near-universal requirement of international extradition treaties and other forms of international law enforcement cooperation between the United States and other countries.²⁴⁰ In the extradition context, a dual-criminality requirement prevents extradition of a defendant to a requesting state if the defendant is sought for conduct that is not a crime in both the requesting and requested states.²⁴¹ The dual-criminality requirement

238. *Small v. United States*, 544 U.S. 385, 388–89 (2005) (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)) (stating that “[i]n determining the scope of the statutory phrase we find help in the ‘commonsense notion that Congress generally legislates with domestic concerns in mind,’ and that “[t]his notion has led the Court to adopt the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application”).

239. *See, e.g., Pasquantino v. United States*, 544 U.S. 349, 371–72 (2005) (commenting that because “the wire fraud statute punishes frauds executed ‘in interstate or foreign commerce,’” that “this is surely not a statute in which Congress had only ‘domestic concerns in mind’” (quotations omitted)); *see also infra* Appendix pt. C (listing of geoambiguous statutes). Professor Dodge underscores the weakness of the “domestic concerns” rationale by suggesting that it outright justifies extraterritorial application of U.S. law: “Congress’ focus on domestic conditions does not mean that its legislation should be applied only to conduct that occurs within the United States.” Dodge, *Understanding the Presumption*, *supra* note 54, at 124.

240. *See* William V. Dunlap, *Dual Criminality in Penal Transfer Treaties*, 29 VA. J. INT’L L. 813, 829 (1989) (“[D]ual criminality remains virtually universal in extradition, recognized by nearly every international extradition treaty, act of national implementing legislation, judicial opinion and scholarly commentary on the subject.” (footnotes omitted)); John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1459 (1988) (“A maxim of international law, and a standard provision in nearly every United States extradition treaty, is that extradition will not take place unless the offense charged is a crime in both the demanding and the requested country.”); *see also* RESTATEMENT, *supra* note 6, § 476(1)(c) (stating that for most international agreements, extradition is not granted “if the offense with which [the defendant] is charged or of which he has been convicted is not punishable as a serious crime in both the requesting and the requested state”).

241. *See* Dunlap, *supra* note 240, at 829 (noting three common forms of “dual criminality” requirements, such that “(1) a treaty may contain a mandatory clause requiring the requested State to refuse an extradition request when the act giving rise to the request does not constitute an offense under its

“serves the most important function of ensuring that a person’s liberty is not restricted as a consequence of offences not recognized as criminal by the requested State,” and that “[t]he social conscience of a State is also not embarrassed by an obligation to extradite a person who would not, according to its own standards, be guilty of acts deserving punishment.”²⁴² Although the United States has not deployed a dual-illegality rule to curb its assertion of extraterritorial jurisdiction,²⁴³ some foreign states decline to criminalize extraterritorial conduct if the conduct is not also illegal in the state where it occurred.²⁴⁴

laws; (2) a treaty by its terms may apply only to offenses chargeable in both States; or (3) a treaty may enumerate the offenses extraditable under the treaty and list only those that are common to both States”); Daseul Kim, Note, *“Perfectly Properly Triable” in the United States: Is Extradition a Real and Significant Threat to Foreign Antitrust Offenders?*, 28 NW. J. INT’L L. & BUS. 583, 594 (2008) (discussing the common use of “open-ended” dual criminality clauses rather than clauses that enumerate specific offenses as extraditable, such that “[a] typical pure dual criminality clause defines extraditable offenses as [a]n offense . . . [that] the conduct on which the offense is based is punishable under the laws in both States by deprivation of liberty for a period of one year or more or by a more severe penalty” (quoting Extradition Treaty, U.S.-U.K., art. 2, Mar. 31, 2003, S. TREATY DOC. NO. 108-23 (2003))).

242. Jonathan O. Hafen, *International Extradition: Issues Arising Under the Dual Criminality Requirement*, 1992 BYU L. REV. 191, 194 (quoting IVAN SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 137–38 (1971)).

243. One federal law, 18 U.S.C. § 546 (2006), comes close to imposing a dual-illegality requirement by specifying criminal penalties against any owner of a U.S. vessel who takes part in a scheme to smuggle merchandise into a foreign country, but only “if under the laws of such foreign government any penalty or forfeiture is provided for violation of the laws of the United States respecting the customs revenue.” See *Pasquantino*, 544 U.S. at 374 (commenting that section 546 “provided for criminal enforcement of the customs laws of a foreign nation only when that nation has a reciprocal law criminalizing smuggling into the United States”).

244. See Christopher L. Blakesley & Dan E. Stigall, *The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century*, 39 GEO. WASH. INT’L L. REV. 1, 18 (2007) (noting that “countries of civil law tradition” generally allow a nation-state to prosecute its own nationals for crimes committed abroad, “[b]ut most require that double criminality apply—that the offense be punishable in the place where it was committed as well”); Amy Fraley, Note, *Child Sex Tourism Under the PROTECT Act: Does It Really Protect?*, 79 ST. JOHN’S L. REV. 445, 475–76 (2005) (describing a Swedish law that requires dual criminality as a precondition to the prosecution of Swedish citizens for crimes committed abroad); David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT’L L. 471, 494 (2009) (surveying different states’ approaches to criminalizing foreign acts of bribery by their nationals and noting that “some States employ a dual criminality requirement for a finding of nationality jurisdiction, insisting that the conduct in question be a crime in the place where it occurred

Outside the criminal extradition context, English courts have also long acknowledged a rule of double accountability to restrain them from awarding tort damages for conduct that is not wrong in the place where committed. In accordance with the landmark case of *Phillips v. Eyre*, the double-accountability rule provides that “the wrong must be of such a character that it would have been actionable if committed in England,” and that “the act must not have been justifiable by the law of the place where it was done.”²⁴⁵

Although U.S. courts have not embraced the *Phillips* rule,²⁴⁶ it is far from novel for Congress to predicate the scope of federal law upon the law of another jurisdiction. The Federal Tort Claims Act, for example, authorizes an award of tort damages against the United States “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”²⁴⁷

and that the party against whom sanctions are to be imposed is a national of the imposing State”).

245. See *Phillips v. Eyre*, [1870] 6 L.R.Q.B. 1, 28–29 (Willes J.) (invoking a rule to bar recovery in a court in England for a tort allegedly committed by the English governor of Jamaica in circumstances where the governor’s alleged abuses were clearly immunized under Jamaican law); see also *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 & n.6 (2d Cir. 2000) (citing the *Phillips* rule); Peter Handford, *Edward John Eyre and the Conflict of Laws*, 32 MELB. U. L. REV. 822, 825 & n.23 (2008) (noting that the *Phillips* rule has been superseded by statute in the United Kingdom except for defamation cases). The *Phillips* rule did not find favor as a rule of pre-*Erie* federal common law in the United States Supreme Court. See *Huntington v. Attrill*, 146 U.S. 657, 670 (1892) (stating that the *Phillips* rule “is not the law of this [C]ourt” and that “[b]y our law, a private action may be maintained in one State, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the State where the suit is brought”). I am grateful to Professor Dodge for calling the double-accountability rule of *Phillips* to my attention as a useful analogue to my proposed dual-illegality rule.

246. See, e.g., *Cuba R.R. Co. v. Crosby*, 222 U.S. 473, 473 (1912) (reversing a Third Circuit decision that relied in part on the *Phillips* rule); *Huntington*, 146 U.S. at 670.

247. 28 U.S.C. § 1346(b)(1) (2006). Because the Federal Tort Claims Act (FTCA) has an exclusion for claims arising in foreign countries, see 28 U.S.C. § 2680(k) (2006), this provision refers to the laws of states within the United States. See, e.g., *FDIC v. Meyer*, 510 U.S. 471, 478 (1994) (holding that the FTCA’s “reference to the ‘law of the place’ means law of the State—the source of substantive liability under the FTCA”); *Richards v. United States*, 369 U.S. 1, 11–16 (1962) (finding that “law of the place” in the FTCA refers to law of the state where the negligent act occurred, not the law of the state where the negligent act had an operative and harmful effect from the crash of the plane).

A dual-illegality rule in the U.S. extraterritoriality context would embrace the best elements of both judicial unilateralism and judicial territorialism, all while avoiding the pitfalls of judicial interests balancing. Most significantly, it would preserve the core of strict territoriality by presuming that each nation-state has exclusive power to decide what kind of conduct within its own borders is proscribed or otherwise subject to regulation. Absent the clear intent of Congress, U.S. law would not prohibit or regulate extraterritorial conduct—such as the alleged extraterritorial price-fixing by British companies in the *Hartford Fire* case—that is perfectly legal or nonregulated in the place where it occurred.

Dual illegality is not a return to anachronistic territorialism. In contrast to strict territoriality, the dual-illegality rule would allow some U.S. courts to sit in judgment of violations of shared norms that occur in foreign countries (at least in cases where the United States otherwise has a *prima facie* interest in regulating the conduct and, of course, where U.S. courts properly have personal jurisdiction over a defendant). The dual-illegality rule would thereby open the way for U.S. courts to apply U.S. law to much of the foreign-based conduct that would otherwise fall within the scope of broad application of the effects, protective, or universal principles of jurisdiction. And it would allow the application of U.S. law where strict territorialist concerns serve little purpose, such as where an offender has broken the law of the territorial state but fled to the United States.²⁴⁸

The dual-illegality rule would capitalize on the increasing convergence among many nation-states on criminal and regulatory standards. For example, broad consensus exists on criminal prohibitions against corruption, smuggling, and money laundering.²⁴⁹ Broad consensus also exists on norms against

248. Of course, in such a case the United States might also have the option to extradite the offender to the foreign state where the criminal act took place.

249. See, e.g., United Nations Convention Against Corruption, G.A. Res. 58/4, ch. III, U.N. Doc. A/RES/58/4 (Nov. 21, 2003); United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, art. 15(5), U.N. Doc. A/RES/55/25 (Jan. 8, 2001); Buxbaum, *Transnational Regulatory Litigation*, *supra* note 30, at 301–02 (contending that there is “broad consensus on some issues” in “the area of criminal behavior that gives rise to RICO claims,” such as that “[e]very state collects taxes and prohibits nonpayment” and that “there are shared policies on the deterrence of particular crimes, including money laundering, bribery, and smuggling”).

gross abuses of human rights.²⁵⁰ As for civil economic regulation, “while it is unlikely that every jurisdiction will share a regulatory approach to the letter, it is fair to conclude that some basics have the agreement of all regulating jurisdictions,” such as for “hard-core price-fixing” in the antitrust context.²⁵¹ Broad consensus exists against security fraud,²⁵² and progress toward the adoption of International Disclosure Standards and International Accounting Standards holds promise for far greater consensus in other regulatory areas of securities law.²⁵³ Moreover, to the extent that some jurisdictions lack antitrust or securities laws, they may have generally applicable fraud, embezzlement, and unfair trade practice laws that could satisfy a dual-illegality requirement for conduct that is criminalized by a different name under U.S. law.

While affirming a foreign state’s exclusive authority to decide the substantive rule of conduct for those that act within its territory, the dual-illegality rule does not allow a foreign state to enact a rule and then bottle up its application or enforcement against persons who are otherwise subject to personal jurisdiction in the United States. This comports with the general principle in U.S. domestic law that one U.S. state government’s authority to announce a legal rule does not in turn preclude another U.S. state government from giving a remedy for a violation in the first state of that same rule. In *Tennessee Coal, Iron, & Railroad Co. v. George*, a worker who was injured in Alabama filed suit in Georgia for violation of an Alabama defective-machinery statute that required that any suit for its violation must be brought in a state court of Alabama and not else-

250. *Chapter IV: Human Rights*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (last visited Oct. 19, 2010) (listing major multilateral human rights treaties).

251. See Buxbaum, *Transnational Regulatory Litigation*, *supra* note 30, at 301.

252. See *Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167, 175 (2d Cir. 2008) (stating that “while registration requirements may widely vary, anti-fraud enforcement objectives are broadly similar as governments and other regulators are generally in agreement that [securities] fraud should be discouraged”; that for cases of fraud, “[t]he primary interest of [a foreign state] is in the righting of a wrong done to an entity created by it”; and that “[i]f our anti-fraud laws are stricter than [a foreign state’s], that country will surely not be offended by their application” (internal quotations and citations omitted)), *aff’d*, 130 S. Ct. 2869 (2010). As noted above, the Supreme Court in affirming the Second Circuit’s ruling disapproved of its reasoning and also expressed concern about potential conflicts between U.S. and foreign securities laws. See *Morrison*, 130 S. Ct. at 2885–86.

253. See Buxbaum, *Transnational Regulatory Litigation*, *supra* note 30, at 299.

where.²⁵⁴ The Supreme Court noted that venue was no part of the underlying right to be enforced, and that “a State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction.”²⁵⁵ More generally, the Court observed that “jurisdiction is to be determined by the law of the court’s creation [in Georgia] and cannot be defeated by the extraterritorial operation of a statute of another State [Alabama], even though it created the right of action.”²⁵⁶

More recently, the Supreme Court has acknowledged a similar principle between the dual jurisdictions of federal and state courts. Federal courts often exercise their habeas jurisdiction to review the constitutional propriety of criminal convictions that have occurred in state courts.²⁵⁷ For the last two decades, however, the Court has declined to allow federal courts to announce or give retroactive effect to new rules of federal constitutional criminal procedure when in the context of reviewing state court criminal proceedings.²⁵⁸ Recently, the Supreme Court has recognized that this limitation should not be made mandatory for state courts—in other words, that state courts are free to announce or give retroactive effect to new rules of constitutional criminal procedure, despite the remedial bar against federal courts doing so.²⁵⁹ Again, the prevailing principle is that one jurisdiction’s authority to announce a rule of substantive conduct should not ordinarily preclude another jurisdiction from choosing to adopt and apply that rule within its own juridical system.²⁶⁰ True enough, a state or juridical entity

254. *Tenn. Coal, Iron & R.R. Co. v. George*, 233 U.S. 354, 358 (1914).

255. *Id.* at 360.

256. *Id.*; *see also* *Marshall v. Marshall*, 547 U.S. 293, 313–14 (2006) (applying the rule of *Tennessee Coal* to conclude that the Texas state court did not have exclusive jurisdiction to preclude a judgment by the federal district court concerning rights under Texas state law).

257. *See, e.g.*, *Banks v. Thaler*, 583 F.3d 295, 299–300 (5th Cir. 2009) (exercising habeas jurisdiction to review the propriety of a murder conviction in light of the state’s nondisclosure of witness interview transcripts), *cert. denied*, 130 S. Ct. 2092 (2010).

258. *See* *Teague v. Lane*, 489 U.S. 288, 305–10 (1989).

259. *Danforth v. Minnesota*, 552 U.S. 264, 275–82 (2008).

260. More recently, the Federal Customs Service of the Russian Federation hired U.S. lawyers to sue the Bank of New York in a Russian court, alleging that certain of the bank’s activities violated the U.S. Racketeer Influenced and Corrupt Organizations (RICO) Act and that a Russian court had authority to enforce U.S. law. *See* Sara Rhodin, *Testimony About a U.S. Law in Russian Bank Case*, N.Y. TIMES, July 29, 2008, available at 2008 WLNR 14111526. The case eventually settled without resolution of the Russian court’s authority. *See*

may geographically restrict itself from applying its own rules extraterritorially (just as the federal presumption against extraterritorial application of U.S. laws purportedly does for U.S. courts). This limitation should not impede the United States from adopting and enforcing the same substantive rule of conduct chosen by other foreign states where the conduct in question takes place.

B. POTENTIAL OBJECTIONS TO THE DUAL-ILLEGALITY RULE

Critics of a dual-illegality rule could raise several objections. First, they could argue that a dual-illegality rule inappropriately undervalues foreign state interests because it requires neither that a foreign state formally consent to the United States' exercise of jurisdiction nor that the United States defer to a foreign state's wishes about whether and how the rule should be enforced. Indeed, at least some critics of U.S. extraterritorialism object not just to the United States imposing its substantive values to regulate foreign conduct, but also imposing its procedures and appurtenant baggage—including American-style jury decisionmaking, class action devices, attorney fee-payment structures, wide-ranging and expensive pre-trial discovery mechanisms, and potential punitive or treble damage remedies.²⁶¹ In *Empagran*, for example, the Supreme Court noted that “even where nations agree about primary conduct, say, price fixing, they disagree dramatically about appropriate remedies,” and “[t]he application, for example, of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy.”²⁶²

These concerns are not insubstantial, but they are of second-order significance next to the primary right of the foreign state to decide the substantive conduct rule. Further, they

Andrew Ross Sorkin, *Russia Drops \$22.5 Billion Suit Against Bank of New York*, N.Y. TIMES DEALBOOK BLOG (OCT. 22, 2009, 6:43 AM), <http://dealbook.blogs.nytimes.com/2009/10/22/russia-drops-225-billion-suit-vs-bank-of-new-york/>. The Russian case differs from the dual-illegality scenarios suggested in this Article because it involved a foreign court's authority to directly apply foreign statutory law, as opposed to a U.S. court's application of U.S. law that is merely consistent with foreign law.

261. See, e.g., Buxbaum, *Transnational Regulatory Litigation*, *supra* note 30, at 296–97; Ugo Mattei & Jeffrey Lena, *U.S. Jurisdiction over Conflicts Arising Outside the United States: Some Hegemonic Implications*, 24 HASTINGS INT'L & COMP. L. REV. 381, 390–95 (2001).

262. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 167 (2004).

are equally implicated by a judicial unilateralist approach, which would apply U.S. law to some kinds of conduct that are not even illegal or regulated in the territory where the conduct took place. Such concerns about procedural differences in the American enforcement system hazard a whiff of hypocrisy when cited to excuse actors from accountability for violation of a shared-norm substantive rule. If a foreign state has decided that particular acts are dangerous or noxious enough to be outlawed or civilly regulated in a certain manner, it is ill-positioned to complain that the United States has chosen to embrace and pursue a violation with greater vigor against a defendant (over whom the United States otherwise has personal jurisdiction under the Due Process Clause).

In any event, the dual-illegality rule would not invariably require that U.S. law be applied to dually illegal foreign conduct. If political or fairness concerns seem to counsel that any particular case should be adjudicated in the country where the conduct took place rather than in the United States, the dual-illegality rule would not foreclose the United States in criminal cases from granting a request for extradition.²⁶³ Nor would it foreclose U.S. courts in civil cases from dismissing actions involving foreign conduct under the doctrine of *forum non conveniens*²⁶⁴ or for failure to exhaust foreign law remedies.²⁶⁵

Critics of a dual-illegality rule might also argue that the rule would be ineffective or impractical to apply because it would be rare for U.S. law to coincide with foreign law. In *Empagran*, for example, the Court voiced concern about U.S. courts “hav[ing] to examine how foreign law, compared with American law, treats not only price fixing but also, say, information-sharing agreements, patent-licensing price conditions, territorial product resale limitations, and various forms of joint venture, in respect to both primary conduct and remedy.”²⁶⁶

263. See, e.g., 18 U.S.C. § 3184 (2006) (statute on extradition of foreign fugitives from the United States).

264. See, e.g., *Aldana v. Del Monte Fresh Produce, Inc.*, 578 F.3d 1283, 1300 (11th Cir. 2009) (affirming the dismissal of an ATS claim involving alleged human rights abuses in Guatemala on ground of *forum non conveniens*), *petition for cert. filed*, 78 U.S.L.W. 3689 (U.S. May 10, 2010).

265. See, e.g., *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1025–26 (W.D. Wash. 2005) (dismissing, on failure-to-exhaust grounds, a Torture Victim Protection Act claim brought by the family of a peace activist crushed in Israel by a bulldozer manufactured by the defendant), *aff’d on other grounds*, 503 F.3d 974 (9th Cir. 2007).

266. *Empagran*, 542 U.S. at 168. The dual-illegality argument that is advanced in this Article was not made in the *Empagran* case. The dicta about

Similarly, in *Morrison*, the Court observed in the securities context that “the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney’s fees are recoverable, and many other matters.”²⁶⁷

But those are concerns that have long been surmounted in the extradition context (which the Court in *Empagran* and *Morrison* did not acknowledge). Dual criminality in the extradition context requires only that the conduct at issue be illegal under the law of both states. The crimes need not have the same name, they need not have the same legal elements, and they need not be subject to the same penalty or punishment.²⁶⁸ “When the laws of both the requesting and the requested party appear to be directed to the same basic evil, the statutes are substantially analogous, and can form the basis of dual criminality.”²⁶⁹ Moreover, “that defenses may be available in the re-

the difficulties of matching U.S. and foreign law was in response to plaintiffs’ argument that the courts should apply prescriptive comity on a case-by-case basis to decide if foreign sensibilities would be offended by application of U.S. law to conduct that did not have any effect within the United States. *See id.*

267. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2885 (2010).

268. *See Collins v. Loisel*, 259 U.S. 309, 312 (1922) (“The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.”); RESTATEMENT, *supra* note 6, § 476 cmt. d (noting that “the fact that a particular act is classified differently in the criminal law of the two states does not prevent extradition under the double criminality rule,” and that “[f]or instance, if the requesting state charged the person sought with embezzlement but the acts alleged would constitute larceny by trick or fraud in the requested state, extradition would be required”); *see also Hafen*, *supra* note 242, at 199–207 (discussing the evolution of U.S. law interpreting the dual-criminality requirement).

269. *Clarey v. Gregg*, 138 F.3d 764, 766 (9th Cir. 1998) (internal citation omitted) (quoting *Peters v. Egnor*, 888 F.2d 713, 719 (10th Cir. 1989)). *Compare Theron v. U.S. Marshal*, 832 F.2d 492, 496–98 (9th Cir. 1987) (holding that a broadly worded South African statute criminalizing the failure of an adjudicated insolvent to disclose his insolvency when obtaining credit was sufficiently analogous to a U.S. statute criminalizing false statements to a bank; “[a]dmittedly, South Africa’s law is broader than [US law], but both laws can be used to punish the failure to disclose a loan applicant’s liabilities to a bank when obtaining credit,” and “it is immaterial that South Africa’s law is broader than the analogous law in this country”), *with United States v. Khan*, 993 F.2d 1368, 1372–73 (9th Cir. 1993) (reversing the conviction of defendant on a drug charge on grounds that a Pakistani law of conspiracy was not sufficiently analogous to a U.S. criminal statute prohibiting the use of a telephone to facilitate a drug offense).

requested state that would not be available in the requesting state, or that different requirements of proof are applicable in the two states, does not defeat extradition under the dual criminality principle.²⁷⁰ In short, the dual-criminality rule has long been functionally and flexibly applied in the extradition context to ensure substantive similarity and it has been done so without regard to insubstantial differences between two nations' laws.

In the same way, a dual-illegality rule should filter out immaterial differences between laws and adjust for differences to ensure that the two nations' laws are viewed in a parallel manner. Consider, for example, a geoambiguous U.S. law that prohibits destruction of U.S. government property.²⁷¹ To decide whether this law would allow prosecution in a U.S. court of the destruction of U.S. government property in a foreign country, the dual-illegality rule would properly inquire whether the foreign state's law similarly prohibits destruction of its own government's property, not whether it specifically outlaws destroying U.S. government property or the property of other foreign governments. The two laws, then, would be substantially analogous as required in the extradition context.

Critics might also contend that the location of the conduct at issue may be difficult to identify. Does "conduct" mean the human act that proximately causes harm or is it the resulting harm itself? Most criminal and regulatory statutes target human action (or human action resulting in specific harms), rather than targeting only the results of human action in the abstract. The law prohibits murder and fraud, not death and loss of money. In deciding where the conduct took place, the dual-illegality rule would necessarily look to the place of the human act that constitutes the prohibited or regulated act or that proximately causes the consequences within the scope of the prohibition or regulation. In my river-dumping case above, the regulated conduct was discharge of toxic waste in Canada, not the later contamination of a lake in the United States which was the result of human conduct in Canada.²⁷² Similarly, in *Morri-*

270. RESTATEMENT, *supra* note 6, § 476 cmt. d.

271. See 18 U.S.C. § 1361 (2006) (prescribing criminal penalties for anyone who "willfully injures or commits any depredation against any property of the United States," but without specifying whether the statute applies to destruction of U.S. government property outside of the United States).

272. Thus, U.S. courts should not be free to rationalize away an extraterritoriality problem by conflating a human act with its nonanthropogenic consequences. See *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1078 (9th

son, the Court had little difficulty identifying the location of the conduct subject to regulation as foreign, regardless of the transactions' taint from fraudulent conduct within the United States or any effect that these foreign-based transactions might have had on U.S. markets.²⁷³

Still, critics might contend that some kinds of conduct—like use of the Internet—defy geographical specificity. Even if true, this is a problem that equally plagues application of the currently reigning presumption against extraterritoriality as much as it would burden a new rule of dual illegality. Both rules require courts to decide where the conduct subject to regulation has taken place. In any event, other commentators have convincingly debunked the myth that the Internet has no one locus and is not amenable to territory-based regulation by national governments.²⁷⁴ Recent events in China have demonstrated the general regulatory effectiveness—for better or worse—of national, territory-based controls on Internet activity.²⁷⁵

Would a dual-illegality rule extinguish all conflicts and concerns about the projection of U.S. law to regulate conduct that occurs in other countries? Would it always be clear whether a U.S. law has a substantially analogous foreign counter-

Cir. 2006) (holding that CERCLA was not “extraterritorially” applied to a company in Canada that disposed of slag in a river in Canada, because the “release” of toxics from the slag occurred upon the slag coming to rest in U.S. waters); Zhang, *supra* note 235, at 545 (criticizing *Pakootas* and arguing that its “strained legal fiction, which bifurcates an act of international pollution into two separate events in two countries, allowed the court to avoid evaluating the decision’s ramifications for international law and comity”).

273. See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883–86 (2010) (observing that the “focus” of the securities law is “upon purchases and sales of securities in the United States” and that “[i]t is those transactions that the statute seeks to ‘regulate’”); see also *id.* at 2886–87 (noting distinction between the securities laws and a general wire-fraud statute that punishes “fraud *simpliciter*” in the United States without reference to the location of any foreign target or transaction).

274. See Goldsmith, *supra* note 58, at 480–82 (describing the means by which national governments may regulate in-territory users of the Internet, in-territory Internet service providers, and in-territory physical equipment for Internet transmission); see also F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REV. 1, 68–69 (2004) (noting that the views of Goldsmith and other “cyberskeptics” are now “orthodoxy,” and that “it is certainly true that geographically-delimited nation-states have not abandoned their claims to regulate transactions that affect them”).

275. See, e.g., Sharon LaFraniere, *Censors Put Tighter Grip on Internet in China*, N.Y. TIMES, Dec. 18, 2009, at A18, available at 2009 WLNR 25473299 (describing new Chinese Internet controls).

part? Almost certainly not. But by restoring the primacy of foreign territorial states to decide the legality and regulability of acts that take place on their territory, the dual-illegality rule would go a considerable distance toward reducing concerns about antidemocratic overextension of U.S. law. When disputes arise about where certain conduct has taken place or whether the U.S. law at issue is substantially analogous to the law of the territorial state, judges can decide these purely legal issues without enmeshing themselves in evaluating the comparative interests at stake or the harm-protecting purposes and merits of the U.S. law, as judges do now under the current judicial-unilateralist and interests-balancing approaches.

Critics of the dual-illegality rule might argue that it gives safe harbor to wrongdoers to harm the United States from countries with weak or vague laws that don't match up to U.S. regulatory standards. True. But this is a cost of our nation-state system and the respect that judges should presumptively accord to states that choose to regulate differently than we do. In any event, this safe-harbor objection overlooks at least three limitations on the dual-illegality rule's application.

First, the dual-illegality rule is no more than a default rule of statutory construction for geoambiguous statutes. Congress remains free—as it already has for scores of statutes, including for a broad range of terrorism crimes and for any serious assault or killing of a U.S. national—to expressly extend U.S. law to harmful extraterritorial acts.²⁷⁶ What the dual-illegality rule would do is stop our judges from making policy decisions about the wisdom or need to extend U.S. law when Congress has not seen fit to do so.

Second, the dual-illegality rule would not apply to U.S. statutes that regulate acts that occur in whole or in part within the United States, even if such regulation simultaneously reaches some foreign-based activity or is otherwise intended to have extraterritorial effects. For example, it would have no application to the federal statute that prohibits any person from traveling from the United States with the intent to engage in sexual abuse of a child in a foreign country; this statute criminalizes an act (travel) that takes place in part on U.S. territory.²⁷⁷

276. See, e.g., 18 U.S.C. §§ 2332, 2332a, 2332f(b)(2) (2006); 18 U.S.C. § 2332b (2006 & Supp. II 2007–2009).

277. A federal child-sex-tourism statute prohibits persons from “travel[ing] in foreign commerce, for the purpose of engaging in any illicit sexual conduct.”

Third, the dual-illegality rule would pose no obstacle to extraterritorial application of U.S. law in cases where foreign countries have agreed by general treaty or specific consent to allow the adjudication of extraterritorial violations in U.S. courts.²⁷⁸ Of course, if a foreign country has laws similar to the United States but simply chooses not to enforce them, the dual-illegality rule would not offer wrongdoers a safe harbor.

This proposed rule of dual illegality for U.S. courts would be employed when deciding whether to apply U.S. law to acts that occur wholly in other foreign countries. The dual-illegality rule would, in essence, require courts to abstain from applying geoambiguous laws to foreign conduct absent a determination that the conduct was subject to the same prohibition or regulation in the foreign state where the act took place. Although serious objections to a dual-illegality rule may be asserted, dual illegality has well-established roots in the practice states already follow for granting international criminal extradition. Furthermore, a dual-illegality rule is superior to competing approaches of judicial territorialism, unilateralism, and interests balancing.

CONCLUSION

Globalization has long betrayed the reasons why it once made sense to confine U.S. law to regulate only what happens on U.S. territory. Congress has responded in part by extending some of its laws to criminalize or regulate conduct in other countries. Much of federal law, however, is geoambiguous, and our courts have been left to decide how far U.S. law should reach. The Supreme Court has announced a presumption against extraterritoriality, but thinly and inconsistently applied it in a manner that bespeaks substantive discord about whether and why U.S. law should apply abroad. Scholars alike

See id. § 2423(b) (2006). As applied to a U.S. citizen who leaves the United States for a child-sex-tourism destination, this is a territorial law that would not be subject to the dual-illegality rule, regardless whether the destination foreign country has comparable legal protections.

278. For example, the Maritime Drug Law Enforcement Act authorizes U.S. courts to exercise jurisdiction over narcotics trafficking conduct that has no nexus to the United States except for the consent of the government of the foreign-flag vessel on the high seas or consent of the government of the territorial seas travelled by a ship that has been interdicted by U.S. law enforcement authorities. The law does not require that the country giving consent also have a comparable law against narcotics trafficking. *See* 46 U.S.C. §§ 70502, 70503 (2006).

have divided. Judicial territorialists suggest that our courts should not construe U.S. law to apply abroad absent a clear-statement of Congress or consent of the affected foreign countries. Judicial unilateralists suggest that our courts should liberally apply U.S. law to respond to unwanted effects in the United States from foreign-source conduct. Judicial interests balancers suggest that our courts should apply U.S. law abroad only if reasonable in light of a multitude of interest-based factors.

This Article has criticized all these approaches and advanced a new rule of dual illegality that U.S. courts should use to decide the geographical scope of geoambiguous laws. The dual-illegality rule preserves the paramount interest of nation-state territoriality by allowing foreign states to decide what conduct in their own territory is illegal or subject to regulation. Yet, departing from strict territoriality, the dual-illegality rule also allows extraterritorial application of U.S. law when U.S. law is substantially the same as the law of the territorial state. Dual illegality would reduce judicially initiated jurisdictional contestability by deferring to the substance of a foreign state's law. U.S. courts applying the dual-illegality rule would continue to consider at the outset whether a *prima facie* prescriptive jurisdictional basis exists (such as under the effects, protective, and universal principles). However, the dual-illegality rule would leave the ultimate determination of whether a geoambiguous law should extend abroad to depend upon a legal judgment of the comparative scope of U.S. and foreign law, rather than upon policy-like judgments about the nature of the harm, the scope of universal crimes under customary international law, or the strength of the policy interests of the United States in having its law apply.

The dual-illegality rule would not prevent the United States from superseding foreign law. It is merely a default rule of interpretation for judges when Congress has chosen not to extend its law abroad. Nor will the dual-illegality rule constrain courts from applying U.S. law with full force to acts that take place in part within the United States (even if they have foreign effects) or to extraterritorial acts for which foreign states have agreed should be subject to adjudication by U.S. courts. When faced with applying a geoambiguous U.S. law to wholly foreign conduct, U.S. courts should apply the dual-illegality rule.

APPENDIX: A GEOGRAPHICAL CLASSIFICATION
OF FEDERAL CRIMES

This Appendix lists a broad range of federal criminal statutes by reference to their apparent geographical scope. The list below is illustrative and does not include all federal crimes. The listed crimes fall into three broad groups: (A) explicitly territorial crimes (criminal statutes restricted to acts that take place inside the United States), (B) explicitly extraterritorial crimes (criminal statutes that plainly extend to extraterritorial acts), and (C) geoambiguous crimes (criminal statutes that are not clear about their geographical scope).

A. EXPLICITLY TERRITORIAL CRIMES

Numerous federal criminal statutes have language indicating their application to domestic acts only, such as a requirement that the act occur inside the United States or that it occur within the “special maritime and territorial jurisdiction” of the United States or that it occur in some other manner that makes clear that the forbidden act must almost certainly occur on U.S.-controlled territory. See, for example, 18 U.S.C. § 372 (2006) (conspiracy by any two persons in the United States to impede or injure a federal officer); 18 U.S.C. §§ 478–480 (2006) (generally prohibiting counterfeiting, passing, or fraudulent possession of foreign government security or obligation “within the United States”); 18 U.S.C. § 661 (2006) (theft within special maritime and territorial jurisdiction of the United States); 18 U.S.C. § 917 (2006) (impersonation “within the United States” of a member of the American National Red Cross); 18 U.S.C. § 951 (2006) (prohibiting anyone other than diplomats from “act[ing] in the United States as an agent of a foreign government without prior notification to the Attorney General”); 18 U.S.C. § 956 (2006) (prohibiting persons within the United States from conspiring to “kill, kidnap, maim, or injure persons or damage property in a foreign country”); 18 U.S.C. §§ 959–962 (2006) (prohibiting anyone “within the United States” from enlisting in a foreign service, participating in expeditions against friendly nations, and strengthening or arming a vessel of a foreign nation).

B. EXPLICITLY EXTRATERRITORIAL CRIMES

Many federal criminal statutes explicitly apply to extraterritorial acts. As listed below, these statutes can be classified into three groups: (1) U.S.-nationality-based extraterritorial

crimes (e.g., the offender is a U.S. national); (2) U.S.-effects-based extraterritorial crimes (e.g., a harm or effect results within the United States or against a U.S. citizen or official); and (3) universal extraterritorial crimes (e.g., a crime for which there is no requirement of any showing of any connection to the United States or its citizenry). Each of these statutes is deemed “explicitly” extraterritorial because either it has a provision expressly directing that it should be applied extraterritorially or it has a provision directing that it may be applied against any defendant who is later present or otherwise found within the United States.

1. U.S.-Nationality-Based Extraterritorial Crimes

Some federal criminal statutes explicitly apply to extraterritorial acts, but only if the offender or victim is a U.S. national or has some similar residency connection to the United States. See, for example, 18 U.S.C. § 38 (2006) (prohibiting extraterritorial false statements concerning “any aircraft or space vehicle part” when “in or affecting interstate or foreign commerce” and if the offender or victim is a U.S. national or “an act in furtherance of the offense was committed in the United States”); 18 U.S.C. § 175 (2006) (possession of biological weapons, with “extraterritorial Federal jurisdiction over an offense under this section committed by or against a national of the United States”); 18 U.S.C. § 175c (2006) (possession or use of the variola virus “outside of the United States” by or against a U.S. national); 18 U.S.C. § 229 (2006) (possession of chemical weapons if offender or victim is a U.S. national or if a chemical weapon is used against property that is owned, used, or leased by the United States); 18 U.S.C. § 953 (2006) (prohibiting “[a]ny citizen of the United States, wherever he may be,” from conducting certain correspondence with foreign governments); 18 U.S.C. §§ 1831, 1837(1) (2006) (theft or misappropriation of a trade secret by a U.S. national outside the United States if “intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent”); 18 U.S.C. § 2332a (2006) (use of a weapon of mass destruction against a U.S. national abroad or by a U.S. national abroad); 18 U.S.C. § 2423(b) (2006) (prohibiting a “United States citizen or an alien admitted for permanent residence in the United States” from “travel[ing] in foreign commerce, for the purpose of engaging in any illicit sexual conduct”); 18 U.S.C. § 2423(c) (2006) (illicit sexual acts in foreign places by “[a]ny United States citizen

or alien admitted for permanent residence who travels in foreign commerce”).

2. U.S.-Effects-Based Extraterritorial Crimes

Some federal criminal statutes apply to extraterritorial acts but only if such acts create or threaten an adverse effect within the United States or if such acts otherwise victimize U.S. nationals or U.S. government officials (wherever they may be). See, for example, 18 U.S.C. § 351 (2006) (assault, kidnapping, or killing of high-level U.S. government officials); 18 U.S.C. § 470 (2006) (prohibiting counterfeiting of U.S. obligations or securities anywhere “outside the United States”); 18 U.S.C. § 877 (2006) (mailing a threatening communication from a foreign country to the United States); 18 U.S.C. § 1512 (2006 & Supp. II 2009) (witness tampering); 18 U.S.C. § 2114(a) (2006) (assault on any person in custody of “any money or other property of the United States”); 18 U.S.C. § 2251 (2006) (generally prohibiting creating a visual depiction of child pornography in foreign countries if intended or known that the depiction is to be transmitted to the United States); 21 U.S.C. § 959 (2006) (prohibiting the manufacture or distribution of controlled substances while intending or knowing that they will be imported into the United States and stating that “[t]his section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States”).

3. Universal Jurisdiction Crimes

Some federal criminal statutes explicitly apply to extraterritorial acts and effectively allow universal jurisdiction because they do not require any kind of a link between the prohibited conduct and U.S. territory or any U.S. citizen or official. See, for example, 18 U.S.C. § 37 (2006 & Supp. II 2009) (violence at international airports); 18 U.S.C. § 112 (2006) (assault on “foreign official, official guest, or internationally protected person”); 18 U.S.C. § 831 (2006) (prohibiting transactions involving nuclear materials); 18 U.S.C. § 832 (2006) (participation in nuclear and weapons of mass destruction threats to the United States); 18 U.S.C. § 878 (2006) (threats or extortion against foreign officials, official guests, or internationally protected persons); 18 U.S.C. § 1091 (2006) (authorizing prosecution of genocide if defendant is at some point “present” in the United States); 18 U.S.C. § 1201 (2006) (kidnapping of “internationally protected persons”); 18 U.S.C. § 1203 (2006) (taking of a hostage “to com-

pel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained”); 18 U.S.C. §§ 1581, 1583, 1589, 1596(a) (2006 & Supp. II 2008) (peonage, enticement into slavery, and forced labor if defendant is at some point “present” in United States); 18 U.S.C. § 1651 (2006) (piracy on the high seas); 18 U.S.C. § 2251A (2006) (selling or buying of children for use in child pornography); 18 U.S.C. § 2340A (2006) (torture); 18 U.S.C. § 2442 (Supp. II 2008) (recruitment of child soldiers); 21 U.S.C. § 959 (2006) (manufacture or distribution of narcotics intending or knowing it will be imported illegally into the United States).

C. GEOAMBIGUOUS CRIMES

Numerous U.S. federal criminal statutes are geoambiguous in the sense that a U.S. court could plausibly apply them to wholly extraterritorial acts, either because the statute expressly refers to activity that affects or involves “foreign commerce” or because the statute has broadly and generally worded terms that have no apparent geographical limitation. See, for example, 18 U.S.C. § 32 (2006) (destruction of motor vehicles used in foreign commerce); 18 U.S.C. § 36 (2006) (drive-by shootings in furtherance of major drug offenses); 18 U.S.C. § 39 (2006) (sale or use “in or affecting interstate or foreign commerce” of a traffic signal preemption transmitter to a nonqualifying user); 18 U.S.C. § 43 (2006) (travel in interstate or foreign commerce to damage an animal enterprise); 18 U.S.C. § 111 (2006 & Supp. II 2008) (assault on a federal employee); 18 U.S.C. § 115 (2006 & Supp. II 2008) (assault, kidnap, or murder of a family member of a federal officer); 18 U.S.C. § 116 (2006) (female genital mutilation); 18 U.S.C. § 119 (Supp. II 2008) (public disclosure of certain “restricted” information—such as home address, email, or Social Security number—to facilitate threat, intimidation, or commission of crime against federal employees or other persons involved with federal investigations); 18 U.S.C. § 152 (2006) (fraudulent concealment of bankrupt debtor assets); 18 U.S.C. § 175b (2006) (possession “in or affecting interstate or foreign commerce” by “restricted persons” of certain biological agents, including as “restricted persons” citizens or agents of state-sponsored supporters of terrorism); 18 U.S.C. § 201 (2006) (bribery of U.S. public officials and witnesses); 18 U.S.C. § 241 (2006) (civil rights conspiracy); 18 U.S.C. § 247 (2006) (obstruction of free exercise of religious beliefs or defacement of reli-

gious property if the offense “is in or affects interstate or foreign commerce”); 18 U.S.C. § 248 (2006) (obstructive conduct at reproductive health facilities); 18 U.S.C. § 331 (2006) (fraudulent defacement of U.S. coinage); 18 U.S.C. § 371 (2006) (conspiracy to commit U.S. offense or to defraud the United States); 18 U.S.C. § 484 (2006) (prohibiting “connect[ing] together different parts of two or more notes, bills, or other genuine instruments issued under the authority of the United States, or by any foreign government, or corporation, as to produce one instrument, with intent to defraud”); 18 U.S.C. § 486 (2006) (prohibiting uttering or passing of “any coins of gold or silver or other metal, or alloys of metals, intended for use as current money, whether in the resemblance of coins of the United States or of foreign countries”); 18 U.S.C. § 511 (2006) (removing, altering, or tampering with “an identification number for a motor vehicle or motor vehicle part”); 18 U.S.C. § 555 (2006) (financing a border tunnel); 18 U.S.C. § 641 (2006) (theft, embezzlement, or conversion of U.S. government property); 18 U.S.C. § 659 (2006) (theft from the “interstate or foreign shipment” of goods or merchandise); 18 U.S.C. § 666 (2006) (theft or bribery concerning program receiving federal funds); 18 U.S.C. § 667 (2006) (theft or misappropriation of property “in connection with the marketing of livestock in interstate or foreign commerce”); 18 U.S.C. § 668 (2006) (knowing receipt, concealment, exhibiting, or disposing of major artwork stolen from museum “situated in the United States”); 18 U.S.C. § 700 (2006) (flag burning and desecration of the U.S. flag); 18 U.S.C. §§ 792–798 (2006) (espionage and related offenses); 18 U.S.C. § 871 (2006) (threats against the President or Vice President done by “deposit[ing] for conveyance in the mail or for a delivery from any post office or by any letter carrier”); 18 U.S.C. § 873 (2006) (blackmail under “threat of informing” as to “any violation of any law of the United States”); 18 U.S.C. § 875 (2006) (“transmit[ting] in interstate or foreign commerce” certain kinds of threats); 18 U.S.C. § 892 (2006) (extortionate extension of credit); 18 U.S.C. §§ 911–914 (2006) (impersonation of a U.S. citizen, U.S. government employee, or U.S. creditor); 18 U.S.C. § 922(o) (2006) (unlawful possession of a machine-gun); 18 U.S.C. § 1001 (2006) (false statements “within the jurisdiction” of the U.S. government); 18 U.S.C. § 1031 (2006) (major contract or procurement fraud against the United States); 18 U.S.C. § 1037 (2006) (fraudulent hacking into protected computers and sending spam emails “in or affecting interstate or foreign commerce”); 18 U.S.C. § 1361 (2006) (“in-

jur[ing] or commit[ting] any depredation against any property of the United States”); 18 U.S.C. § 1366 (2006) (damaging an energy facility); 18 U.S.C. § 1661 (2006) (on-shore robbery by pirates); 18 U.S.C. § 2074 (2006) (false weather reports where purported to be issued by U.S. government service); 18 U.S.C. § 2119 (2006) (carjacking of vehicle “that has been transported, shipped, or received in interstate or foreign commerce”); 18 U.S.C. § 2252B (2006) (use of misleading Internet domain name with intent to deceive a person or minor “into viewing material constituting obscenity”); 18 U.S.C. § 2252C (2006) (“knowingly embed[ding] words or digital images into the source code of a website with the intent to deceive a person into viewing material constituting obscenity”).