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Lea Brilmayer
Yale Law School

Charles Norchi

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FEDERAL EXTRATERRITORIALITY AND FIFTH AMENDMENT DUE PROCESS

Lea Brilmayer* and Charles Norchi**

Currently, defendants subject to the extraterritorial application of federal law generally do not invoke the Due Process Clause of the Fifth Amendment to limit the application of federal statutes. Defendants subject to extraterritorial application of state law, on the other hand, quite often succeed in making analogous Fourteenth Amendment due process arguments. In this Article, Brilmayer and Norchi contend that courts should recognize Fifth Amendment limits on choice of law in the context of federal extraterritoriality in the same manner that they recognize Fourteenth Amendment limits on state extraterritoriality. Surveying a number of prominent recent cases, Brilmayer and Norchi examine how the application of Fifth Amendment constraints would alter the results in these cases.

I. INTRODUCTION

By some accounts, American movie and record producers lose close to half a billion dollars in licensing fees annually when foreign entrepreneurs reproduce and sell American products without authorization and when foreign governments simply look the other way.¹ What if our government passed a law providing treble damages for all unlicensed copying or playing for profit of American tapes anywhere in the world?² Under current law, what would be her best defense?


² Compare this to Grundman's oft-quoted observation: "In the past twenty-five years, the United States has had three major exports: rock music, blue jeans, and United States law. The first two have acquired an acceptance the last can never achieve. People resent being told what to do." V. Rock Grundman, The New Imperialism: The Extraterritorial Application of United States Law, 14 Int'l Law. 257, 257 (1980).

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* Benjamin F. Butler Professor, New York University Law School.
** Tutor in Law and J.S.D. Candidate, Yale Law School. The authors wish to thank Maria Chedid and Cheryl DeFillipo for their much-appreciated contributions to this article. Sam Estreicher, Larry Kramer, Hans Linde, Howard Shapiro, and Russell Weintraub were generous enough to comment on an earlier draft. The authors also would like to thank Howard Shapiro for bringing the cases cited in note 226 to their attention.
Presently, the most effective defense in extraterritoriality cases is likely to be that Congress did not intend the statute to apply to the particular fact pattern in question. Assume, however, that our hypothetical statute was clearly intended to cover even non-Americans who legally acquired tapes in their home countries and copied or played them according to the law in effect there. This first defense, then, fails. A second defense might be that extending American law to such a case would violate international law, because international law limits the extent to which a state may apply its own laws to cases composed predominately of foreign elements. This defense is even less likely to succeed than the first, and for the same reason: congressional intent is clear, and current doctrine allows Congress to override international law as long as it is sufficiently specific.

So our hypothetical defendant seems to be out of luck. Compare her plight to the legal posture of a second foreign defendant, this one protesting extraterritorial application of state law on some similar issue (for example, common law fraud or unfair trade practices). Again, assume that the state legislature that wrote the statute has sufficiently specified that the statute is designed to apply to the conduct at issue in the case. Regarding defenses based on statutory interpretation or common law choice of law rules, our second defendant is in the same

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There is no fixed meaning for the term “extraterritoriality.” Certainly, it means that some factors in the case are foreign rather than domestic. But which ones? Is a statute being applied “extraterritorially” when the case involves a foreign defendant acting within the United States? When it involves a local defendant acting abroad? As used here, a case involves extraterritoriality when at least one relevant event occurs in another nation. Cases in which all events occur in the United States are unlikely to raise serious constitutional due process issues, even when the defendant is a foreign national. Thus, whether or not one considers these to constitute cases of extraterritoriality need not be addressed in this article.

4 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

5 See id. § 115(1)(a); BRILMAYER, AN INTRODUCTION, supra note 3, at 298 & n.40 (citing cases). Some commentators argue that the elected branches should be bound by international law, at least in certain circumstances. See, e.g., Jules Lobel, The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law, 71 VA. L. REV. 1071, 1075–76 (1985). This suggestion, however, has not yet been adopted by the courts.

6 See, e.g., Bernkrant v. Fowler, 360 P.2d 906, 910 (Cal. 1961) (examining the policy considerations underlying a California statute to resolve an interstate conflicts question); People v. One 1953 Ford Victoria, 311 P.2d 480, 481–83 (Cal. 1957) (interpreting the legislative intent behind a California statute to resolve an interstate conflicts question).

7 See, e.g., RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 311 (1934) (setting forth the
position as the first: the dictates of the legislature defeat each of his arguments.

But in other respects, the posture of our second defendant is rather different from that of the first. Defendants protesting the application of state law to international cases rarely make arguments based on international law. Instead, when faced with state legislative overreaching, defendants tend to fall back on the United States Constitution, and in particular on the Due Process Clause of the Fourteenth Amendment. This is so even when the case exhibits international and not purely interstate elements. On the other hand, although defendants faced with federal legislative overreaching do raise arguments based upon international law, they rarely rely on the Due Process Clause of the Fifth Amendment, the federal analog of the Fourteenth Amendment's Due Process Clause. This difference is

“place of contracting” rule for contract cases; id. § 377 (setting forth the “place of wrong” rule for tort cases).

Prior to the adoption of the Fourteenth Amendment, state conflicts cases occasionally cited international law as placing limits on state power. See, e.g., Baker v. Baker, Eccles & Co., 242 U.S. 394, 401 (1917) (noting that “long before the adoption of the 14th Amendment” courts applied “the rules of international law” to resolve questions of state law jurisdiction).

Today, state cases rarely, if ever, rely on international law to restrict choice of law. We surveyed a number of well-known state choice of law cases with international elements, and searched for references to international law or to the Restatement (Third) of Foreign Relations Law. See In re Korean Air Lines Disaster, 829 F.2d 1171 (D.C. Cir. 1987), aff’d, 490 U.S. 112 (1989); Wong v. Tenneco, Inc., 702 P.2d 570 (Cal. 1985); Milkovich v. Saari, 203 N.W.2d 408 (Minn. 1973); Neumeier v. Kuehner, 286 N.E.2d 454 (N.Y. 1972); Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1953); Holzer v. Deutsche Reichsbahn-Gesellschaft, 14 N.E.2d 798 (N.Y. 1938). None discussed international law or the Restatement, with the arguable exception of Wong which relied on a theory of international comity. See Wong, 702 P.2d at 575-76; cf. Frummer v. Hilton Hotels Int’l, Inc., 227 N.E.2d 851, 858 (N.Y.) (referring to “private international law,” a term synonymous with choice to law), cert. denied, 389 U.S. 923 (1967).

Federal extraterritoriality cases sometimes mention the Constitution as an aside, seemingly indicating that the Constitution limits federal legislative power. See, e.g., Lauritzen v. Larsen, 345 U.S. 571, 578 (1953); Steele v. Bulova Watch Co., 344 U.S. 280, 285-86 (1952); and Vermilya-Brown Co. v. Connell, 335 U.S. 377, 385 n.8 (1948). International law is relevant in such cases because, when Congress has not expressly provided territorial reach, it is presumed to legislate in accordance with international law. See Lea Brilmayer, International Law in American Courts: A Modest Proposal, 100 YALE L.J. 2277, 2282 & n.16 (1991) [hereinafter Brilmayer, A Modest Proposal].

For examples of federal extraterritoriality cases raising international law arguments or relying on the Restatement (Third) of Foreign Relations Law, see Lauritzen v. Larsen, 345 U.S. 571, 578 (1953); Steele v. Bulova Watch Co., 344 U.S. 280, 285-86 (1952); and Vermilya-Brown Co. v. Connell, 335 U.S. 377, 385 n.8 (1948). International law is relevant in such cases because, when Congress has not expressly provided territorial reach, it is presumed to legislate in accordance with international law. See Lea Brilmayer, International Law in American Courts: A Modest Proposal, 100 YALE L.J. 2277, 2282 & n.16 (1991) [hereinafter Brilmayer, A Modest Proposal].

10 Federal extraterritoriality cases sometimes mention the Constitution as an aside, seemingly indicating that the Constitution limits federal legislative power. See, e.g., Lauritzen, 345 U.S. at 579 n.7; United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945) (stating that “the only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so”); see also Brilmayer, Appraisal, supra note 3, at 24-25 (citing cases). Few cases seriously discuss the constitutional question, and none invalidate application of federal law on these grounds. We examined a number of the leading federal extraterritoriality cases, mostly at the Supreme Court level. None of these cases treat due
enormously important for one simple reason: international law arguments are defeated by a clear showing of Congressional intent.13 Constitutional law arguments, in contrast, trump contrary legislative preferences. Thus, a defendant faced with state legislative overreaching apparently has an arrow in his quiver that a defendant faced with federal legislative overreaching lacks. This is true even though the Due Process Clauses of the Fifth and Fourteenth Amendments are identical in language and, on their face, would seem to have an identical substantive scope.

This puzzle becomes even more mystifying when one adds a third hypothetical defendant. Assume this third defendant faced with federal overreaching believes that he is not properly subject to personal jurisdiction in the American forum. In this situation, the case law seems to indicate that the defendant can raise a Fifth Amendment due process argument.14 Few cases admittedly deal with this issue, primarily because most assertions of jurisdiction in federal cases are measured by state long-arm statutes. In such cases, the relevant standard is therefore derived from Fourteenth Amendment limits on the actions of states.15 In the few cases applying federal long-arm statutes, however, there is a general assumption that Fifth Amendment due process limitations apply.16 It also seems (although the


In addition, more detailed research into lower court cases in particular substantive areas, see infra Part II, disclosed very few discussions of due process. The cases that do mention the Constitution generally equate its limitations with those based on international law. See, e.g., United States v. Peterson, 812 F.2d 486, 493–94 (9th Cir. 1987); Rocha v. United States, 288 F.2d 545, 549 & n.4 (9th Cir. 1961); United States v. Layton, 509 F. Supp. 212, 215–16 (N.D. Cal. 1981). Several cases specifically deny that constitutional limits exist on extraterritorial application of American penal laws. See Chua Han Mow v. United States, 730 F.2d 1308, 1311 (9th Cir. 1984), cert. denied, 470 U.S. 1031 (1985); United States v. Baker, 609 F.2d 134, 136 (5th Cir. 1980); United States v. King, 552 F.2d 833, 850 (9th Cir. 1977), cert. denied, 430 U.S. 966 (1977). We only found one case that clearly differentiated between international and constitutional law, and that took constitutional limitations seriously. See United States v. Davis, 905 F.2d 245, 248–49 & n.2 (9th Cir. 1990), cert. denied, 111 S. Ct. 753 (1991).

13 See supra notes 3–5 and accompanying text.


15 If Congress fails to supply a federal long-arm statute, a federal court must apply the long-arm statute of the state in which it sits. See Omni Capital, 484 U.S. at 105.

authority is rather thin) that international law limits federal long-arm statutes, at least if Congress has not been specific about its intent to override it.\(^\text{17}\) International law, however, has not been recognized as a limitation on state long-arm statutes.\(^\text{18}\)

This rather confusing pattern of results is illustrated in Figure 1. Extraterritorial application of federal substantive law has not typically been subjected to due process scrutiny, yet the opposite is true of extraterritorial exertions of state substantive law and of both state and federal judicial authority. International law is used to help interpret (but not to override) federal law and federal long-arm statutes, but not the laws or long-arm statutes of the states. Further, nowhere is there any judicial acknowledgment that this odd pattern exists, much less any attempt to rationalize it.\(^\text{19}\)

\(^{17}\)Section 421 of the Restatement (Third) of Foreign Relations Law describes the limits international law places on federal long-arm statutes. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 (1987). The current relevance of this provision is unclear, because explicit Congressional standards would override international law. See supra note 3.

\(^{18}\)Section 421 does purport to apply to exercises of state long-arm power internationally. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 cmt. f (1987). However, the application of state long-arm statutes has not traditionally been scrutinized for consistency with international law. See, e.g., Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1362 (7th Cir. 1985) (noting that the defendant did not make an international law argument). Although an exhaustive search of state long-arm cases is not possible, a computer search on the Westlaw “all states” database (state court cases dated after 1944) was conducted. A request was made for all state court opinions that mentioned both “long-arm” and “international law.” Fifteen cases were retrieved, but none of them used international law to invalidate the assertion of state court jurisdiction. However, foreign states and their agents have invoked the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1988), to foreclose jurisdiction in United States courts. See, e.g., Schwartz v. Merchants Bank of N.Y., 490 N.Y.S.2d 194, 196 (App. Div. 1985); Raji v. Bank Sepah-Iran, 495 N.Y.S.2d 576, 579-81 (Sup. Ct. 1985); Tucker v. Whitaker Travel, Ltd., 501 A.2d 643, 644 (Pa. Super. Ct. 1985).

Prominent international cases assess the constitutionality of state long-arm statutes. See Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113-16 (1987); Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 413-18 (1984). In both cases, the Supreme Court invalidated exercises of state long-arm power, but did not rely on international law. Asahi briefly suggested that international cases might require different treatment than domestic ones, see Asahi, 480 U.S. at 115, but this suggestion largely rested on potential for conflict between state law and the federal foreign affairs power.

The failure to apply international law in state long-arm cases that cross international borders is particularly puzzling because international law has the status of federal common law, and could, for this reason, override contrary state law. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 111-112 (1987).

\(^{19}\)The Restatements rationalize their different treatment of state and federal cases by differentiating between “private” international law, which is covered by the conflicts restatement, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 cmt. d (1971), and “public” international law, which is covered by the Foreign Relations Restatement, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 101 cmt. c (1987). The distinction is far from clear, for both
The problem is not merely academic. Serious practical questions are raised by the extraterritorial application of American federal statutes. In one case discussed below, a Colombian national was prosecuted under American law for the attempted murder of two American drug agents in Colombia and for the theft of their American passports. Although the Eleventh Circuit arguably may have correctly decided that the prosecution was consistent with international law, it made no effort to square its holding with the United States Constitution. Similarly, persons acting outside the United States have been charged with murder of a member of Congress and theft of United States government property, and noncitizens acting outside the United States have been prosecuted for attempting to commit immi-

Restatements address issues of judicial and legislative (or choice of law) jurisdiction as well as civil and governmental judgment enforcement actions. Moreover, it is unclear why issues such as antitrust and securities regulation are any more "public" than torts, contracts, family law, and corporations questions that are covered by the conflicts restatements. The real difference seems to be that the conflicts restatement involves conflicts of state laws while the foreign relations restatement involves conflicts of federal law. However, a radical difference in treatment on this ground is hard to defend.

21 See infra p. 1255.
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24 These cases, and others examined below, demonstrate the need for Fifth Amendment scrutiny.

Because it has already received a great deal of academic attention, the extraterritorial reach of American commercial legislation, particularly the antitrust and securities laws, will only be addressed in passing.²⁵ We will focus instead on the application of civil and criminal RICO,²⁶ as well as the application of federal drug laws.²⁷ Each of these examples includes cases with politically prominent defendants: the Marcos family in the first case and General Manuel Noriega in the second. A final example is of comparable political importance, for it concerns so-called universal jurisdiction over terrorists and airline hijackers — jurisdiction that is not founded upon any connection between the defendant's activities and the forum.²⁸

As these examples demonstrate, extraterritorial application of American law has become a potent tool for effectuating American foreign policy. The increasingly unilateral and aggressive character of United States foreign policy should heighten concern about the application of American law to foreign defendants. During the 1960s and 1970s other nations and their citizens primarily feared overly aggressive regulation of their commercial interests by the American antitrust and securities laws.²⁹ Today government priorities are different. Our courts are used to protect professed national security interests through application of American drug and terrorism laws. Whether this is a proper role for our judicial system is an open question. But if courts are to become involved, they must do so in a manner consistent with the Constitution.

Before addressing these concrete instances of extraterritoriality, however, it is necessary to build the case for applying the Constitution to limit the extraterritorial application of American federal law. It is our thesis that the Fifth Amendment Due Process Clause limits federal actions in much the same manner that the Fourteenth Amendment Due Process Clause limits state actions. Although no Supreme Court case explicitly discusses and adopts this proposition, little or no authority exists to the contrary. When the Supreme Court finally does address this question, we believe the proper answer is clear: the Fifth Amendment limits extraterritorial application of substantive federal law.

²⁴ See Rocha v. United States, 288 F.2d 545, 546 (9th Cir. 1961).
²⁵ For a fuller discussion, see Symposium, Extraterritoriality of Economic Legislation, 50 LAW & CONTEMP. PROBS., Summer 1987, at 1, 117-250.
²⁶ See infra pp. 1246-49.
²⁷ See infra pp. 1254-60.
²⁸ See infra pp. 1249-54.
²⁹ Economic legislation is still more likely to receive extraterritorial application than is antidiscrimination legislation. See Jonathan Turley, "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality, 84 NW. U. L. REV. 598, 600 & n.9 (1990).

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II. STATE AND FEDERAL EXTRATERRITORIALITY CONTRASTED

A brief word on terminology may be useful. A case's facts may implicate only a single state (intrastate), may cross state borders within the United States (interstate), or may cross national borders (international). If the case is international, a conflict may arise between the laws of a state and a foreign nation or between federal law and the law of a foreign nation. Both of these are problems of "legislative jurisdiction," as choice of law is sometimes called. The former we denominate issues of state international extraterritoriality (or state international choice of law) and the latter we term federal extraterritoriality (or federal choice of law). Both types of cases can be brought in either federal or state court. Thus, to describe a case as presenting a problem of federal extraterritoriality does not (as we use the term) indicate anything about the forum in which it is litigated.

Questions surrounding the propriety of the forum implicate issues of personal jurisdiction rather than legislative extraterritoriality. When personal jurisdiction is based on a state long-arm statute, the issue is one of state international personal jurisdiction. Federal international personal jurisdiction refers to the scope of federal long-arm statutes. When a case is brought in federal court but jurisdiction is based on a state long-arm statute, we refer to it as involving state international personal jurisdiction.

To the uninitiated, it might seem that issues of state and federal extraterritoriality should be treated substantially the same. The decision to apply the law of one sister state rather than that of another does not appear noticeably different from the decision to apply the law of one nation rather than that of another or from the choice between applying sister state and foreign law. However, state international extraterritoriality cases are treated identically to state interstate extraterritoriality cases and differently from federal extraterritoriality cases. This pattern is illustrated in Figure 2.

A. Doctrinal Evolution

1. A History of Extraterritoriality Doctrine and Theory. — State and federal extraterritoriality doctrines were not so different at their inception. Early choice of law theory was something of an undifferentiated mass, with federal and state choice of law cases relying indiscriminately on one another and on constitutional law, interna-

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30 The Restatement of Foreign Relations Law supports this intuition in some places. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 reporters' note 5 (1987) (noting that the same principles govern state and federal extraterritoriality, except in the case of federal preemption under the foreign affairs power). But see supra note 19 (noting that private and public law issues should be treated differently).
The chief inspiration consisted of the writing of a number of territorialist scholars: Ulrich Huber, Joseph Story, and Joseph Beale. Under the territorialist theory, a sovereign's power was limited to activities occurring within its territory. Other states were supposed to enforce the rights that “vested” under the law of the place where the cause of action accrued. In the first quarter of this century, choice of law cases often referred to this so-called *obligatio* or “vested rights” theory.

31 See, e.g., American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (relying on reasoning about national sovereignty and citing a state law decision in ruling upon a federal extraterritoriality case); Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904) (relying on *obligatio* reasoning in a review of a state choice of law case without referring to constitutional provisions); Huntington v. Attrill, 146 U.S. 657, 666, 669 (1892) (deciding whether to accord full faith and credit by reference to international law and citing Blackstone on the choice of law question).


33 For a general description of the vested rights theory, see LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS § 1.2, at 18-22 (1990) [hereinafter BRILMAYER, FOUNDATIONS].
Oliver Wendell Holmes, for instance, was a proponent of the *obligatio* theory of choice of law, applying it in both state and federal extraterritoriality cases.\(^{35}\)

The territorial theory had its most prolonged and important impact on state choice of law cases, perhaps because Joseph Beale (the foremost intellectual proponent of the theory) was the reporter for the American Law Institute's *Restatement (First) of the Conflict of Laws*.\(^{36}\)

Partly because of the prominence of the Restatement, criticism of the vested rights theory centered on its application to state choice of law. Despite the intellectual attack coming from members of the legal realist school of jurisprudence,\(^{37}\) several prominent Supreme Court cases of the period seemed to adopt the vested rights approach as constitutional dogma, as Beale had urged.\(^{38}\) This period was, of course, the heyday of substantive due process,\(^{39}\) and the Due Process Clause was the primary constitutional tool used in invalidating state choice of law decisions.\(^{40}\)

During this period, most choice of law cases involved interstate issues. This is not surprising, because interstate trade was more common than international trade. International cases involving either state or federal laws were rare, and few federal regulatory statutes existed. Choice of law litigation was largely state law choice of law litigation. Constitutional limits on choice of law thus meant constitutional limits on *state* choice of law.

The attacks of the legal realists finally bore fruit in the 1960s, when Brainerd Currie developed a competing theory to Beale's vested rights doctrine: the interest analysis approach to choice of law.\(^{41}\) Interestingly, Currie believed that his approach was equally pertinent to state and federal choice of law issues, although his most commonly read essays dealt with state choice of law.\(^{42}\) His influence was pri-
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marily felt by state judges in formulating state choice of law doctrine, particularly in a few key states such as California and New York. Adoption of his methods led states to apply their laws far more expansively to cases having progressively fewer, and more attenuated, connections with the forum.

State choice of law cases carried forward their reliance on due process analysis (with an occasional reference to the Full Faith and Credit Clause), but in responding first to the legal realists' attack and then to Currie's interest analysis approach, judges began to turn away from the fundamentalism of vested rights. Increasingly, the cases asked whether there were "contacts" between the forum and the controversy, whether application of local law was "fair," and whether the state had an "interest" in having its law applied. Most of these cases involved interstate conflicts rather than international ones, especially at the Supreme Court level, although there were occasional exceptions. This probably reflected the interstate, as opposed to international, character of most commercial litigation. Constitutional limits still meant limits on state choice of law.

The increasing importance of federal choice of law is traceable to the increasing adoption of federal regulation. The modern era of federal extraterritoriality dates from United States v. Aluminum Co. of America (ALCOA), which abandoned the restrictive vested rights approach of the turn-of-the-century cases. ALCOA itself involved the antitrust laws, while other cases involved the reach of copyright

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BRAINERD CURRIE, The Silver Oar and All That: A Study of the Romero Case, in CURRIE ESSAYS, supra note 41, at 361, 361. He believed that these cases should be resolved under his state law theory. See id. at 366-67.

43 See, e.g., Reich v. Purcell, 432 P.2d 727, 729-31 (Cal. 1967) (renouncing the "place of wrong" rule and assessing the "interests" of the various states and private parties); Babcock v. Jackson, 191 N.E.2d 279, 284-85 (N.Y. 1963) (assessing the competing "interests" and "policies" of New York and Ontario).

44 See infra note 70.

45 See, e.g., Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981) (plurality opinion) ("[T]he Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and with the occurrence of the transaction."); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 502-03 (1939) (weighing competing interests of two states); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 542-43 (1935) (same). For further discussion, see infra pp. 1240-44.


47 148 F.2d 416 (2d Cir. 1945).

48 See id. at 443-44.
protection,49 the Fair Labor Standards Act,50 and the Jones Act.51 These cases pursued a common methodology, as in each the Court perceived the key question as one of statutory construction: should the statute be interpreted to apply extraterritorially?52 International law might aid in construing the statute, for Congress was presumed to act in accordance with international law.53 However, Congress could contravene international law if it clearly expressed its intent to do so. Current cases use this methodology to interpret the reach of securities and commodities laws54 and civil rights legislation.55

2. Why Did State and Federal Choice of Law Develop Differently?

The state choice of law revolution, then being fought out in the law reviews and in the courts, had virtually no impact on the development of federal choice of law.56 The critical question is why. In

52 See Brilmayer, Appraisal, supra note 3, at 14-15.
53 See id. at 15.
56 References in modern extraterritoriality cases to state choice of law are few and far between. We examined thirteen leading cases in federal extraterritoriality since ALCOA was decided and looked for evidence of the influence of state choice of law doctrine or theory. A number of cases did not mention state choice of law. See McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963); Foley Bros. v. Filardo, 336 U.S. 281 (1949); Commodity Futures Trading Comm’n v. Nahas, 738 F.2d 487 (D.C. Cir. 1984); Tamari v. Bache & Co., 730 F.2d 1103 (7th Cir.), cert. denied, 469 U.S. 871 (1984); Psimenos, 722 F.2d at 1041; Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979).


The results in none of the cases surveyed turned in whole or even in part on reliance on a state choice of law analogy. None discuss “modern” choice of law theory such as interest analysis or the Restatement (Second) of Conflict of Laws (some, of course, were decided prior to its publication). The allusions to state choice of law are peripheral in the extreme. At the time that many of these civil actions were resolved, state choice of law was undergoing a

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both areas the courts were breaking away from the old-fashioned vested rights dogma of Holmes and Beale, but they did so in different ways.57 In the state law arena, judges relied upon a vigorous academic literature concerning the nature of the choice of law process and decided that states should disregard territorial limitations to further local interests (defined in terms of providing the benefits of local laws to locals).58 In contrast, courts deciding federal choice of law issues looked to international law and to legislative history, and chose to emphasize that statutes are normally designed to apply only to activities or harms occurring within the sovereign's territory.59

Most recently, for instance, the Supreme Court interpreted the reach of title VII of the Civil Rights Act of 196460 and held that it did not apply to the claim of an American employee who alleged discrimination while he was working for an American employer in Saudi Arabia.61 The Court treated the question as one of statutory construction, applying a presumption that, unless Congress provides to the contrary, it intends to limit the reach of statutes to the territory of the United States.62 If the issue were one of "modern" state choice of law, it seems unlikely that extraterritorial application would have been denied. The United States would have had an interest in pro-

veritable revolution, which is never mentioned in these cases. Instead, they rely on international law and the Restatement (Third) of Foreign Relations Law. See supra note 12.

This may change to some extent, for the newest Restatement of Foreign Relations Law itself uses a "reasonableness" test that purports to be influenced by the Restatement (Second) of Conflict of Laws. See generally Andreas F. Lowenfeld, Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction, 163 RECUEIL DE COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INT'L LAW 311, 360–63 (1979) (arguing for the adoption of a modern choice of law theory).

57 One possible explanation might be that federal extraterritoriality involves conflicts between coequal sovereigns, while state international choice of law involves a choice between the law of one sovereign and a subdivision of another. This difference, however, would not explain why the states of the United States are more aggressive in applying their law than the federal government is. For a criticism of the Supreme Court's lack of attention to modern choice of law theory in federal extraterritoriality cases, see Larry Kramer, Vestiges of Beale: Extraterritorial Application of American Law, 1991 SUP. CT. REV. (forthcoming 1992) (manuscript at 34–35, 41, on file at the Harvard Law School Library).

58 See BRAINERD CURRIE, Survival of Actions: Adjudications Versus Automation in the Conflict of Laws, in CURRIE ESSAYS, supra note 41, at 128, 144–45. For example, California has an interest when an injured party who would benefit from application of California law is a Californian. On this phenomenon generally, see John H. Ely, Choice of Law and the State's Interest in Protecting Its Own, 23 WM. & MARY L. REV. 173, 173–80, 211–17 (1981).

59 See, e.g., EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227, 1230 (1991) (discussing the presumption that Congress usually intends to regulate only within United States territory); see also Foley Bros. v. Filardo, 336 U.S. 281, 284–85 (1949) (noting the presumption that Congress intends laws to apply "only within the territorial jurisdiction of the United States").


62 See id. at 1230.
tecting the American plaintiff, and Saudi Arabia would have had no interest in application of its law because the defendant was not Saudi Arabian. 63 Modern theory denies that state legislatures would prefer that their statutes be limited to local occurrences. 64

The state courts' rejection of interpretive presumptions against extraterritoriality and their application of forum law largely accounts for the fact that constitutional issues were pressed in cases involving state but not federal extraterritoriality. The perception of overreaching may have lead to a search for means to restrain the states, and the Due Process Clause was the tool closest at hand. This is not to say that defendants prevailed in most of these constitutional arguments; to the contrary, the Supreme Court increasingly allowed states to apply their laws to cases with demonstrably attenuated connections. 65 However, what is significant is that constitutional arguments were invoked at all, considering their absence in similar federal choice of law cases.

Although several other possible explanations might arguably account for the peculiar divide between federal and state choice of law theory, few have much appeal. One potential explanation posits that courts have misunderstood the analogy between the interstate and international contexts. If the choice between applying New York and Connecticut law is analogous to the choice between applying the laws of the United States and France, then one might also view the Constitution as playing the same role in the interstate case as is played by international law in the international context. This analogy is based on the notion that the Constitution exists outside of and above the laws of the two states — it provides a neutral frame of reference for choosing between the two. Similarly, international law can be viewed as outside of (and arguably above) the laws of the two nations and thus operating neutrally between them.

This analogy may be fine so far as it goes, but it only goes so far. Specifically, it is misleading because it implies exclusivity — that constitutional law is the only appropriate device for limiting state choice of law, and that international law is the only vehicle for limiting federal choice of law. In fact, international law might also apply to state international choice of law issues, and the Constitution might

63 For an explanation of "false conflicts" and why these occur in common domicile cases, see Brilmayer, Foundations, supra note 33, § 2.1.2, at 58; and Ely, supra note 58, at 206–07.
64 See Kramer, supra note 57 (manuscript at 37–38). Brainerd Currie asserted, for instance, that legislatures were exceedingly unlikely to specify that their laws should be applied only to local activities. See Brainerd Currie, Married Women's Contracts: A Study in Conflict-of-Laws Method, in Currie Essays, supra note 41, at 77, 116. He also claimed that it is irrational to the point of unconstitutionality to resolve choice of law cases on the basis of where the wrong occurred. See Brainerd Currie, The Constitution and the "Transitory" Cause of Action, in Currie Essays, supra note 41, at 283, 306.
also apply to federal choice of law. International law should apply to state choice of law because international law has the status of federal law, either as statutory law (if the international law stems from a treaty) or as federal common law (if the international law stems from the sovereign's practice).66 Constitutional law should apply to federal choice of law for the same reason that it applies to all other exercises of federal power.67 The Fifth Amendment's Due Process clause has as much relevance to choice of law issues as it does to domestic exercises of federal authority68 and to other international exercises of federal power such as the assertion of adjudicative jurisdiction.69

A second potential explanation for the divide between federal and state choice of law theories lies in the wording of the Full Faith and Credit Clause.70 At first glance, the Full Faith and Credit Clause might appear to account for differences between state and federal choice of law because the clause requires deference to the laws of other states but not to the laws of foreign nations.71 For this reason, courts may base a choice between federal and foreign law on different grounds than a choice between the laws of several states. Thus, international choice of law might be expected to develop differently from interstate choice of law. The problems with this explanation however, are evident. The critical question is why federal choice of law is different from state choice of law, yet the above explanation answers a separate question: why international choice of law is different from interstate choice of law. Numerous state choice of law decisions concern international questions, such as when Texas must decide to apply its own law or Mexican law.72

67 The Restatement apparently agrees, although it does not focus much on the problem. See, e.g., id. § 402 cmt. j.
68 See infra pp. 1234–37.
69 For cases applying due process scrutiny to federal long-arm power, see supra note 14. Cf. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209 (1958) (holding that the Fifth Amendment would be implicated if the United States required a party to commit acts that would subject him or her to criminal prosecution in another nation).
70 U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State . . . .").
72 See id. at 405–12. It would probably make more sense to differentiate between interstate and international choice of law than between federal and state choice of law. It seems possible that international problems (which involve competing sovereign states and very different sets of laws) might involve different considerations than interstate ones. If such differentiation were made, the Full Faith and Credit Clause might provide one doctrinal explanation. But this is not the way that the line has been drawn. As we have noted, state choice of law doctrine takes little account of whether the problem is interstate or international. Furthermore, it is not clear that the applicability of the clause even makes much of a difference, because the Supreme Court has consistently held that the Full Faith and Credit and Due Process Clauses play identical roles. See Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 n.10 (1981); see also Sun Oil Co. v.
A final potential explanation for the distinction between federal and state choice of law regimes lies in the structure of federal court jurisdiction. Federal choice of law takes a unilateral approach to jurisdiction, whereas state choice of law takes a multilateral approach.\textsuperscript{73} The unilateral approach means that, in deciding whether to apply federal law, a court looks only at the federal law in deciding whether or not it is applicable. If it is not applicable, the case is dismissed. In contrast, courts approach state choice of law issues multilaterally—by comparing the two competing laws, and deciding which of the two to apply. For example, if a court decides a federal law case in which the facts reveal contacts with both the United States and France, it can only apply American law. If the contacts with the United States are too attenuated for American law to apply, the case is dismissed. But if a court must decide a state law case with contacts with both New York and France, it can apply the law of either jurisdiction. If the contacts with New York are too attenuated for that state's law to apply, the court will resolve the case under French law.

The connection between the unilateral/multilateral dichotomy and federal court jurisdiction is that federal courts are courts of limited jurisdiction, which (for our purposes) requires that a basis for federal jurisdiction exist, such as the presence of a federal question.\textsuperscript{74} One might think that choice of law is linked to the existence of federal question jurisdiction—once it is determined that federal law does not apply, federal question jurisdiction is similarly nonexistent and the case must be dismissed. Hence, the unilateral nature of federal choice of law: there is no point in considering application of French law. Whether this explanation could account for the lack of constitutional oversight of federal extraterritoriality is far from clear. But this question need not be pursued at length because it collapses under its own weight.

The reason is that the difference we are seeking to explain—the difference in treatment between the federal and state choice of law regimes—does not correspond neatly to the difference between cases heard in federal court and cases heard in state court. There is a statistical correlation, of course, because federal court jurisdiction

\textsuperscript{73} See generally Brilmayer, Foundations, supra note 33, § 1.1.2, at 16–17 (discussing multilateral and unilateral approaches to conflict of laws).

\textsuperscript{74} This explanation was put forward in Brilmayer, Appraisal, supra note 3, at 13. For reasons that appear in the text below, we have now concluded that it is wrong.
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EXTRATERRITORIALITY turns in part on whether the cause of action arises under federal law. A case is more likely to be brought in federal court if it is based on a federal cause of action than if it is not. But federal law cases may also be brought in state court, as long as the federal statute does not grant the federal courts exclusive jurisdiction. Any explanation based entirely on the limited nature of federal court subject matter jurisdiction fails to explain why state courts also use different choice of law methods to resolve conflicts between state and foreign laws than they use to resolve conflicts between federal and foreign laws.75

The best explanation for the failure to consider the Fifth Amendment's limit on federal choice of law may simply be intellectual oversight.76 In some cases the constitutional issue could easily be avoided because a modest interpretation of a statute would accomplish the same goal. But this technique leaves open the question of what to do when the statute itself is written in territorially aggressive terms. At a minimum, an analogy to constitutional limits on state choice of law would seem to create a prima facie case for applying due process limits to federal choice of law. Having raised the issue, it is nonetheless possible that some relevant difference exists between overreaching by states and overreaching by the federal government, leading to the conclusion that the Constitution should limit one but not the other. Perhaps there is a good reason for treating the two situations differently. This question merits closer attention.

B. State and Federal Choice of Law Distinguished

Several possible justifications exist for not applying due process limits on state choice of law to federal choice of law. The first is based on the arguments advanced in the recent Supreme Court case


76 The academic literature contains few discussions of whether the Fifth Amendment Due Process Clause limits federal extraterritoriality. But see Brilmayer, Appraisal, supra note 3, at 27–35 (noting that the Fifth Amendment Due Process Clause is "the most obvious source of limitation" on the extraterritorial application of American law). In response to this last suggestion, Professor Fritz Juenger has claimed that the Supreme Court should not review federal extraterritoriality on constitutional grounds because it has mishandled the review of state extraterritoriality. See Friedrich K. Juenger, Constitutional Control of Extraterritoriality?: A Comment on Professor Brilmayer's Appraisal, 50 LAW & CONTEMP. PROBS., Summer 1987, at 39, 42–43.

Professor Andreas Lowenfeld has written what is probably the best article on the impact of the Constitution on extraterritoriality. See Andreas F. Lowenfeld, U.S. Law Enforcement Abroad: The Constitution and International Law, 83 Am. J. INT'L L. 880 (1989). He argues that the Constitution requires our courts to adhere to international law in extraterritoriality cases. See id. at 881–84. This argument is different from ours in two respects. First, our argument applies regardless of whether international law limits exist on extraterritoriality. Second, Lowenfeld does not rely (at least not explicitly) on either the Fifth Amendment Due Process Clause or the analogy to Fourteenth Amendment limits on state choice of law.
of *United States v. Verdugo-Urquidez*,77 which limited the extraterritorial impact of the Constitution, and indicates that the Constitution does not provide protection for aliens who act outside of our borders. The second is based on the federal government's broad foreign affairs powers, which might be thought more extensive than state powers in either the domestic or the international context, and implies that due process protections may be subordinated to considerations of national security. Although seemingly related, the two arguments are distinct because some extraterritoriality cases raise no national security problems.78 Conversely, national security concerns are not limited to the actions of aliens taken abroad, for domestic cases can also have national security overtones.79 We argue below that neither of these considerations warrants insulating federal extraterritoriality from due process review.

1. The Verdugo Opinion — Verdugo involved the American prosecution of a suspected murderer of a United States drug agent. The Mexican police took the suspect into custody in Mexico and handed him over to American authorities at the border.80 Acting without a warrant, the American and Mexican police then jointly searched the suspect's home in Mexico while he remained in custody in the United States.81 The issue facing the Supreme Court was whether the Fourth Amendment applied to the search. The Court held that it did not.82 *Verdugo* is potentially pertinent to the question whether the Fifth Amendment Due Process Clause limits the extraterritorial reach of federal statutes.83 As in *Verdugo*, defendants raising Fifth Amendment extraterritoriality claims are not likely to be American citizens. Furthermore, such defendants would be asking a court to give extraterritorial reach to the Fifth Amendment, just as Verdugo asked the Supreme Court to give extraterritorial application to the Fourth Amendment.

Several factors, however, militate against carrying over the holding in *Verdugo* to the Fifth Amendment context. One might argue that

78 For example, most garden-variety private law suits involve no such issues.
80 See *Verdugo*, 494 U.S. at 262.
81 See id.
82 See id. at 261.
83 For a general discussion of the *Verdugo* opinion, see Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 971–76 (1991). At one point, the Court seemed to address the constitutional issue directly, and wrote "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Verdugo*, 494 U.S. at 269. The Court was discussing Johnson v. Eisentrager, 339 U.S. 763 (1950), in which the Court held that enemy aliens captured in China and held in Germany after World War II could not seek writs of habeas corpus in American federal courts. See id. at 777–81.
enforcing due process limits on the extraterritorial application of a federal statute does not give extraterritorial reach to the Constitution. Arguably, the relevant government action in *Verdugo* (the search) occurred in another nation, whereas in Fifth Amendment extraterritoriality cases the relevant government action (the application of American law during the course of the litigation) would occur in the United States.  

Because limits on choice of law would only constrain courts within the United States, according to this argument, the application of the Fifth Amendment would not entail any extraterritorial application of the Constitution. Unfortunately, this line of reasoning plunges us headfirst into a metaphysical quagmire, requiring a determination of what the relevant governmental action is and where it occurs. Does "application" of the law occur at the time of primary conduct or at the point when the court renders a judgment based on the law? It is hardly helpful to talk about the problem in these terms.

One might claim with some force, on the other hand, that in a constitutional government of limited powers, a statute cannot have a broader reach than the Constitution that provides its basis. If federal laws are applicable extraterritorially any time that Congress explicitly so states, they can presumably be applied regardless of the lack of connection between a controversy and the United States. In contrast, the Constitution's reach would be limited to government activities occurring within our territorial boundaries. Although this result admittedly seems peculiar, the *Verdugo* Court seemed quite happy to live with the paradox. It acknowledged that *Verdugo* was subject to American drug laws for his activities outside the United States even though he could not invoke protections afforded by the Due Process Clause. In light of *Verdugo*, it is not clear that the current Supreme

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84 In this light, consider the *Verdugo* majority's attempt to distinguish the Fourth Amendment from the Fifth Amendment prohibition on compulsory self-incrimination. See *Verdugo*, 494 U.S. at 264–66. The Court stated that the Fourth Amendment violation occurs at the time and at the place where the search was conducted, whereas the Fifth Amendment violation occurs at trial. See id. at 264.

85 It is inconsistent for a defendant to claim that the application of the Constitution occurs in American courts, but that the application of an American statute in the same case is extraterritorial. After all, American courts apply the statute as well as the Constitution. The defendant may argue, however, that the statute has an extraterritorial application because it influences the primary conduct of persons in other nations. If so, the Constitution must also apply extraterritorially because it removes statutory impediments to primary conduct. Either both the statute and the Constitution apply extraterritorially, or neither one applies.

One of the early debates in choice of law theory was somewhat similar: Beale spoke in terms of rights "vesting" at the time of primary conduct, and the legal realists claimed that no rights came into existence until the court delivered its verdict. See Brilmayer, Foundations, supra note 33, § 1.2, at 19, § 1.5, at 33–36.

86 See *Verdugo*, 494 U.S. at 269–73.
Court would be dissuaded by the limited powers argument, whatever the argument’s merits as a matter of first impression.

The extraterritorial defendant, however, still has a convincing basis for distinguishing Verdugo from choice of law cases, for Verdugo was a Fourth Amendment case. The Fourth Amendment is unique in that evident difficulties exist with satisfying it in international cases, because it is unclear to whom the police would apply for a warrant to conduct a foreign search.\(^7\) Moreover, Verdugo itself relied in part on the precise wording of the Fourth Amendment, which (unlike the Fifth Amendment) purports to protect “the people.”\(^8\) “The people,” according to the Court, refers to “the American people.”\(^9\) Most notably, the disfavored status of the exclusionary rule is no secret.\(^10\) It has been clear for some time that the exclusionary rule is not itself supposed to be of constitutional stature, but merely a remedy for constitutional violations, and the Court alluded to the remedial nature of the rule in declaring it inapplicable extraterritorially.\(^11\) Given that the rule has been held inapplicable in parole hearings,\(^12\) grand jury proceedings,\(^13\) and certain other governmental processes,\(^14\) perhaps it should not be surprising that it does not apply in Mexico.

In addition to arguments limiting Verdugo to the search and seizure context, other reasons exist for believing it inapplicable to the reach of the Fifth Amendment, for due process has historically limited federal action in a number of similar settings. The closest analog to federal extraterritoriality is federal long-arm jurisdiction, which has been subject to due process scrutiny.\(^15\) The Court has stated emphatically in the related context of service of process that “there has been no question in this country of excepting foreign nationals from the protection of our Due Process Clause.”\(^16\) It has also indicated that due process prevents an American court from ordering conduct that

\(^7\) The Court alluded to this problem. See id. at 274 (maintaining that warrants issued by American judges “would be a dead letter outside the United States”).

\(^8\) See id. at 265. The Fifth Amendment states that “no person” may be deprived of property without due process of law. U.S. CONST. amend. V.

\(^9\) See Verdugo, 494 U.S. at 265.


\(^11\) See Verdugo, 494 U.S. at 264 (stating that a Fourth Amendment violation occurs at the time that the evidence is seized, not when it is admitted at trial).

\(^12\) See United States v. Finney, 897 F.2d 1047, 1048 (10th Cir. 1990).


\(^15\) See cases cited supra note 14.

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is illegal under the laws of another country. These examples indicate that due process protections are not entirely limited by our borders.

Perhaps most importantly, there is no suggestion in the Verdugo opinion that a different result would have obtained if the extraterritorial search had been conducted by state rather than federal officials. But if extraterritoriality should not turn on whether it is the state rather than the federal government whose conduct is at issue, the Fifth Amendment ought to limit federal choice of law, for it is well established that the states are subject to Fourteenth Amendment due process limits in the application of their laws to international cases. If state and federal officials are to be treated equivalently for extraterritoriality purposes, the Fifth Amendment Due Process Clause must apply to federal choice of law.

This analysis of Verdugo identifies what would surely have to be the central element in any argument that the Fifth Amendment does not limit extraterritorial application of federal law — some basis for distinguishing state practice in the interstate and international context from federal practice. The argument must show why Congress may make its laws applicable to any case whatsoever, regardless of the case's connection with the territory of the United States, although the states may not. Verdugo, however, offers no basis for distinguishing state from federal power. The argument for differentiation must be that Congress has more expansive power over transnational litigation than the states, and the basis for this argument most plausibly lies in federal prerogatives in the area of foreign affairs.

2. The Foreign Affairs Power. — Numerous cases have affirmed the federal government's plenary power over foreign affairs. However, quick reference to the "plenary power" cases cannot resolve the due process question because many of them involve conflicts between federal and state power (in which federal power is undeniably superior) or conflicts between various branches of the federal government. Choice of law issues raise additional considerations — questions of fairness to persons who claim to be beyond the reach of state power. Thus, the more relevant cases are those involving the application of the Bill of Rights to protect international defendants from exertions of federal power. Cases suggesting that the Bill of Rights

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100 Cf. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 253 (1972) (distinguishing separation of powers problems from Bill of Rights problems for purposes of the Curtiss-Wright case).
does not apply to international issues typically arise in the context of immigration.

The legislative and executive branches of the United States government possess practically absolute power to exclude aliens from American territory.\(^\text{101}\) The exclusion power is a non-enumerated foreign affairs power\(^\text{102}\) that the federal government possesses as a consequence of national sovereignty.\(^\text{103}\) Nation-states have long claimed alien exclusion as necessary for self-preservation.\(^\text{104}\)

As early as 1889, the Supreme Court in the *Chinese Exclusion Case*\(^\text{105}\) upheld severe restrictions imposed by Congress upon alien entry. The Court later held that "[n]o limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens."\(^\text{106}\) The federal government has also long engaged in alien detention. In 1896, in the case of *Wong Wing v. United States*,\(^\text{107}\) the Supreme Court approved temporary alien detention. Much later, in *Shaughnessy v. United States ex rel. Mezei*\(^\text{108}\) the Supreme Court declined to grant relief to an alien who had been detained on Ellis Island for two years while immigration and naturalization services sought without success to locate a country that would accept him.

The immigration cases provide the clearest example of the Court holding the Due Process Clause inapplicable to government procedures. Professor Louis Henkin concedes (with distaste) that it is possible to read the cases as providing for no constitutional scrutiny whatsoever.\(^\text{109}\) But the potential immigrant is in a very different position from the foreign defendant protesting the application of American law. The foreign defendant vulnerable to American criminal prosecution or to large civil judgments seeks neither entrance into the

\(^{101}\) See *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909))).

\(^{102}\) The Constitution does not explicitly grant the federal government the power to control immigration, but immigration powers have been implied from conceptions of nationhood and sovereignty. *See* *Chae Chan Ping v. United States*, 130 U.S. 581, 604–10 (1889) (The Chinese Exclusion Case).


\(^{105}\) 130 U.S. 581 (1889).

\(^{106}\) *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (discussing the *Chinese Exclusion Case*).

\(^{107}\) 163 U.S. 228 (1896).

\(^{108}\) 345 U.S. 205 (1953).

United States nor any benefit under our laws. The immigrant, in contrast, arguably wants something positive from the United States. Regardless of whether one agrees that aliens should not be entitled to due process in exclusion proceedings (a position that we decline to endorse), extraterritoriality presents a stronger case for Fifth Amendment scrutiny. The relevant position is found in Perez v. Brownell: “The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations.”

Choice of law cases typically implicate national security to a lesser degree than do immigration cases. Although antitrust, intellectual property, and title VII cases involve national interests, failure to apply these laws to a particular dispute probably would not threaten national security, and blanket immunity from Fifth Amendment scrutiny is therefore inappropriate. Examined below are some extraterritoriality cases that raise problems of national security, such as terrorism and drug prosecutions. Yet even in these contexts, Fifth Amendment analysis is appropriate, for the due process standard itself allows room for legitimate considerations of national security. If constitutional limits on federal choice of law run parallel to the analogous constitutional limits on state law, the forum’s interests are already adequately accommodated in the due process equation.

III. CONSTITUTIONAL LIMITS ON FEDERAL CHOICE OF LAW

Assuming that the Fifth Amendment Due Process Clause imposes limits on Congress’ power to mandate extraterritorial application of federal law, what shape should these limits take? In part, the answer to this question simply borrows from the state choice of law doctrine and imposes comparable limits on the federal government. But it also involves making adjustments for the ways in which federal law is distinctive. State constitutional choice of law must be translated into

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110 See Augustin v. Sava, 735 F.2d 32, 36 (2d Cir. 1984) (citing Shaughnessy v. United States ex rel Mezei, 345 U.S. 206, 216 (1953)). This explanation forms the basis for the doctrinal distinction between exclusion and deportation. See id.; see also Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1393-96 (1953) (arguing that, despite this distinction, the general power to issue writs of habeas corpus requires federal courts to become involved in exclusion as well as in deportation cases).


112 Id. at 58. The Restatement (Third) of Foreign Relations Law takes a firm position that the Bill of Rights applies to exercises of the foreign affairs power. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 721 (1987). The Restatement specifically includes due process, and for this purpose it equates Fifth and Fourteenth Amendment protections. See id. § 721 cmt. f and reporters’ note 6.
the federal context with due regard for the relevant differences between state and federal power.

A. Contacts, Interests, and Fairness

The current test for due process limitations on state choice of law originated in Allstate Insurance Co. v. Hague. Under Hague, the state must have "significant contacts or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." No majority opinion was produced in Hague; the plurality and the concurrence relied on different choice of law theories. The plaintiff's decedent had been killed in a motorcycle accident in Wisconsin. All persons involved in the accident lived in the state, and all of the vehicles were registered there. After the accident, however, the widow moved to Minnesota and brought suit there. Application of Minnesota law was upheld in part because of the widow's after-acquired domicile, but also because the defendant insurance company did unrelated business in Minnesota and because the decedent had been employed in the local state courts.

Hague signalled judicial willingness to allow states extreme latitude in applying their own laws. Indeed, one might wonder whether, after Hague, significant constitutional limitations still exist. A subsequent case, Phillips Petroleum Co. v. Shutts, indicated that constitutional scrutiny has not been completely vitiated, but the Court offered little help in predicting what the future limits might be. In Shutts, a lower court judge faced with a multistate class action had held that forum law would apply to all plaintiffs in the class, regardless of whether their particular dispute with the defendant had any connection with

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115 Justice Stevens concurred without adopting the significant contacts formulation. He argued that, although the Full Faith and Credit Clause does not "require the forum state to apply foreign law whenever another state has a valid interest in the litigation," the Due Process Clause prohibits the application of forum law if it favors residents over nonresidents, is dramatically different from the laws in other states, or is unfair on its face or as applied. See Hague, 449 U.S. at 322–31 (Stevens, J., concurring). These suggestions have not been adopted in subsequent cases.
116 See Hague, 449 U.S. at 305.
117 See id. at 313–20.
the forum.\textsuperscript{119} In reversing this decision, the Supreme Court held that mere administrative convenience could not justify the application of forum law.\textsuperscript{120} Beyond this, however, the Court failed to indicate what circumstances would justify the application of forum law.

Certainly, after \textit{Shutts}, the mere fact that the forum state has personal jurisdiction over the defendant is not in itself adequate to resolve all choice of law issues. This result seems correct when the rather attenuated factors that might establish personal jurisdiction are considered. For example, the defendant might be subject to jurisdiction simply because she was passing through the state for a few hours and happened to be served with process.\textsuperscript{121} But what factors \textit{would} be adequate? Examining some additional cases suggests circumstances in which application of forum law is probably appropriate. For example, personal jurisdiction is sufficient to justify the application of forum law to questions characterized as procedural. The precise contours of this procedural category are unclear, but Justice Scalia’s opinion in \textit{Sun Oil Co. v. Wortman}\textsuperscript{122} suggests that borderline cases should be analyzed by looking at how the procedural category has historically been drawn.\textsuperscript{123}

It is also fairly well established that a state may regulate its residents, even when they are acting outside of the state. In \textit{Skiriotes v. Florida},\textsuperscript{124} the state sought to apply its law to one of its residents who, while outside the state’s territorial waters, violated a prohibition on using scuba equipment to fish for sponges. Recognizing the power of the states over their own citizens, the Court held that Florida could apply its own law.\textsuperscript{125} This holding is analogous to the recognition in personal jurisdiction cases that a state may compel its domiciliaries to return to defend a lawsuit.\textsuperscript{126} International law similarly recognizes the defendant’s nationality as an adequate basis for application of local law.\textsuperscript{127}

Other possible bases for legislative jurisdiction are somewhat more speculative. \textit{Hague} suggests that the defendant’s unrelated conduct in the forum may support the application of forum law in combination with other factors.\textsuperscript{128} \textit{Sun Oil} also suggests that historically recognized

\textsuperscript{119} See id. at 803.
\textsuperscript{120} See id.
\textsuperscript{122} 486 U.S. 717 (1988).
\textsuperscript{123} See id. at 726–29 (allowing the forum state to apply its own statute of limitations on the grounds that the statute governs a “procedural” issue). Other issues commonly treated as procedural for state choice of law purposes include burdens of proof, see \textit{Restatement (First) of Conflict of Laws} § 601 (1934), and competency and credibility of witnesses, see id. § 596.
\textsuperscript{124} 313 U.S. 69 (1941).
\textsuperscript{125} See id. at 76–77.
\textsuperscript{127} See \textit{Restatement (Third) of Foreign Relations Law} § 402(2) (1987).
bases for jurisdiction are probably constitutionally adequate. In both the interstate and the international contexts, commission of a wrong within the state would likely be included — a manifestation of the old territorialist theory of Oliver Wendell Holmes and the first restatement of conflicts.

Criminal jurisdiction is treated only slightly differently from civil jurisdiction. Fewer cases exist, suggesting perhaps that states themselves have been less inclined to press the limits of the Constitution than have their individual citizens when they seek monetary judgments. One such criminal case was Skiriotes v. Florida, which held that a state may regulate acts of its citizens committed outside of the state. Domicile of the victim, however, has not traditionally been a basis for jurisdiction, except in child support or alimony cases. Strassheim v. Daily upheld a conviction based on territorial impact, and stated that "acts 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 [the defendant] had been present at the effect."

These state choice of law cases are useful tools in assessing the constitutionality of federal extraterritoriality. Despite its frustrating vagueness, the three aspects of the Hague formulation should be kept in mind: due process requires "contacts" with the forum, "interests" arising out of these contacts, and "fairness" to the defendant.

The requirement of contacts seems straightforward: something about the controversy or the defendant must touch the forum. Some of these contacts may be related to the controversy. The events leading up to the litigation, for instance, may have occurred in the forum, or perhaps one or more of the parties to the litigation are United States residents. Other contacts may be completely unrelated to the controversy. For example, if a defendant in securities litigation conducts other business in the United States, or travels there frequently on unrelated business, this might be taken into account even if insufficient to establish jurisdiction.

The insistence that the contacts "create interests" is somewhat less clear. Even in the state context, courts have offered no satisfactory formulation for what kinds of interests suffice. In the federal con-

132 313 U.S. 69 (1941).
133 See George, supra note 131, at 623.
134 221 U.S. 280 (1911).
135 Id. at 285. Because the prosecution was a state law case, the holding was based on constitutional rather than statutory provisions.
136 See Lea Brilmayer, Legitimate Interests in Multistate Problems: As Between State and
text, we suggest that the notion of interests can best be understood in terms of the limited power of the federal government. The federal government must generally demonstrate an affirmative basis for regulating — such as the Commerce Clause or national defense powers — when it adopts a statute. The international context is not distinguishable in this regard, and the affirmative bases authorizing Congress to regulate internationally can give content to the notion of "interests." Because the Constitution permits Congress to regulate commerce with foreign nations, for example, the assertion of American law over incidents arising from commercial contacts with the United States may be considered further legitimate interests within the meaning of the Hague test. On this view, other exercises of the foreign affairs power create similar interests. A showing that the application of United States law to a particular case will further the exercise of the commerce or foreign affairs power demonstrates that the requisite regulatory interest exists.

Most cases that proceed in United States courts are likely to exhibit some contacts with the United States, if only because of the requirement that the court have personal jurisdiction over every defendant. Additionally, most statutes reflect interests supportive of federal regulation — otherwise, they would be invalid as a domestic matter. The third requirement is therefore probably the most demanding one for Fifth Amendment purposes. Contacts and interests in themselves do not demonstrate the fundamental fairness of holding a defendant to legislative standards. Fairness has been an elusive concept in conflict of laws jurisprudence, both in contexts such as personal jurisdiction as well as in choice of law specifically. Sometimes it is argued that the key requirement of due process is avoidance of unfair surprise. This approach is problematic, however, because states can avoid surprise simply by making it clear that they will subject all litigants in their courts to local law. If mere notice would suffice, the fairness requirement would be empty, for such notice could always be provided.

Another approach to fairness requires that the defendant, by his or her own actions, must have voluntarily affiliated him or herself

Federal Law, 79 Mich. L. Rev. 1315, 1348–49 (1981) (noting that the Hague plurality did not "provide standards for determining when contacts are significant and interests legitimate").


139 For a discussion of the bases and limits of the foreign affairs power, see id. § 4-4, at 219–25.

140 See, e.g., Clay v. Sun Ins. Office, Ltd., 377 U.S. 179, 182 (1964) (arguing that a Florida-licensed insurer must have known that it would be subject to suit in Florida). See generally Russell J. Weintraub, Commentary on the Conflict of Laws 520–21 (3d ed. 1986) (discussing the unfair surprise argument).
with the United States. By entering the country and engaging in business activities there, a defendant subjects himself to United States regulation of these activities. By purposefully bringing about harm within the United States, the defendant submits to United States law. On this view, although the requirements of contacts and fairness must each be satisfied, they are interrelated — the defendant's voluntary contacts are precisely what makes the assertion of jurisdiction fair. Numerous difficulties are posed by this consent-based or “voluntarist” notion of jurisdiction. Yet there is no doubt that it captures some deeply held intuitions of Anglo-American political thought about fair subjection to sovereign power.

These admittedly rather abstract observations can best be made concrete by an examination of some contemporary problems.

B. Contemporary Applications

In surveying contemporary instances of federal extraterritoriality, it is worthwhile to briefly examine the bases that international law recognizes as adequate for the application of forum law. Federal extraterritoriality has been strongly influenced by international law, for as previously noted, Congress is presumed to act in accordance with international law unless it specifically indicates to the contrary. International law recognizes five traditional bases for the exercise of legislative jurisdiction: territorial, national, protective, passive personality, and universal jurisdiction.

Not all of these categories are of equal constitutional validity. As we argue below, for instance, territoriality is a less problematic basis for constitutional purposes than passive personality. The advantage of focusing on the categories of international law is that it allows us to outline how constitutional and international law diverge. If extra-territoriality violates the Constitution, it makes little difference that it complies with the relevant principles of international law. Yet the

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141 See generally Lea Brilmayer, Consent, Contract, and Territory, 74 MINN. L. REV. 1, 5–10 (1989) (describing the consent theory of jurisdiction as a legal fiction intended to rationalize a state’s exercise of authority).

142 See ALAN J. SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 57–70 (1979) (discussing consent to political authority).

143 See supra note 11.

144 These bases were outlined between 1932 and 1935 by an influential group of American scholars under the direction of Manley O. Hudson and published as The Harvard Research in International Law. See Draft Convention on Jurisdiction with Respect to Crime, 29 AM. INT’L L. 435, 445 (Supp. 1935).

145 Although the Harvard research group concerned itself exclusively with criminal jurisdiction, the Restatement (Third) of Foreign Relations Law applies similar categories to civil actions. See RESTATMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987).

146 See infra pp. 1261–62.
international law scheme still provides a useful framework because the constitutional difficulties may vary from one category to another.

The territorial theory of jurisdiction allows a state to exercise jurisdiction over a wrong committed, in whole or in part, within its borders. This category includes actions taken outside the territory that have a local impact, a theory sometimes referred to as impact territoriality or the "effects principle" of jurisdiction. According to the nationality theory, a state may exercise jurisdiction respecting any actions committed beyond its territory by one of its own nationals. The protective theory relates more directly to national security, and allows the state to exercise jurisdiction over an offense committed outside its territory. Jurisdiction may be asserted over an alien if the offense is directed against the security, territorial integrity, or political independence of that state. According to the passive personality theory, a state may exercise jurisdiction over a defendant accused of harming a national of the state claiming jurisdiction.

The principle of universal jurisdiction, finally, allows the assertion of jurisdiction for certain offenses considered particularly heinous, regardless of whether the accused has any nexus with the forum. The category of crimes recognized for the purposes of universal jurisdiction has traditionally been limited to offenses that all states condemn and thus that all states possess a universal interest in suppressing. Piracy, for example, has long been recognized as such a crime. Such jurisdiction was expressly provided for under Article I, section 8 of the United States Constitution, which grants Congress the power "to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."

The contemporary applications of substantive American law examined below tend to blend elements of impact territoriality, passive personality, universal, and protective jurisdiction. The injury of an American government agent abroad, for example, implicates both protective jurisdiction and passive personality. If the injury occurs in certain contexts (during a hijacking, for instance), universal jurisdiction...
tion may also be relevant. Nonetheless, certain types of actions are most likely to be based on specific jurisdictional theories. We will examine civil RICO (where jurisdiction has been based primarily on impact territoriality), terrorism prosecutions (based primarily on passive personality and universal jurisdiction), and drug prosecutions and related homicides (typically based on impact territoriality and protective jurisdiction). These cases merely illustrate the range of situations to which the Constitution should be applied. The conclusion summarizes the constitutional strengths and weaknesses of these contemporary applications and of the international law theories that they exemplify.

1. The Racketeer Influenced and Corrupt Organizations Act (RICO). — In 1970, Congress passed as title IX of the Organized Crime Control Act the Racketeer Influenced and Corrupt Organizations Act, otherwise known as RICO.\(^{156}\) In its preamble, Congress stated that the purpose of RICO is "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."\(^{157}\)

The authors of RICO sought to combat the trend of organized crime acquiring control of legitimate businesses, a trend that was quite pronounced by the late 1960s.\(^{158}\) The application of RICO, however, extends beyond traditional organized crime. The statute also applies to white-collar crime, including commercial fraud.

RICO prohibits the following activities: (1) acquiring an interest in an enterprise by using or investing income either directly or indirectly derived from a pattern of racketeering activity;\(^{159}\) (2) acquiring or maintaining either directly or indirectly an interest in an enterprise through a pattern of racketeering activity;\(^{160}\) (3) conducting or participating directly or indirectly in the affairs of an enterprise through a pattern of racketeering activity;\(^{161}\) and (4) conspiring to violate any of the above-listed provisions.\(^{162}\) The "pattern" of acts referred to in RICO consists of acts somehow "related" to one another by a common

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\(^{159}\) See 18 U.S.C. § 1962(a) (1988). Under 18 U.S.C. § 1961(5), a "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity.

\(^{160}\) See id. § 1962(b).

\(^{161}\) See id. § 1962(c).

\(^{162}\) See id. § 1962(d).
plan or scheme. The statute provides criminal and civil remedies for violations. Civil actions promise a plaintiff treble damages, costs of the suit, and attorneys' fees.\footnote{163 See id. § 1964(c).} On the criminal side, an individual convicted under RICO may be fined, imprisoned for up to twenty years, or both, and will be required to forfeit any proceeds derived from the prohibited activity.\footnote{164 See id. § 1963(a).}

In 1986, the Republic of the Philippines brought a civil suit against former President Ferdinand Marcos and his wife, Imelda, under RICO. On June 25, 1986 the District Court entered a preliminary injunction forbidding the Marcoses from disposing of any assets except for attorneys' fees and normal living expenses.\footnote{165 See Republic of the Phil. v. Marcos, 818 F.2d 1473, 1477 (9th Cir. 1987).} The Marcoses appealed, and a panel of the Ninth Circuit vacated the injunction.\footnote{166 See id. at 1490.} The Ninth Circuit then heard the case en banc and reinstated the district court's injunction.\footnote{167 See Republic of the Phil. v. Marcos, 862 F.2d 1355, 1364 (9th Cir. 1988) (en banc), cert. denied, 490 U.S. 1035 (1989).}

The Republic of the Philippines alleged that the Marcoses engaged in mail fraud, wire fraud, and the transportation of stolen property in either the foreign or interstate commerce of the United States. The Republic asserted that the acts were repeated, forming a pattern of predicate acts sufficient under RICO to give rise to civil liability.\footnote{168 See id. at 1490.} Specifically, the complaint alleged that the Marcoses and other defendants arranged for investment of four million fraudulently obtained dollars in Beverly Hills real estate.\footnote{169 See id. at 1490.} The Republic further claimed that the Marcoses plotted for the creation of two bank accounts in the name of Imelda Marcos at Lloyds Bank of California that totaled over $800,000, and that these funds were also fraudulently acquired.\footnote{170 See id.} The complaint alleged that the Marcoses transported to Hawaii wrongfully obtained money, jewels and other property worth over $7,000,000.\footnote{171 See id.}

The court held that the activity in question "forms a pattern [for RICO purposes] if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."\footnote{172 Id. (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985) (quoting 18 U.S.C. § 3575(e) (1988))).}

The court determined that the episodes involved in the case were not isolated events. Rather, they
represented "a plan and a practice" of removing "the fruits of fraud" from the Philippines to the United States.\textsuperscript{173} Although the gravamen of the Republic's case was that the Marcoses stole Philippine public money,\textsuperscript{174} the court found American law applicable because the Marcoses' utilized the United States mails and wires to invest the "fruits of the fraud" and illegally transported these fruits in interstate commerce.\textsuperscript{175}

The \textit{Marcos} case illustrates the impact territoriality theory of extraterritoriality. The family engaged in theft and fraud outside of the United States, but directed the proceeds of this theft into the country. A parallel can thus be drawn between \textit{Marcos} and products liability cases in which a manufacturer deliberately ships a defective product into the forum in which it causes injury. If application of forum law to this product liability action would be constitutionally permissible in the state choice of law context, application of American RICO law would probably be constitutional in the \textit{Marcos} case.

Although the Supreme Court has not ruled that application of forum law to precisely this sort of products liability case would be constitutional, this conclusion seems a fair implication from existing precedents. The Court has twice held that insurance companies with headquarters outside the forum state could be subjected to local law when the insured risk eventuated in the forum.\textsuperscript{176} In one of these cases, \textit{Watson v. Employers Liability Assurance Corp.},\textsuperscript{177} forum law allowed direct actions against insurance companies, and the forum was permitted to apply this rule to an out-of-state insurer with no other local contacts.\textsuperscript{178} In upholding the application of the law, the Court reasoned that the forum state's interest in protecting the rights of persons injured locally mandated subjecting the insurance company to the direct action law.\textsuperscript{179} Similarly, a \textit{manufacturer} who deliberately shipped defective products into the state could be held to local law. A different outcome might result if the impact in the forum was completely unforeseen. The \textit{Marcos} case does not present this problem, however, because the Marcoses deliberately sent the money into the United States.

It might be objected that \textit{Marcos} differs from products liability cases because the injury (theft of public moneys) did not occur in the

\begin{itemize}
\item \textsuperscript{173} Id.
\item \textsuperscript{174} It was alleged that during his 20 years as president, Mr. Marcos used his position of authority and power to embezzle funds and property that belonged to the Philippines and to its people. \textit{See id.} at 1359.
\item \textsuperscript{175} \textit{See id.} at 1358.
\item \textsuperscript{177} 348 U.S. 66 (1954).
\item \textsuperscript{178} \textit{See id.} at 73–74.
\item \textsuperscript{179} \textit{See id.} at 71–73.
\end{itemize}
United States but in the Philippines. But this argument ignores that a basic purpose of RICO is to declare investment of ill-gotten gains an additional wrong. 180 Indeed, the application of RICO to the Marcos facts represents, in some respect, a stronger case for extraterritorial jurisdiction than the application of local law to products liability cases involving out-of-state manufacture. In the usual products liability case, applying local law would subject the defendant's out of state activities to the law of the forum. RICO, in contrast, could potentially permit the use of foreign law to define the underlying criminal activity while using American law for the regulation of subsequent investment of the proceeds in the United States. 181

2. Anti-Terrorism Laws. — If civil RICO in the Marcos case exemplifies impact territoriality, our antiterrorism laws exemplify the principles of universal jurisdiction and passive personality. The category of universal offenses is quickly expanding. International instruments provide for universal jurisdiction for particular crimes, although it is unclear whether jurisdiction in these circumstances is obligatory only for those states which have become party to these agreements. 182 Increasingly, international law applies universal jurisdiction to acts of terrorism. 183

On June 11, 1985, Fawaz Yunis and four others boarded a Royal Jordanian Airlines flight in Beirut carrying assault rifles and grenades. Yunis took control of the cockpit and forced the pilot to take off. 184 The remaining hijackers held the passengers, including two American citizens, hostage in their seats. The hijackers explained that they wanted a meeting with delegates to the Arab League Conference then underway in Tunis. 185 After several frustrated efforts to land in various Mediterranean cities, the hijackers returned to Beirut. At Beirut the hijackers released the passengers, held a press conference

181 The Marcos court only considered application of American law to claims involving crimes alleged to have occurred within the United States. See Republic of the Phil. v. Marcos, 818 F.2d 1473, 1477-79 (9th Cir. 1987) (aff'd en banc, 862 F.2d 1355 (1988), cert. denied, 490 U.S. 1035 (1989); cf. Michael Goldsmith & Vicki Rinne, Civil RICO, Foreign Defendants, and "ET," 73 MINN. L. REV. 1023, 1039-40 (1989) (suggesting that the extraterritorial application of RICO poses less of a foreign relations problem than the application of other laws because the activities RICO penalizes are criminal in other nations as well).
182 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 cmt. a (1987).
183 For example, the United States and six Latin American states have adopted a convention providing for universal jurisdiction for terrorist crimes. See Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949.
185 See id.
demanding that Palestinians leave Lebanon, blew up the plane, and left the airport. American investigators identified Yunis as the leader of the hijackers. 186

In September, 1987, the Federal Bureau of Investigation (FBI) launched "Operation Goldenrod" for the purpose of arresting Yunis. The FBI lured Yunis onto a yacht off Cyprus with the promise of a drug deal and arrested him after he entered international waters. American agents flew Yunis to Washington, D.C., where he was charged with conspiracy, hostage-taking, aircraft damage, and air piracy. 187

The Federal Government asserted jurisdiction over Yunis pursuant to two statutes: the Hostage Taking Act 188 and the Antihijacking Act of 1974. 189 The Hostage Taking Act provides in part:

(a) [W]henever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act . . . shall be punished by imprisonment for any term of years or for life.

(b)(i) It is not an offense under this section if the conduct required for the offense occurred outside the United States unless,

(A) the offender or the person seized or detained is a national of the United States;

(B) the offender is found in the United States; or

(C) the governmental organization sought to be compelled is the government of the United States. 190

The Antihijacking Act 191 provides for the punishment of individuals who hijack aircraft operating outside the jurisdiction of the United States provided the hijackers are later "found in the United States." 192 The Yunis court found that, under the Antihijacking Act, it was irrelevant how Yunis entered the United States. Once he was within American territory, he had been properly indicted and could be prosecuted. 193 The court concluded that under the universal and

186 See id.
187 See id.
191 The Antihijacking Act was enacted in response to the Convention for the Suppression of Unlawful Seizure of Aircraft (the "Hague Convention"), Dec. 16, 1970, 22 U.S.T. 1643, 860 U.N.T.S. 105. See Yunis, 924 F.2d at 1092. This Convention requires signatory nations to extradite or punish hijackers found within their territory. See id.
193 The Yunis Court contended that "Congress intended the statutory term 'found in the United States' to parallel the Hague Convention's [term] present in a [contracting state's] territory," and not to require the voluntary submission to the state's jurisdiction by the offender. Yunis, 924 F.2d at 1092.
the passive personality theories of international jurisdiction, the United States could prosecute Yunis on the hostage-taking charge as well as on the hijacking charge, and affirmed Yunis' conviction.

The court, however, did not completely ignore the issue of extraterritorial application of the Constitution. Yunis had relied on United States v. Toscanino in arguing that his seizure had been illegal. Toscanino created a limited exception to the so-called Ker-Frisbie doctrine, which declared that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction." Under Toscanino, a court was not free to assert personal jurisdiction if the government committed a "deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." In response, the Yunis court concluded that "[although] the government's conduct was neither 'picture perfect' nor a 'model for law enforcement behavior,'" Yunis' Fifth and Sixth Amendment rights had not been violated, because nothing in the record suggested intentional or outrageous government misconduct. In so ruling, the court cited Sami v. United States, which held that there would be no actionable constitutional claim if the court could not find shocking behavior.

Although the Yunis court seemed to acknowledge a role for the Constitution in assessing the means by which Yunis was apprehended, it did not inquire into Fifth Amendment due process limits on the application of federal law. Further, it is questionable whether Yunis would meet the usual constitutional tests for the extraterritorial application of law in the state choice of law context. As noted earlier, the three considerations are contacts, interests, and fairness. First, Yunis' contacts with the United States were quite tenuous. It was sheer happenstance that the plane Yunis and his fellow hijackers detained carried American citizens, and it is difficult to argue that the mere presence of United States nationals aboard a non-American aircraft provides a sufficient jurisdictional nexus between Yunis' actions and the United States. The Antihijacking Act provided for jurisdiction because the defendant was "found" within American territory, and this apparently supplies a second contact. But as one scholar has noted, when an accused's "presence is not directly related to the

194 See id. at 1091-92.
195 See id. at 1099.
196 500 F.2d 267 (2d Cir. 1974).
198 Toscanino, 500 F.2d at 275.
199 Yunis, 924 F.2d at 1093 (quoting United States v. Yunis, 859 F.2d 953, 969 (D.C. Cir. 1988)).
200 617 F.2d 755, 774 (D.C. Cir. 1979), cited in Yunis, 924 F.2d at 1093.
201 See supra pp. 1242-44.
offense charged . . . jurisdiction on that basis seems too self-generated to pass constitutional muster." Here, the fear of self-generated jurisdiction is particularly acute: Yunis was only found in the country because American officials kidnapped him and took him to the United States.

Although Yunis' contacts with the United States were sparse, the interests of the forum in his case were more substantial. Congress certainly has a general interest in effectively dealing with hijacking. The prosecution of hijackers also arguably protects Congress's interest in regulating commerce with other nations. But it is less clear that Congress has sufficient interest in hijackings unconnected to the United States. Furthermore, meeting the fairness requirement is difficult. It does not appear that Yunis purposefully sought to bring about harm within the United States or even sought to harm United States citizens. Yunis' objective was to influence the Arab League meeting in Tunis, and the Americans were on the Jordanian aircraft by mere coincidence. Therefore, it hardly appears that the defendant voluntarily submitted himself to American law by committing actions directed against the United States.

This analysis appears to present serious obstacles to the prosecution of terrorists who unintentionally harm American citizens abroad. One factor that makes terrorism distinctive, however, and arguably preserves the constitutionality of the Yunis decision, is the phrasing of Article I, Section 8. This provision specifically grants Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas and offenses against the Laws of Nations." The drafters of this clause may well have anticipated its application to cases with no overt connection to the United States, for most piracies and felonies committed on the high seas and most offenses against the law of nations would have no nexus with American territory. This leaves the question whether the Fifth Amendment, adopted at a later point, alters the clause by imposing a jurisdictional requirement. Given

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202 Lowenfeld, supra note 76, at 893.
203 U.S. CONST. art. I, § 8, cl. 10.
204 The Supreme Court held that no impediment existed to a prosecution based on extraterritorial jurisdiction in United States v. Palmer, 16 U.S. (3 Wheat.) 610, 630-31 (1817):

The question, whether this act [punishing piracy on the high seas] extends farther than to American citizens, or to persons on board American vessels, or to offenses committed against citizens of the United States, is not without its difficulties. The [C]onstitution having conferred on Congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offense against the United States. The only question is, has the legislature enacted such a law?

There are two problems with the Court's reasoning in Palmer. First, the Court did not consider the Fifth Amendment issue. Second, the Court's logic is questionable. Every exercise of federal power must be based on some source of federal authority. The existence of a source of federal power does not automatically negate the limitations imposed by the Bill of Rights.
that the clause arguably authorizes a form of universal jurisdiction, and that the Fifth Amendment does not specifically address crimes detailed by the clause, one might conclude that the answer is no.

In *United States v. Davis*, however, the Ninth Circuit decided that a Fifth Amendment inquiry into the constitutionality of extraterritorial jurisdiction was required. The defendant was convicted of violating the Maritime Drug Law Enforcement Act, which specifically applies to drug traffic outside the territorial boundaries of the United States. After recognizing that Article I, Section 8 gave Congress the power to define and punish felonies upon the high seas, the court stated that any law enacted pursuant to this clause must also satisfy the Fifth Amendment. After examining the facts of the case, the court found that a sufficient nexus between the defendant and the United States existed to satisfy the Due Process Clause.

Although the case has not to this point had much precedential impact, the facts of *Davis* suggest why the additional Fifth Amendment inquiry is warranted. If the Fifth Amendment were not pertinent, Congress could punish any conduct upon the high seas that it chose to define as a felony, regardless of whether it had any connection with the United States or whether (as in *Davis*) the accused is a noncitizen. To take an extreme example, Congress could criminalize a high stakes poker game between two Australians sailing an Australian sailboat from Australia to Fiji. In the context of universal jurisdiction, the exercise of extensive congressional powers seems unproblematic because only especially heinous crimes, as identified by international law, give rise to the power to prosecute without a nexus. The "piracy" portion of Article I, Section 8 is therefore not problematic. But if the Fifth Amendment is inapplicable whenever Congress invokes Article I, Section 8, then Congress can prohibit any conduct that it chooses to, as long as the conduct takes place on the high seas and Congress deems the crime a felony.

For this reason, the Piracy Clause does not resolve the choice of law problem. A better explanation for the *Yunis* result would rely upon the fact that Congress, in providing for the prosecution of hijackers, did not attempt to criminalize conduct that was legal where

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205 905 F.2d 245 (9th Cir. 1990), cert. denied, 111 S. Ct. 753 (1991).
206 See id. at 248.
208 See id. § 1903(c)(1)(D)-(E). The defendant's sailing vessel was intercepted approximately 35 miles southwest of Point Reyes, California, with a cargo of drugs. See *Davis*, 905 F.2d at 247.
209 See *Davis*, 905 F.2d at 248.
210 See id.
211 See id. at 249.
it occurred, but rather merely established an American mechanism for the enforcement of international law. Yunis's activities did not necessitate a choice of law analysis because his activities were prohibited everywhere. Because universal jurisdiction exists only when certain norms of international law are violated, and because domestic courts have a valid and important role to play in international law enforcement (because, indeed, domestic courts are typically the only forum available for international criminal prosecution), no nexus with the United States need be shown. Universal jurisdiction traditionally existed almost entirely for crimes committed beyond the territorial boundaries of any nation, such as piracy. Uniform international law, universally enforceable, was the only solution to the problem, and it presents no choice of law problems today.

3. Drugs, Protective Jurisdiction, and Passive Personality. — United States drug laws do not exhibit the universal jurisdiction of our antiterrorism laws. Nonetheless, aggressive application of these laws to extraterritorial events is not uncommon. In United States v. Benitez, the defendant was a Colombian national convicted of conspiring to murder United States Drug Enforcement Administration (DEA) agents in Colombia. Benitez objected to the District Court's jurisdiction on the grounds that he was not a United States citizen and that the acts in question had not occurred in the United States. On appeal, the court noted that the crimes for which Benitez had been convicted included assault upon United States DEA agents, attempted murder of United States DEA agents, and the theft of United States Government property. The court accordingly found jurisdiction under both the protective and passive personality principles of jurisdiction.

Benitez involved a DEA operation in Colombia known as "Tiburón." Two DEA special agents were sent to Colombian airfields to investigate possible shipments of drugs to the United States. The agents carried United States Government passports and were in Colombia with the approval of the Colombian Government. René Benitez, a Colombian fugitive from American justice who had been a target of the DEA operation, discovered the agents, took them prisoner, and held them over a two-day period. During this time, he shot the agents repeatedly, although not fatally.

212 See generally Brilmayer, A Modest Proposal, supra note 11, at 2729 (critiquing the view that American courts should not become involved in questions of international law).
214 See id. at 1313-15.
215 See id. at 1316.
216 See id.
217 See id.
218 See id. at 1313.
219 See id. at 1315.
The court found jurisdiction under the protective principle because the crime had a potentially adverse effect upon the security or governmental functions of the nation.\textsuperscript{220} In addition, the court found that jurisdiction could be based on the nationality or national character of the victim.\textsuperscript{221} The \textit{Benitez} court did not frame the question in Fifth Amendment terms nor did it ask about contacts, interests, or fairness.

In \textit{Benitez}, the victims' status as United States DEA officials provides the crime's only "contact" with the forum. Arguably, sufficient American interests existed because the defendant threatened a United States Government drug operation pursued with the acquiescence of the Colombian Government. Indeed, the court viewed the "Tiburon" operation as implicating national security concerns because the operation was directly connected with "the governmental functions of the nation."\textsuperscript{222}

The real question in \textit{Benitez} dissolves into the third prong of the analysis — fundamental fairness. Did Benitez, by his own action, somehow voluntarily and knowingly affiliate himself with the United States? According to the facts of the case, René Benitez and his brother, Armando, searched the agents for personal effects, and took their official and personal passports and their DEA credentials. After inspecting the credentials, René said, "[t]hese are the guys. They are both DEA agents." One agent asked to call the American Embassy. René Benitez replied, "[y]ou are not going to call the Embassy." He pointed his cocked pistol at the agent's head and stated, "[t]his is the only law in Colombia."\textsuperscript{223}

Although the assault might properly be penalized under Colombian law, its perpetration against American agents should not make a prosecution under United States law permissible. Indeed, the \textit{Benitez} court's reasoning has not been accepted in the state choice of law context, and it should not be accepted here.\textsuperscript{224} It is hard to argue that it is fair to subject citizens of foreign nations to United States law simply because Americans choose to travel abroad, yet the court's passive personality theory allows precisely this result.\textsuperscript{225} The assumption that Americans take their local law along with them when visiting other nations reflects the aggressively unilateral character of American jurisdictional law. The inquiry only focuses on whether the

\begin{footnotesize}
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  \item \textsuperscript{220} See id. at 1316.
  \item \textsuperscript{221} See id.
  \item \textsuperscript{222} Id.
  \item \textsuperscript{223} Id. at 1314.
  \item \textsuperscript{224} Cf. United States v. Columba-Colella, 604 F.2d 356, 359 (5th Cir. 1979) (holding that the court lacked jurisdiction when the victim of the theft occurring in Mexico was American; unclear whether the decision was based on international or constitutional law).
  \item \textsuperscript{225} See supra note 221 and accompanying text.
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United States has an interest in having its law applied; it does not justify application of American law to citizens of other nations. As American citizens, we do not anticipate being subjected to Colombian law if we injure a Colombian citizen here in the United States. Analogously, theft of an American passport in Colombia should not be an offense against American law.

The strongest argument that the application of American law was constitutional in Benitez was that the defendants sought out the drug agents specifically because they were Americans. This is a stronger basis than passive personality and arguably represents a purposeful contact with the United States. If Benitez is correct, it is because of this factor and not merely because the victims were American. Not all drug cases, however, include this added element. One extreme example is United States v. Marino-Garcia. The federal statute at issue in Marino-Garcia prohibited possession of controlled substances with an intent to distribute, and specifically applied to any “vessel subject to the jurisdiction of the United States.” The statute defined “vessel subject to the jurisdiction of the United States” to include stateless vessels. As the court framed it, the issue was whether the United States might apply its law to stateless vessels absent any proof of a nexus with the United States.

In upholding the application of American law, the court noted that the legislative history revealed an intent to exercise jurisdiction to the maximum extent allowed under international law, and concluded that international law permitted application of United States law because the vessel was stateless. But whatever significance statelessness has for international law, its relevance for constitutional due process limits is extremely hard to discern. Although the court examined the statute for unconstitutional vagueness, thus implicitly recognizing that the defendant was entitled to a modicum of Fifth Amendment protection, it did not address the possibility that due process might require a nexus for purposes of applying American law. It did point out in a footnote, however, that the United States had been conducting similar searches for so long that the defendant should have been put on notice that such a search might occur.

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226 679 F.2d 1373 (1982), cert. denied, 459 U.S. 1114 (1983); cf. United States v. Gonzales, 776 F.2d 931, 938 (11th Cir. 1985) (applying American law even though no nexus existed between the defendant and the United States when the state under which the vessel involved was registered consented).
228 Id. § 1903(c)(1)(A).
229 See Marino-Garcia, 679 F.2d at 1379.
230 See id.
231 See id. at 1378 n.3.
232 See id. at 1383.
233 See id. at 1384 n.19. The court also suggested that all nations should permit searches
4. Drugs, RICO, and Conspiracy: The Noriega Case. — A jurisdictional issue also arose in the celebrated case of United States v. Noriega. The facts underlying the case are well known. In February, 1988, a federal grand jury in Miami indicted General Manuel Noriega for conspiracy to transport cocaine into and out of the United States. General Noriega (along with Lieutenant Colonel Luis Del Cid) was charged with a pattern of racketeering activity in violation of the RICO statutes as well as various violations of the drug law. General Noriega was charged as a "principal" for violating the Travel Act, participating in a racketeering enterprise, and conspiring to import, distribute, and/or manufacture cocaine for sale in the United States.

On December 20, 1989, President Bush ordered United States combat troops into Panama City on a mission with the goal, inter alia, of seizing General Noriega to face the indictment in the United States. Not long after the invasion, Lieutenant Colonel Del Cid, the commander of two thousand Panamanian troops, surrendered to American forces. The apprehension of General Noriega took longer, but after eleven days in the Papal Nunciature in Panama City, General Noriega surrendered as well.

In finding jurisdiction, the court noted that, even if extraterritorial conduct produces no effect in the United States, a defendant can still be reached if he intended to produce an effect in the United States or is part of a conspiracy in which some co-conspirator's activities occurred in American territory. Supporting its conclusion, the Court cited Justice Holmes's opinion in Strassheim v. Daily for the proposition that "[a]cts done outside a jurisdiction, but intended to produce or producing effects within it, justify a State in punishing the cause of the harm as if [the accused] had been present at the effect, if the State should succeed in getting him within its power." The impact of stateless vessels. See id. The court's suggestion implicates an argument based on universal jurisdiction as deployed in Yunis. See supra pp. 1249–54. However, recourse to universal jurisdiction does not resolve the constitutional problems with the court's reasoning, for its reasoning was not limited to activities permitted by the laws of all nations. In the court's view, the allowance of the searches by the laws of all states was merely coincidental and not integral to the holding.

235 See id. at 1510.
236 See id.
237 See id. at 1517 (detailing violations of the Travel Act, 18 U.S.C. § 1952(a)(3) (1988)).
238 See Noriega, 746 F. Supp. at 1510.
239 See id.
240 See id. at 1511.
241 See id.
242 See id. at 1513–14.
243 221 U.S. 280 (1911).
244 Noriega, 746 F. Supp at 1513 (quoting Strasheim v. Daily, 221 U.S. 280, 285 (1911)).
territoriality theory of jurisdiction expounded by Justice Holmes indeed supports the Noriega court's result. Importation of drugs has a direct and deliberate effect in the United States, which is enough under Strassheim to support application of American law. As Justice Holmes suggested, however, the impact theory limits itself to situations in which the consequences for the forum were intended or purposeful.

A quite different question would arise if the sole basis for obtaining jurisdiction over Noriega consisted of his alleged role in a conspiracy. Under a conspiracy theory of extraterritoriality, Noriega could be held to American law by virtue of his co-conspirators' acts in the United States. This theory has been used in establishing personal jurisdiction over absent defendants, and, in the context of venue, the conspiracy theory has been justified by recourse to the defendant's "constructive presence." If the defendant purposefully sends someone, such as an agent, into the forum state, it is clear that jurisdiction over the defendant will not violate due process under state choice of law theory. In Young v. Masci, the Supreme Court upheld the application of a New York vicarious liability law to a New Jersey resident who had given a third party permission to drive his car into New York. The Court rested its argument on the grounds that "[a] person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument." According to the Court, the defendant had "subjected himself" to New York law.

The problem with the conspiracy theory, however, is that it potentially extends beyond this principle, and in RICO cases far beyond it. Once a defendant joins a conspiracy, she is responsible for all acts taken in furtherance of the conspiracy even if those acts were not within the defendant's contemplation. This feature of conspiracy jurisdiction has bothered commentators on personal jurisdiction. It

245 See George, supra note 131, at 619, 623.
248 289 U.S. 253 (1933).
249 Id. at 258.
250 Id.
252 See, e.g., Althouse, supra note 246, at 253; Brilmayer & Paisley, supra note 246, at 36; Riback, supra note 246, at 522.
violates due process because it requires no showing of purposefulness or foreseeability. In the choice of law context, for example, a defendant could be subjected to local law merely because a co-conspirator happened into the forum and committed an overt act, regardless of whether the defendant had any idea of the co-conspirator's presence. This result goes far beyond both Strassheim and Young.

The best response to this objection is that the problem is really an issue of substantive conspiracy law. The unfairness of the assertion of jurisdiction reflects the unfairness of the substantive result; the proper remedy would lie in revising the substantive law of conspiracy. In other words, conspiracy jurisdiction should not violate due process if the substantive conspiracy theory does not itself violate due process. The Court's toleration of the theory as a matter of substantive law indicates that it must be accepted as a matter of jurisdictional law.

But this response is misconceived. Even if conspiracy law is substantively constitutional, it does not necessarily follow that the conspiracy law may constitutionally be applied to a foreign defendant with only the most attenuated links to an American forum. A conspiracy arguably extends the reach of forum jurisdiction because the actions of one co-conspirator are attributed to the others. According to this argument, activities in the forum are the activities of the absent defendant for jurisdictional purposes. This attribution only works, however, because a legal rule belonging to the forum makes the attribution possible. The question remains — what authority gives the forum the right to apply its conspiracy theory in the first place?

Using conspiracy to justify application of American law is choice of law bootstrapping. It involves applying American law to justify the application of American law.\textsuperscript{253} Conspiracy theory may justify subjecting the defendant to RICO (or some other substantive law), but it cannot justify subjecting the defendant to our conspiracy laws.\textsuperscript{254} Courts must answer the question of purposeful connection with the forum before they presume our conspiracy laws are applicable. Because the conspiracy test is not as stringent as the usual jurisdictional standard of purposefulness, some substantive conspiracies should not be reachable as a matter of due process. Conspiracy theory does not obviate the need to inquire into the defendant's purposeful connections with the forum — a central element of fairness in

\textsuperscript{253} In the analogous context of personal jurisdiction, the Supreme Court has been loathe to permit states to attribute the contacts of one defendant to another. \textit{See}, e.g., Keeton v. Hustler Magazine, 465 U.S. \textbf{770}, 781 n.13 (1984) ("Each defendant's contacts with the forum State must be assessed individually."); Rush v. Savchuk, 444 U.S. \textbf{320}, 331-32 (1980) (holding that contacts must be shown as to each defendant).

\textsuperscript{254} For recognition of the choice of law problems in establishing jurisdiction through conspiracy law, see Brilmayer & Paisley, supra note 246, at 37.
due process analysis. Assertions of American law in conspiracy cases should meet the Strassheim test.255

IV. CONCLUSIONS: A CONSTITUTIONAL ASSESSMENT

In one respect, the Constitution appears inadequate for restraining excesses of legislative jurisdiction. Foreign citizens might feel that they should not be required to rely on American law itself as a defense against American overreaching. After all, foreigners have no say concerning the Constitution's position on the assertion of jurisdiction over foreigners. In this sense, the Constitution cannot solve all fairness problems;256 the overreaching must be addressed through the vehicle of international law.

But international law, conversely, does not address all of the problems covered by the Fifth Amendment. Specifically, satisfying international law does not automatically meet the due process standard. The framework provided by international law, however, is helpful in identifying the cases most likely to pose constitutional problems. Jurisdiction asserted against Americans is unlikely to present constitutional problems, for the defendant's home state has a constitutionally recognized basis for regulation.257 Territorial jurisdiction, due to its historical pedigree, is also unlikely to violate the Due Process Clause.258 As previously noted, the only two territoriality cases that might offend the Constitution are those impact territoriality cases in which the local consequences are not foreseeable, and those conspiracy cases in which the defendant had no advance warning or control over the co-conspirator's actions in the forum.

Universal jurisdiction appears to present a more difficult constitutional issue, because it does not require a nexus between the forum and the dispute. This problem vanishes, however, once it is recognized that the forum does not really apply its own law, but rather enforces international law that has been incorporated into domestic law. The forum merely provides a mechanism for the implementation of norms that, in theory, are universally in effect. We say "in theory" because some nations might, contrary to international law, actually encourage hijackings. A genuine choice of law problem would present itself if a hijacking occurred in a state that authorized such conduct

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256 The Supreme Court has held that the Constitution permits transient jurisdiction without regard to its international law status. See Burnham v. Superior Court, 110 S. Ct. 2105, 2115 (1990). But cf. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 cmt. e (1987) (rejecting transient jurisdiction).

257 See supra p. 1241.

258 See supra p. 1242.
by positive law. However, such choice of law issues seldom arise because states have acted in this manner and because the defendant has no claim to immunity from international legal standards.

The most difficult categories of extraterritorial jurisdiction are passive personality and protective jurisdiction. They are related in that neither requires a connection between the defendant and the forum, aside from the United States or one of its nationals having suffered an injury. These theories do not even require that the defendant be aware that he or she has caused harm to an American or to the United States government. The Restatement has expressed doubts concerning the international status of the passive personality principle in certain categories of cases. We express similar reservations as a matter of constitutional law. The Supreme Court has never upheld the application of state law on the grounds that a forum resident, temporarily present in another state, suffered injury there (although it has never explicitly invalidated such an application). The strongest arguments in support of allowing passive personality and protective principles involve the defense of United States interests. But if the Fifth Amendment applies to federal extraterritoriality (as argued above), then national interests are only one ingredient in the due process calculus. Passive personality and protective theories are hard to justify in terms of fairness to the defendant unless the defendant acted with some degree of intent to cause an impact in the forum.

Unfortunately, the cases examined above indicate that claims of right by individuals may indeed come into sharp conflict with perceptions of national interests. This unfortunate fact is illustrated not only by the terrorism statutes, but also by the Noriega and Marcos prosecutions. In the former, a popular president pursuing a popular political agenda (the war on drugs) might not have been overly concerned with fine points of constitutional or international law. In the latter, our nation not only possessed its own motivations for pursuing the Marcos's wealth, but also wanted to be viewed as helpful to a sympathetic new government in the Philippines. This is not the place to debate where the true national interest may lie. Perhaps national interests would not be served by any of these applications of American law, in which case national interests and individual rights coincide.

Nonetheless, a theoretical conflict would still remain. The proper accommodation of individual rights and national interests would at

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259 See Restatement (Third) of Foreign Relations Law § 402 cmt. g (1987) (stating that the passive personality principle is not generally applicable to ordinary torts or crimes); see also Goldsmith & Rinne, supra note 181, at 1045–46 & nn. 83–84 (noting that the passive personality principle has not been widely accepted).

260 For example, an isolationist might argue that the United States should not be involved in policing corruption around the world. It is arguable that penalizing theft of money from the Philippines treasury, as in Marcos, does not satisfy any American interest.
some point need to be addressed, because sooner or later a true divergence would occur. In such cases, courts should uphold individual rights. These are not cases where courts can remain beyond the fray by refusing to intervene in exclusion proceedings or by declining to issue writs of habeas corpus. These are cases in which the elected branches of government have sought the assistance of the courts in enforcing American law. If courts, especially Article III courts, are asked to decide cases, they must decide them in accordance with the Constitution.

This argument concedes that the Constitution operates more importantly as a shield than as a sword. It attempts to preserve the integrity of courts that are asked affirmatively to involve themselves in the effectuation of unconstitutional policies. As Henry Hart argued, "so long at least as Congress feels impelled to invoke the assistance of courts, the supremacy of law in their decisions is assured." When asked affirmatively to apply American law to controversies having no connection with the United States, and when application of American law would be fundamentally unfair, courts should invoke the Fifth Amendment. Under current law, courts could otherwise become involved in overly aggressive assertions of American foreign policy without an opportunity to ask the proper constitutional questions.

When standards of the Fifth Amendment Due Process Clause are treated as parallel to those of the Fourteenth Amendment, the fate of foreigners is tied to the fate of American citizens. Foreigners will possess the same due process protection against federal overreaching as American citizens possess against the laws of sister states. Denying this basic protection is hard to justify — what is unfair to a citizen is also unfair to a noncitizen. Admittedly, national interests may prove stronger than the interests of competing states, but there is room for including this factor in the due process calculus. Due process, however, does require considering fairness to the defendant in addition to state or national interests.

Hopefully, few cases will present these difficulties. Congress has typically been silent on the extraterritorial reach of federal legislation. Consequently, potential problems of unfairness can be avoided entirely through deft interpretation. When Congress does specify territorial reach, it rarely tries to make statutes universally applicable, and when it spells out the range of cases to which one of its statute does apply, it will likely require the types of connections that would satisfy the

262 See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).
263 Hart, supra note 110, at 1383.
265 See supra pp. 1234–37.
Fifth Amendment (as well as international law). However, courts and litigants should keep constitutional limitations in mind. A court should consider potential constitutional limits when it interprets a statute that is silent on territorial reach, for courts typically construe statutes to avoid raising constitutional difficulties. With due awareness of potential constitutional considerations, Fifth Amendment due process problems of federal extraterritoriality will be rare. If Congress ever does force the issue, however, courts must stand prepared to enforce the Fifth Amendment’s limits on international choice of law.