The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles

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The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles

Mark P. Gibney

I. EXTRATERRITORIALITY VERSUS DEMOCRATIC PRINCIPLES

Given the ready acceptance of the principle that "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States,"¹ the only real issue in cases involving the extraterritorial application of U.S. law is not whether Congress has the power to extend the force of domestic law beyond the nation's borders,² or what the consequences would be if U.S. law was or was not applied extraterritorially in a particular instance, but simply whether Congress had purportedly intended such a result when enacting certain legislation. This reading of both international and domestic law stands in stark contrast to the prevailing theory at the turn of this century. At that time, U.S. law was based almost exclusively on the territorial principle—the idea that the power of American law ends at the country's boundaries.³ Changes in the world economic system, how-

² A few scholars have questioned this proposition that Congress has unbridled power to apply U.S. law wherever and whenever it chooses to do so. See Lea Brilmayer & Charles Norchi, Federal Extraterritoriality and Fifth Amendment Due Process, 105 Harv. L. Rev. 1217 (1992) (arguing that the Fifth Amendment limits federal extraterritoriality in the same manner as the Fourteenth Amendment limits state extraterritoriality); Andreas F. Lowenfeld, U.S. Law Enforcement Abroad: The Constitution and International Law, 83 Am. J. Int'l L. 880 (1989) (arguing that extraterritorial criminal statutes that go beyond the provisions of international law violate the Due Process provisions of the Constitution).
³ Although U.S. law had long been based on the territoriality principle, the first case to explicitly
ever, soon brought about a selectively different reading of the scope of U.S. law.

Recognizing that activities which occurred wholly outside the country's borders could at times have a substantial domestic impact, the judiciary, perhaps doing the bidding of the political branches, began to give an extraterritorial reading to certain acts of Congress. Thus, antitrust laws that were originally limited to monopolistic practices within the United States began to be applied extraterritorially (without any change in the wording of the statute) when the domestic impact of these overseas activities became more recognizable. Likewise, and

enunciate this was American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). An American businessman named McConnell had purchased a banana plantation in Panama, which at the time was still a part of Columbia. *Id.* at 354. McConnell was promptly contacted by the United Fruit Company, a U.S. corporation aggressively seeking to monopolize the Central American banana trade. *Id.* United Fruit provided McConnell with one of two unenviable choices: either sell the plantation to them, or get out of the business. McConnell refused both offers, but later sold his plantation to the American Banana Company, a newly established enterprise run out of Alabama. *Id.*

Subsequent to this, Costa Rica invaded the now-independent Panama, allegedly at the behest of United Fruit. Costa Rican forces seized American Banana's plantation and gave it to a person named Atsua, who immediately sold it to United Fruit. *Id.* at 355. Having lost its plantation, American Banana shifted venues from the battlefield to the courtroom and brought an antitrust action against United Fruit. In its suit, American Banana charged United Fruit with a number of anti-competitive acts: conspiring with other banana producers, interfering with American Banana's contracts, and below-cost bidding. *American Banana*, 213 U.S. at 355.

The case eventually made its way to the United States Supreme Court which held that the Sherman Act did not apply to monopolistic practices that occur beyond the country's borders. *Id.* at 356. In fact, in his majority opinion, Justice Holmes expressed no small measure of surprise that such a case was brought in the first place.

It is obvious that, however stated, that plaintiff's case depends on several rather startling propositions. In the first place, the acts causing the damage were done, so far as it appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress. *Id.* at 355.

Holmes then went on to enunciate a rule of law that would soon come to be modified: "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." *Id.* at 356.

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Consider the changes in the scope of antitrust laws. Notwithstanding the rather absolute language in *American Banana*, 213 U.S. at 347, a short time after that decision the Court began to erode the territoriality principle in cases which applied U.S. law to companies engaged in the transportation of goods to and from the United States. Thus, in United States v. Pacific & Arctic Ry. & Navigation, 228 U.S. 87 (1913), the Supreme Court applied American antitrust laws against a Canadian company's conspiracy to monopolize rail transportation between the United States and Canada, reasoning that failure to do so would "put the transportation route... out of the control of either Canada or the United States." *Id.* at 106. In United States v. Sisal Sales Corp., 274 U.S. 268 (1927), the Court further expanded the scope of U.S. antitrust law. In that case, the government brought antitrust charges against American companies for a conspiracy to monop-
for much the same reason, the judiciary soon gave a very broad jurisdictional reading to trademark and securities laws as well. In rather

olize Mexican sisal exports. Although the monopoly was to operate in Mexico, the Supreme Court held that the conspiracy was furthered by agreements that had been made within the United States, and that an export monopoly would have direct effects within this country. *Id.* at 275.

The transformation was completed in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). The Second Circuit, sitting as a court of last resort by virtue of the Supreme Court’s inability to muster a quorum, held that the Sherman Act applied extraterritorially to a Canadian corporation’s participation, outside the United States, in an international aluminum cartel. *Id.* at 443. Employing what eventually became known as the “effects test,” the court, in an opinion written by Judge Learned Hand, permitted the extraterritorial application of U.S. antitrust laws to conduct that had sufficient contact with the United States, even if none of the events comprising the monopoly occurred in the United States. *Id.* at 443–44.

Commenting on this extraterritorial transformation of U.S. antitrust law, Gary Born has written:

> The significant extension of the extraterritorial reach of the antitrust laws under *Alcoa’s* effects test did not result from amendments to the Sherman Act or from any newly-discovered reading of the Act and its legislative history. The differences instead resulted indirectly from new economic realities and regulatory demands, and more directly from the perceived changes in principles of public international law, conflict of laws thinking and state practice that followed this evolution.


> Any person who shall, in commerce, (a) use, without the consent of the registrant, any reproduction, counterfeit, copy or colorable imitation of any registered mark in connection with the sale, offering for sale, or advertising of any goods or services ... or ... (b) reproduce, counterfeit, copy, or colorably imitate any such mark ... shall be liable to a civil action by the registrant for any or all of the remedies hereinafter provided in this chapter.


In *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), the Supreme Court read the Lanham Act as having extraterritorial application. The defendant was a U.S. citizen who operated a factory in Mexico that made counterfeit Bulova watches. *Id.* After examining a number of factors—the purposes behind the Lanham Act, the negative effects from such conduct in the United States, the defendant’s nationality, and the absence of any conflict of law between the United States and Mexico—the Court held that the Lanham Act could reach these activities in Mexico. *Id.* at 285.


Despite this confusing jurisdictional language, a number of federal courts have given the Securities Exchange Act an extraterritorial reading, although a few courts have admitted to their
stark contrast to this, certain areas of the law, most notably labor regulations and environmental legislation, were, and continue to be, given strict territorial readings.

ignorance of where this power explicitly comes from. See Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975), cert. denied, 423 U.S. 1018 (1975) ("We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions [extraterritoriality], we would be unable to respond."); Continental Grain Pry. v. Pacific Oilseeds, Inc., 592 F.2d 409, 421 (8th Cir. 1979) ("We frankly admit that the finding of subject matter jurisdiction in the present case is largely a policy decision.").

In a series of decisions the judiciary, quite often the Supreme Court itself, has refused to apply extraterritorially to: the Eight Hour Law, 40 U.S.C. §§ 324–25 (1940); see Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949) (holding that the Eight Hour Law did not apply to contract between the United States and a private contractor for construction work in a foreign country); the Labor Management Relations Act, 29 U.S.C. § 141 (1982); McCullough v. Sociedad Nacional de Marin­eros de Honduras, 372 U.S. 10 (1963) (holding that the Labor Management Relations Act was not applicable to the internal management and affairs of vessels flying the Honduran flag); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957) (holding that the Labor Management Relations Act did not apply to a labor dispute involving American workers on a foreign ship even while the ship was temporarily in an American port); the Federal Employer’s Liability Act, 45 U.S.C. § 51 (1982); New York Cent. R.R. v. Chisholm, 268 U.S. 29 (1925) (holding that the Federal Employer’s Liability Act had no extraterritorial effect and does not subject an interstate carrier to liability for death of an employee killed outside U.S. territory); the Railway Labor Act, 45 U.S.C. § 151 (1982); Air Line Dispatchers Ass’n v. National Mediation Bd., 189 F.2d 685 (D.C. Cir. 1951) cert. denied, 342 U.S. 849 (1951) (holding that the Railway Labor Act could not be applied extraterritorially to dispute between U.S. air carriers and employees in foreign countries); Air Line Stewardesses Ass’n, Int’l v. Trans World Airlines, Inc., 273 F.2d 69 (2d Cir. 1959), cert. denied 361 U.S. 901 (1959) (holding that the Railway Labor Act could not be applied to force U.S. airline to bargain with certified representative of flight attendants who were not U.S. nationals or residents and who were employed by the airline solely in connection with flights outside the continental United States); the National Labor Relations Act, 29 U.S.C. § 151 (1982) (the National Labor Relations Act was amended by the Labor Management Relations Act); the Equal Pay Act, 29 U.S.C. § 206 (1982); Foley Bros., 336 U.S. at 286 (noting that Equal Pay Act cannot be applied extraterritorially).

See generally Beatrice A. Cameron, Global Aspiration, Local Adjudication: A Context for the Extraterritorial Application of Environmental Law, 11 Wis. Int’l L.J. 381, 417 (1993) ("U.S. courts have, over the years, been anything but hospitable to arguments that U.S. environmental laws should apply extraterritorially.").

One of the most noteworthy examples of this antipathy toward the extraterritorial application of U.S. law to enforce environmental, health and safety regulations concerned the sale of a nuclear power reactor to the Philippines by the Westinghouse Corporation in the mid-1970s. The plant was to be situated above an earthquake fault line, and just below an active volcano. In terms of technical design, the nuclear power plant did not meet domestic (U.S.) standards. Despite this uncontroversed evidence, the Nuclear Power Commission voted to issue the plant’s license, taking the position that it lacked jurisdiction, under domestic statutes, to consider the health, safety and environmental impacts on the citizens of a recipient nation, or even to consider the effects of an exported reactor on U.S. interests and U.S. citizens abroad (U.S. military bases were within the immediate region). In re Westinghouse Elec. Corp., 11 N.R.C. 631 (1980). The District of Columbia Circuit affirmed this decision, holding that the agency had properly approved the exported reactor without evaluating the health, safety and environmental impacts. Natural Re-
The law at the present time, at least as it is stated, is that there is a presumption against the extraterritorial application of U.S. law. As the Supreme Court recently held in *EEOC v. Arabian American Oil Co. (Aramco)*, it is a "long-standing principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Unfortunately, with very rare exception, Congress gives little guidance to whether U.S. law should apply beyond our country's territorial boundaries. In fact, there are only a handful of statutes where Congress has explicitly spelled out the extraterritorial application, or non-application, of the law. Instead, in the vast majority of legislative and executive enactments there is very hazy and ambiguous jurisdictional language, and the task of interpreting extraterritoriality from this has fallen on the courts. The problem, however, is that the judiciary has been no more consistent, on the surface at least, than Congress. In some instances the courts have read very ambiguous statutory language quite expansively, but in other cases they have taken equally broad language and given it a territorial interpretation.

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10 Congressional intent is clearest in statutes that explicitly address extraterritoriality. Section 175 of the Biological Weapons Anti-Terrorism Act, for example, contains specific extraterritorial language. Pub. L. No. 101-298, 104 Stat. 201, codified at 18 U.S.C. § 175 ("[t]here is extraterritorial federal jurisdiction over an offense under this section committed by or against a national of the United States."). Similarly, the Maritime Drug Law Enforcement Act, explicitly spells out its extraterritorial scope. 46 U.S.C. app. § 1903 (1988). Section (h) of the Act is entitled "Extension beyond the territorial jurisdiction of the United States," and it reads: "This section is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States." 46 U.S.C. app. § 1903(h) (1988).

11 One of the clearest examples where Congress has given a unequivocal territorial limitation to a statute is the Fair Labor Standards Act, which specifically excludes certain sections of itself from applying to employees in a workplace, "within a foreign country." 29 U.S.C. § 213 (1988). These sections refer to maximum hours, minimum wages, child labor, and essential labor practices. *Id.*

12 For example, the language in the Lanham Act referring to "any person," *supra* note 5, has been interpreted as indicating an extraterritorial intent. Steele v. Bulova Watch, 344 U.S. 280 (1952). Similarly, notwithstanding the confusing and seemingly contradictory language in the Securities Exchange Act, *supra* note 6, the courts have applied U.S. securities laws outside the country's borders. Continental Grain Pry. v. Pacific Oilseeds, Inc., 592 F.2d 409 (8th Cir. 1979); Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975).

Contrast these results with the Supreme Court's decision in Foley Bros., Inc. v. Filardo, 336
It is not likely that the Supreme Court's recent forays into this area will clear up the apparent confusion, and the patently inconsistent applications of the extraterritorial presumption will most likely remain.\textsuperscript{13} One reason is that, notwithstanding the Court's "clear state-

U.S. 281 (1949). In that case a U.S. citizen working on U.S. government public works projects in Iran and Iraq brought suit. The issue before the Court was whether the Eight Hour Law applied to workers outside the country's borders. The Law provides that

\begin{quote}
Every contract made to which the United States . . . is a party shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor . . . shall be required or permitted to work more than eight hours in any one calendar day upon such work . . .
\end{quote}


Perhaps the environmental caselaw presents the most puzzling and troublesome results. Much of it has revolved around the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321–79 (1982). NEPA mandates that federal agencies must issue environmental impact statements (EIS) for projects undertaken by the federal government. Although the statute is replete with extraterritorial language "recognizing the . . . critical importance of restoring and maintaining environmental quality to the overall welfare and development of man," the statute has generally been given a territorial application. Amlon Metals Inc. v. FMC Corp., 775 F.Supp. 668 (S.D.N.Y 1991); Greenpeace v. Stone, 748 F.Supp. 749 (D. Haw. 1990); Natural Resources Defense Council v. N.R.C., 647 F.2d 1345 (D.C. Cir. 1981); \textit{But see}, Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993). \textit{See generally} Cameron, \textit{supra} note 8.

\textsuperscript{13}In fact, the Supreme Court's decision in \textit{Aramco} only serves to underscore many of the problems that exist in this area because this appeared to be one of the few instances where Congress had clearly indicated an extraterritorial intent.

The question before the Court in \textit{Aramco} was whether Congress intended the Civil Rights Act of 1964 to be applied extraterritorially. \textit{Aramco}, 499 U.S. at 248. The plaintiff, Ali Boureslan, was a naturalized U.S. citizen who worked in Saudi Arabia. \textit{Id.} at 246. The defendant corporations were Arabian American Oil Company and Aramco Services Corporation, both Delaware corporations, whose principal places of business were Saudi Arabia and Texas respectively. \textit{Id.} Boureslan claimed that he was fired from his position because of discrimination based on race, national origin and religion. \textit{Id.} The plaintiff based his arguments on three separate grounds, none of which were successful. First, that Title VII prohibits discriminatory acts by employers engaged in "commerce," defined to include any activity involving "trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof." Because the definition of "State" already included territories and the District of Columbia, the plaintiff argued that "any place outside thereof" must refer to foreign commerce. \textit{Id.} at 246. Aramco countered that this language simply created a jurisdictional nexus under the commerce clause and that it had nothing to do with the scope of liability. \textit{Aramco}, 499 U.S. at 247. The Court found it unnecessary to choose between these two interpretations.

Each is plausible, but no more persuasive than that. The language relied upon by petitioners—and it is they who must make the affirmative showing—is ambiguous, and does not speak directly to the question presented here. The intent of Congress as to the extraterritorial application of the statute must be deduced by inference from boilerplate language which can be found in any number of congressional acts, none which have ever been held to apply overseas. \textit{Id.} at 250–51.
ment” rule in *Aramco*, both the judiciary and the Congress are simply too wedded to precedent to envision any dramatic change. To state the proposition baldly, the Sherman Antitrust law will not—cannot—be interpreted as it originally had been in *American Banana*. The same is true of securities regulations and trademark law; and any hesitancy in applying and enforcing American criminal law overseas apparently ended some time ago.\(^{16}\)

Petitioner’s second argument was based on Title VII’s so-called “alien exemption” which provides that the statute “shall not apply to an employer with respect to the employment of aliens outside any State.” *Id.* at 252. Reasoning that there would have been no need to exempt aliens abroad unless the statute had extraterritorial application, the petitioners argued that the logical inference is that Title VII was meant to protect Americans employed “outside any state.” *Id.* The Court did not accept this view, claiming that there would be no way of distinguishing between U.S. corporations doing business overseas from foreign corporations who employed U.S. citizens in their home operations. *Id.* at 253.

Thus, a French employer of a United States citizen in France would be subject to Title VII—a result at which even petitioners balk. The EEOC assures us that in its term “employer” means only “American employer,” but there is no such distinction in the statute, and no indication that EEOC in the normal course of its administration had produced a reasoned basis for such a distinction.

*Aramco*, 499 U.S. at 255.

Finally, the petitioners argued that the Court should defer to the EEOC guidelines which for some time had interpreted Title VII to protect Americans employed abroad. The Court responded that under the particular circumstances of the case, where the EEOC had originally interpreted the act not to apply extraterritorially, much less deference would be given to the agency’s guidelines. *Id.* at 256–57.

\(^{14}\) It is possible to interpret the Court’s holding as requiring a clear statement from the judiciary from Chief Justice Rehnquist’s language: “Therefore, unless there is ‘the affirmative intention of the Congress clearly expressed.’” 499 U.S. at 248 (quoting *Benz v. Compania Naviera Hidalgo*, S.A., 353 U.S. 138, 147 (1957)).

\(^{15}\) *American Banana v. United Fruit Co.*, 213 U.S. 347 (1909). In his opinion in *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891 (1993), Justice Scalia touched upon the lack of apparent extraterritorial intent in the Sherman Act. Commenting on the *Aramco* decision, where the Court had found insufficient extraterritorial congressional intent in the “boilerplate” language of the statute, Justice Scalia offered the following, rather unpersuasive, distinction between the two situations.

The Sherman Act contains similar “boilerplate language,” and if the question were not governed by precedent, it would be worth considering whether that presumption controls the outcome here. We have, however, found the presumption to be overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially.

*Id.* at 2918.

\(^{16}\) Justice Brennan, in his dissenting opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), spells out the tremendous changes in the scope of American law, particularly the criminal component.

Particularly in the past decade, our Government has sought, successfully, to hold foreign nationals criminally liable under federal laws for conduct committed entirely beyond
A second, and more important, reason why the extraterritorial application of U.S. law will continue to be applied inconsistently is that this seeming inconsistency serves some very useful political ends. Jonathan Turley has suggested that the extraterritorial caselaw can best be explained on the basis of economic principles. In his view, the courts have applied one set of standards in “market” cases (i.e. antitrust and securities matters) that have readily allowed the extraterritorial application of U.S. law, while courts have applied what essentially amounts to an irrebuttable presumption against extraterritoriality in so-called “nonmarket” cases.

The problem, however, is that the division between “market” and “nonmarket” cases is not always clear. For example, how would one categorize the sale of a nuclear power reactor to the Philippines? On one level this would be a “market” case pure and simple, and one could expect the extraterritorial application of U.S. law. On quite a different level, however, the sale could be (and has been) seen as an environmental case (i.e., “nonmarket”) where domestic (U.S.) safety and environmental standards are viewed by both regulatory agencies and the courts as irrelevant.

This article offers a slightly different interpretation of the caselaw. Rather than promoting some general principle such as the free market, as Turley suggests, a simpler, but more accurate, description is that U.S. law has been applied extraterritorially when that has served the national interest of the United States or its corporate actors, and it has been given a territorial application when a restrictive interpretation would serve those same ends. Thus, monopolistic practices that occur the territorial limits of the United States that nevertheless has effects in this country. Foreign nationals must now take care not to violate our drug laws, our antitrust laws, our securities laws, and a host of other federal criminal sanctions. The enormous expansion of federal criminal jurisdiction outside our Nation’s boundaries has led one commentator to suggest that our country’s three largest exports are now “rock music, blue jeans, and United States law.”


Id. at 623.

See supra note 8 and accompanying text.

See id.

In fact, sometimes both phenomena appear in the same case, although there is no assurance of a consistent answer. For example, in criticizing the Supreme Court’s holding in Haitian Centers Council v. Sale, 113 S. Ct. 2549 (1993) (upholding the legality of the government’s interdiction program on the grounds that the Immigration and Nationality Act did not apply extraterritorially), Harold Koh has commented: “if Congress had intended the statute to operate extraterrito-
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in any part of the world that might have a negative effect on the American economy can be reached by U.S. law. The same is true for criminal behavior that occurs outside the country's borders, but which might have some negative consequences within the United States. In sharp contrast, applying domestic safety standards to nuclear reactors sold by U.S. corporations to Third World countries is essentially treated as an interference with the ability of U.S. corporations to effectively compete in a global market. 22 Much the same is true of labor regulations as well. 23 The only thing that makes these cases somewhat more difficult is the effect that denying extraterritoriality might have on American citizens, who would thereby be denied the protection of U.S. law. 24

The most remarkable aspect of extraterritoriality—oftentimes lost in the futile effort to uncover Congressional intent—is that it represents such a vastly different conception of the law than what exists under the norms and principles of democratic rule. In this country, for example, the creation and application of the law has as its very basis the notion of the consent of the governed. That is, those who create and pass the laws are ultimately held accountable to "the people." This, however, is not the situation in the extraterritorial context. Extraterritoriality is essentially a situation where rulemakers in one country get to pick and choose which of their own rules they will apply in other countries. Under this scheme, the lawmakers in the country promulgating laws


23 This is the interpretation provided by D'Amato & Engel of why industrialized countries often refuse to apply their own domestic standards when their economic units attempt to sell nuclear power reactors in the developing world. D'Amato & Engel, supra note 8, at 1017.

24 For example, Jonathan Turley has argued that in the NRC case, discussed supra note 8, American law should have been applied extraterritorially because of the negative "effects" that might be felt by the 40,000 or so U.S. service personnel who were stationed within a 50 mile radius of the nuclear reactor. Turley, supra note 17, at 639. There are two problems with this argument. The first is deciding what number of U.S. citizens living or working outside American borders would have to be endangered or otherwise affected in order to invoke the extraterritorial application and protection of U.S. law. Beyond that, accepting Turley's premise would mean accepting the proposition that the U.S. government only has a duty to offer protection to its own citizens. This is a very narrow view of what constitutes moral behavior. See generally Mark Gibney, Strangers or Friends: Principles for a New Alien Admission Policy (1986); Henry Shue, Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy (1980); Exporting Hazards, 91 Ethics 579 (1981); Peter Singer, Famine, Affluence, and Morality, 1 Phil. & Pub. Aff. 229 (1972); Charles Beitz, Political Theory and International Relations (1979).
that will be enforced in other countries are not accountable to "the people" in these other lands. These "other people," are not consulted about the application of foreign law to them, nor do they have the ready means to change the law if it is not consistent with their own domestic standards and norms.

Notwithstanding the absence of this rudimentary aspect of representative rule, "democracies" (democratic, that is, in their own domestic sphere) have applied their laws in other countries in increasing measures—and they have done so notwithstanding the existence of conflicts that thereby have arisen, and oftentimes in the face of the expressed contrary desires of other countries. They have done so even though extraterritoriality is seldom reciprocal (that is, country A is able to apply its laws in country B, but country B does not have the political or economic power to apply its laws in country A). Finally, I


26 Id. The conflicts are both substantive and procedural in nature. An example of a substantive conflict is the different treatment of insider trading. In the United States, insider trading constitutes a violation of the Securities Exchange Act, while in most other countries this is not a criminal act. A procedural difference, with substantive content, would be the manner of obtaining criminal evidence. United States agents commonly recruit informants and employ plea bargaining techniques to elicit testimony. Such actions are impermissible in most civil law countries. Id. at 49.


Congress was adopting the passive personality principle without any link to an international convention, making that principle applicable to murder, manslaughter, robbery and other crimes of violence solely on the basis that either the accused or the victim was a United States national. If two persons aboard a Greek or Panamanian flag ship on the high seas had a fight and one of the two was an American citizen, the United States could prosecute either of them for assault, regardless of whether the American was the assailant or the victim.

Lowenfeld, supra note 2, at 888.

28 Ethan Nadelmann has offered the following analysis of the jurisdictional conflicts and inequities that have arisen from the extraterritorial application and enforcement of U.S. law:

Jurisdictional conflicts, however, do not lead to international conflicts unless the government asserting its extraterritorial basis of jurisdiction can support that claim with an enforcement action. For instance, conflict will not result if a relatively powerless state asserts extraordinarily broad jurisdictional claims. It cannot effectively give substance to such claims. But when the United States expands the reach of its criminal jurisdiction, the potential for conflict is rife. The ability of the United States government to demand foreign recognition of its claims to extraterritorial jurisdiction greatly exceeds that of any other government. Its unparalleled networks of law enforcement, diplomatic, and intelligence agents provide numerous means to further United States interests globally. At the same time, most foreign governments and multinational corporations have
would suggest that they have done so without any semblance of a system of checks and balances, a proposition that is an anathema to our political system. The reason for this is that the judicial branch has devoted itself far more to the promulgation of U.S. law overseas than it has served to protect the well-being and interests of those who are bound by the strictures of U.S. law, but who lack the protections of U.S. law or the Constitution.

There is very little likelihood that the United States can—or necessarily should—reverse the expansive trend toward the extraterritorial application and enforcement of U.S. law. There are simply too many phenomena in other countries that are seen as infringing upon U.S. interests. This will not change, and if anything, the desire to apply U.S. law in other countries will only continue to grow. If, however, the United States is to apply its laws in other countries in a manner that is both morally legitimate as well as true to its democratic principles, two changes must occur. First, the United States must reverse the roles played by its government institutions. To date, the judicial branch has taken the lead in applying U.S. law extraterritorially. When doing so, the rationale that is always given is that the courts are merely carrying out Congressional intent. That rationale, however, has not fooled many, including judges themselves. The mandate in Aramco is a clear one—that it is Congress' responsibility to determine extraterritoriality—but it is by no means clear whether Congress will meet these standards, or if the courts can exhibit the requisite restraint. The track record to date does not inspire much confidence. Beyond this, it is important to note that the objection is not simply that the judiciary has essentially taken on a legislative function; it is the fact that there has been no institutional check on the extraterritorial application of U.S. law.

sufficient interests in, and contacts with, the United States to be susceptible to a wide variety of United States pressures, ranging from domestic law enforcement actions to economic sanctions. Most foreign governments thus have good reason to fear the United States government’s assertions of extraterritorial jurisdiction over violations of its anti-trust, export control, money laundering, tax, and even drug and terrorism statutes. Today, many of the more serious conflicts between the United States and its allies over criminal justice issues focus on precisely these extraterritorial assertions.

Nadelmann, supra note 25, at 42.

29 Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (“The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.”).

30 See supra note 6 and accompanying text.

The second change that needs to be made is that extraterritoriality needs to be viewed in the cold light of reality. This means that the United States must recognize that extraterritoriality is, by definition, anti-democratic in nature; that it is nearly always non-reciprocal and more often than not reflective of the relative political power of countries; that protection of the law has generally not followed the extraterritorial enforcement of the law; and finally, that the extraterritorial application of U.S. law in particular has given the United States a license to employ one set of standards, legal or otherwise, for itself, but quite another for those who live in other countries, but who are under the constraints of U.S. law.

II. REALIGNING INSTITUTIONAL ROLES

In the domestic sphere, Congress and the Executive branch are responsible for the creation of the law, while the judiciary serves as a check on the political branches, ensuring that the laws that U.S. citizens live under meet constitutional standards. This is the intent—and the genius—of the tripartite form of government in the United States. However, something entirely different occurs when the United States enters the international realm, or anything that even hints of foreign affairs. There, the judiciary, with only a few excep-

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32 In his seminal work, John Hart Ely argues that our constitutional scheme is premised on the idea that all voices are heard and somehow represented in the political debate.

The Constitution has... proceeded from the quite sensible assumption that an effective majority will not inordinately threaten its own rights, and has sought to assure that such a majority not systematically treat others less well than it treats itself—by structuring decision processes at all levels to try to ensure, first, that everyone's interest will be actually or virtually represented (usually both) at the point of substantive decision, and second, that the processes of individual application will not be manipulated so as to reintroduce in practice the sort of discrimination that is impermissible in theory.

JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 100–01 (1980).

33 Harold Koh has written the definitive study in THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990). Koh claims that one of the major failings of the Articles of Confederation was the inability to maintain a system of checks and balances in the international realm, and that one of the primary purposes of the new Constitution was to carry forward to the field of foreign affairs the same checks and balances system that had been established for domestic matters. Koh writes:

To remedy the Articles' defects, the Founding Fathers framed the constitutional provisions on foreign affairs with two goals in mind—to fashion a stronger national government while holding each branch of that government accountable to the others through a strong system of checks and balances. The two goals were closely related. On the one hand, the Framers overwhelmingly agreed upon the need for increased national power
In four areas: taxation, military establishment, regulation of foreign commerce, and treaty enforcement.

Id. at 74–75 (citations omitted). Koh continues:

Thus, the linchpin of the entire constitutional scheme remained the notion that powers in foreign affairs should be distributed among the branches and exercised through balanced institutional participation. As Professor Arthur Bestor notes, “the documents of this formative period of American constitutionalism consistently treated the conduct of foreign relations as a shared responsibility.”

Id. at 76 (quoting Arthur Bestor, Respective Roles of Senate and President in the Making and Abrogation of Treaties—the Original Intent of the Framers of the Constitution Historically Examined, 55 WASH. L.R. 1, 72 (1979)) (emphasis supplied by Koh).

In fact, at least in the early part of American history this sharing of the foreign affairs power was the rule and not the exception.

[T]he crucial point is that even during America’s infancy, the time of its greatest national insecurity, foreign affairs were not treated as exempt from the ordinary constitutional system of checks and balances. To the contrary, the Framers designed the checks and balances scheme to apply principally in the realm of foreign affairs.

Id. at 83 (emphasis in original). Koh concludes that:

The changing role of government brought about by the New Deal also witnessed a redefinition of the constitutional politics of U.S. foreign policy, culminating in the Supreme Court’s decision in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). In his majority opinion, Justice Sutherland creates a chasm—which to a large extent still exists today—between domestic and international affairs. Quoting (but misinterpreting) John Marshall’s 1800 speech in the House of Representatives, Sutherland states that the “extraconstitutional” powers inherent in the foreign affairs powers vested entirely in the President.

Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of power is significantly limited. In this vast external realm with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . .

Id. at 319–20.

34 The most notable example in recent history where the judiciary has asserted itself in matters of foreign affairs was in Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure case), 343 U.S. 579 (1952). Set against the backdrop of the Korean War, President Truman had ordered his Secretary of Commerce to seize the nation’s striking steel mills, citing his inherent powers as president and commander in chief. Id. at 582. The Court, however, invalidated the seizure, holding that the President had unconstitutionally usurped legislative authority. Id. at 587–88.

torial application), while the political branches have served as little more than an occasional check on the courts,\textsuperscript{36} although this has started to change, particularly in the area of criminal law.\textsuperscript{37} The extra-territorial journey of the Sherman Antitrust Act is both typical and instructive.\textsuperscript{38} In drafting the legislation, there was no apparent Congressional intent with regard to extraterritoriality. In fact, it is fair to say that the members of Congress who passed this legislation had never given this question a passing thought. The Supreme Court first gave the statute a territorial interpretation in \textit{American Banana}, only to eventually give the unamended statute a much broader reading when economic forces began to change.\textsuperscript{39} Perhaps we could read something into the acquiescence(s) of Congress, but its continued silence on the extraterritorial question—even in the face of such varying judicial interpretations—does not inspire much confidence that the courts are actually reflecting Congressional will, if there really is any will to inter pret.

What needs to happen in the extraterritorial context, quite simply, is that our various institutions of government should begin to perform the same functions that they do in the domestic sphere. For the political branches, this means taking on the lion’s share in determining when, and explaining why, U.S. law should or should not be applied extraterritorially. This is the mandate of \textit{Aramco}.\textsuperscript{40} The judiciary, on the other hand, needs to remove itself from determining or promulgating


\textsuperscript{37} See generally Lowenfeld, \textit{supra} note 2.

\textsuperscript{38} See \textit{supra} notes 3–4 and accompanying text.

\textsuperscript{39} See \textit{supra} note 4 and accompanying text.

\textsuperscript{40} EEOC v. Arabian American Oil Co. (\textit{Aramco}), 499 U.S. 244 (1991).
extraterritoriality. Yet, the judiciary must also avoid the toothless role that courts have readily assumed in the international realm.\textsuperscript{41} Instead, it is essential that U.S. courts take on the same kind of role in the extraterritorial context that they play domestically.\textsuperscript{42} That is, U.S. courts must serve as a check on the extraterritorial actions of the political branches.\textsuperscript{43} In particular, the judiciary must ensure that even when American law is applied beyond the nation’s borders, that it comports with domestic constitutional standards.\textsuperscript{44} What makes this particularly pressing is the fact that extraterritoriality, by its very nature, goes deeply against the grain of democratic governance because those living in the country enacting laws that will be enforced in other countries will not be accountable to the “other people” in those countries.\textsuperscript{45}

What role, in particular, should the judiciary play? The closest analogy is the special protection offered by the judiciary in the Equal Protection area. Going back at least to the time of Justice Stone's

\textsuperscript{41} See Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985) (dismissing a suit brought by a group of Nicaraguan civilians against the United States government for the policy of supporting the contra rebel forces on the basis of sovereign immunity); Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988) (dismissing a suit against the U.S. government for supporting contra rebel forces who were in turn targeting U.S. citizens, the court holding that such support did not amount to a Fifth Amendment Due Process violation).

\textsuperscript{42} As the Supreme Court held in Baker v. Carr, 369 U.S. 186 (1962):

There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government’s views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.

\textit{Id.} at 211 (footnotes omitted).

\textsuperscript{43} “Blanket deference to executive or congressional actions will signal to the political branches, the public, and future courts that the political branches are subject to no legal restrictions.” Jules Lobel, \textit{The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law}, 71 VA. L. REV. 1071, 1157 (1985).


\textsuperscript{45} Ely writes:

The whole point of the approach is to identify those groups in society to whose needs and wishes elected officials have no apparent interest in attending. If the approach makes sense, it would not make sense to assign its enforcement to anyone but the courts.

\textit{ELY, supra} note 32, at 151.
famous footnote 4 in Carolene Products,\textsuperscript{46} courts have used political powerlessness, among other criteria, as a reason to hold the political branches to the very highest standards, and to provide the highest level of judicial scrutiny.\textsuperscript{47} Non-resident aliens who are bound by the provisions of certain U.S. law represent the ultimate in political powerlessness.\textsuperscript{48} Not only are such people ineligible to vote in U.S. elections and

\textsuperscript{46}United States v. Carolene Products Co., 304 U.S. 144 (1938). Footnote 4 states:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth Amendment.

It is unnecessary to consider now whether legislation which restricts those political processes, which can ordinarily be expected to bring about scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote; on restraints upon the dissemination of information; on interferences with political organizations; as to prohibition of peaceable assembly.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial review.

\textit{Id.} at 153 n.4 (citations omitted).

\textsuperscript{47}The first case to explicitly use the language of “strict scrutiny” was Korematsu v. United States, 323 U.S. 214 (1944). Justice Black laid out the governing standard early in his majority opinion: “[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect.” \textit{Id.} at 216.

The modern day test is that the Court will apply its strictest scrutiny (i.e., the state must have a “compelling interest,” and it must have chosen the very best means possible to achieve those objectives) when either a “fundamental right” is infringed, or there is differential treatment of a so-called “suspect class.” Frontiero v. Richardson, 411 U.S. 677 (1973) (writing for a plurality, Justice Brennan concluded that classifications based upon sex are inherently suspect and must be subjected to close judicial scrutiny); Graham v. Richardson, 403 U.S. 365 (1971) (holding that aliens as a class are a prime example of a “discrete and insular” minority). But see Mathews v. Diaz, 426 U.S. 67 (1976) (upholding a federal statute restricting aliens’ access to Medicare unless they had been permanent resident aliens for five years); Foley v. Connellie, 435 U.S. 291 (1978) (upholding a state statute that restricted the hiring of state troopers to U.S. citizens on the basis of the political function served).

\textsuperscript{48}In Ely’s view, \textit{resident} aliens represent the prototype of political powerlessness, thereby warranting special judicial protection.

Aliens cannot vote in any state, which means that any representation they receive will be exclusively “virtual.” That fact should at the very least require an unusually strong showing of a favorable environment for empathy, something that is lacking here. Hostility toward “foreigners” is a time-honored American tradition. Moreover, our legislatures are composed almost entirely of citizens who have always been such. Neither, finally, is the exaggerated stereotyping to which that situation lends itself ameliorated by any degree of social intercourse between recent immigrants and those who make the laws.

\textit{Ely, supra} note 32, at 161.
thus able to throw the "rascals" out of office, but because they are not physically present in this country they have few, if any, opportunities to change objectionable U.S. laws. It is readily conceded that even filing a lawsuit in the United States to challenge some provision of a U.S. law that is being applied extraterritorially might prove to be an insurmountable obstacle for an alien living in another country, both logistically and jurisdictionally. But perhaps this simply goes to underscore the very tenuous relationship that exists between extraterritoriality, on the one hand, and the notion of democratic rule on the other.

Unfortunately, the law seems to be heading in the opposite direction. While the American judiciary has apparently lost a good deal of hesitancy in applying U.S. law extraterritorially, it has continued to give a territorial reading to the Constitution. The leading case in this area is Verdugo-Urquidez in which the Supreme Court held that the Fourth Amendment did not apply to a search conducted by U.S. Drug Enforcement Agents of a foreign national's home in Mexico. The premise of the Court's decision rested on the idea that the Fourth Amendment only applies to "the people" of the United States. In his majority opinion, Chief Justice Rehnquist writes:

49 More than a century ago, in a manner consistent with the territorial restriction of American law that existed at that time, the United States Supreme Court declared that the "Constitution can have no operation in another country." In re Ross, 140 U.S. 453, 464 (1891). However, in Reid v. Covert, 354 U.S. 1 (1957), the Court held that a U.S. citizen was afforded constitutional protection if harmed abroad by U.S. government action. More recently in Verdugo-Urquidez v. United States, 494 U.S. 259 (1990), Chief Justice Rehnquist's majority opinion intimated that Fourth Amendment protections would apply to a search in a foreign country by U.S. law enforcement officials if the property being searched was the domicile of an American citizen. Id. at 259-60.

In the area of immigration law, a rather sharp dichotomy has been perpetuated between those who have made an "entry" into the United States, and those who have not. To remove someone who had made an "entry" into the United States, legal or otherwise, a deportation hearing is mandated, and the process is given constitutional protection. Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86 (1903). For those who have not made an "entry" (or are attempting to make a "re-entry"), removal can be effectuated through an exclusionary hearing, not a deportation hearing, and the United States Constitution does not apply. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress, it is due process as far as an alien denied entry is concerned"); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). Knauff and Mezei remain good law, although their harsh principles were modified somewhat in Landon v. Plasencia, 459 U.S. 21 (1982). In Landon, a returning resident alien who was arrested at the border attempting to smuggle undocumented aliens into the United States claimed that she should be given a deportation hearing rather than an exclusion hearing. The Court disagreed, but held that because of her previous residence in this country, she was entitled to some constitutional protections. Id. at 36-37.

The purpose of the Fourth Amendment was to protect the people of the United States against arbitrary actions by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.\textsuperscript{51}

Who, exactly, are “the people?” The Court held that constitutional protections are not limited to American citizens. Rather, aliens might also be offered protection, but only after “they have come within the territory of the United States and developed substantial connections with this country.”\textsuperscript{52} The Court then went on to hold that because Verdugo-Urquidez had only been present in the United States for a few days (after he had been arrested and brought to the United States) the defendant had not developed the requisite “substantial connections” for Fourth Amendment purposes.

The failing of Verdugo-Urquidez, from a philosophical point of view and perhaps from a legal perspective as well, is that it maintains mutually inconsistent principles. On the one hand, the Court does not even question the enforceability of U.S. law by United States agents in another country. In fact, the Court didn’t even discuss this point in the opinion. The Court, however, somehow refuses to extend constitutional protection along with this enforcement.\textsuperscript{53} In essence, the holding is premised on nothing more than the ability—nonexistent in our domestic sphere—of being able to have one’s cake (enforcement) and still have the means to eat it too (non-protection by the law).\textsuperscript{54}

\textsuperscript{51} Id. at 266.
\textsuperscript{52} Id. at 271.
\textsuperscript{53} Another situation with enforcement of U.S. law without any corresponding protection arose in Sale v. Haitian Centers Council, 113 S. Ct. 2549 (1993). In Sale, the Court held that the nonrefoulement provisions of the Immigration and Nationality Act did not apply beyond the territorial boundaries of the United States. However, as Harold Koh has pointed out, the Court did not even consider the issue of whether United States law could be enforced on the high seas. The Court took that as a given. Koh, \textit{supra} note 33, at 319–20.
\textsuperscript{54} How far can the holding in Verdugo-Urquidez extend? The caselaw regarding abductions in foreign countries would seem to indicate that there are some limitations, but the point where they arise is fairly remarkable. The leading case on this matter is Ker v. Illinois, 119 U.S. 436 (1886). In Ker, government officials in Illinois sought to prosecute Ker, a U.S. citizen living in Peru, on charges of larceny and embezzlement. \textit{Id.} at 437. At the behest of the Governor of Illinois, the President of the United States directed that federal agents be sent to Peru to request Ker’s extradition. \textit{Id.} at 438. The agent never made the extradition request, however, and forcibly abducted Ker instead and brought him to the United States. Ker challenged the court’s jurisdiction over him on the basis of the kidnapping, but the Supreme Court held that the manner in which Ker was brought into court was immaterial. \textit{Id.} at 443–44. The holding of Ker was implicitly reaffirmed in United States v. Humberto Alvarez-Machain, 504 U.S. 655 (1992), where the Supreme Court held that notwithstanding the extradition agreement between the United States
What must be restored in the extraterritorial context is some semblance of constitutional balance; one where the political branches are responsible for creating the law, but the courts serve as a check against governmental abuses. At present, the extraterritorial application of U.S. law does not come close to resembling lawmaking in the domestic sphere. In addition to rectifying these institutional transgressions, what also is needed is the establishment of normative principles to guide the extraterritorial application of domestic law.

III. The Imperative of Establishing Normative Principles

Although it is readily accepted that the United States has the power to apply its laws extraterritorially, this article has attempted to show that such a proposition is far more problematic than it has generally been treated. Not only is extraterritoriality an anathema to our most deeply held views regarding representative democracy, but it has also prompted our institutions of government to play decidedly different, and inferior, roles than they do in the domestic context.

The essential problem is that extraterritoriality is both "underinclusive" and "overinclusive" (and, in some instances, both at the same time), and because of this it is without any coherent guiding principles. We have already discussed several forms of underinclusiveness. One is the very selective and inconsistent manner in which U.S. law has been applied extraterritorially. As we have seen, some areas of law have been readily applied overseas, while other laws, with jurisdictional language that is every bit as vague and uncertain, have been given a territorial reading. Another form of underinclusiveness that we have touched upon is the inconsistent result of applying and enforcing U.S. law beyond the country's boundaries, but then giving the Constitution a territorial reading, at least with respect to non-citizens.

and Mexico, an American court would still have jurisdiction over a person where United States Drug Enforcement Agents bypassed the treaty's provisions and simply kidnapped the defendant. The Second Circuit is the only court that has refused to permit prosecution on the basis of a forced abduction. United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974). In Toscanino, the defendant was repeatedly tortured over a 17 day period. Id. at 269. Although foreign agents were responsible for carrying out these actions, U.S. law enforcement agents were kept fully apprised of the proceedings. Toscanino was subsequently limited by another Second Circuit case, United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975), where the court held that in order to divest itself of jurisdiction, the conduct of U.S. agents must be "of the most outrageous and reprehensible kind" which results in the denial of due process. Id. at 65.

55 The rallying cry of the American Revolutionary war was "no taxation without representation." Yet, the extraterritorial application of U.S. law is essentially "legislation without representation."

56 Lobel notes that:
Another kind of underinclusiveness—in this case because of the unequal treatment of similarly situated individuals—has arisen regarding the manner in which U.S. law has been applied extraterritorially. One such example is the extraterritorial application of U.S. antidiscrimination legislation. Responding to territorial interpretations of the Age Discrimination in Employment Act, and the Civil Rights Act, Congress quickly amended both statutes to specifically give them an extraterritorial reading. The ultimate result of this congressional action, however, is puzzling at best and inconsistent at worst. At present, U.S. multinational corporations operating in other countries are prohibited by U.S. law from discriminating on the basis of age, race, color, religion, sex, or national origin—but only as long as the discriminatory behavior is aimed at a U.S. citizen. That also is to say that there is nothing (at least under U.S. law) that would prevent these same U.S. corporations (or the United States government itself) from systematically discriminating against foreign nationals, or even permanent resident aliens of the United States for that matter, in their operations in other countries.

Finally, underinclusiveness is also manifested by the manner in which “effects” are factored in. That is, while the United States has been very quick to regulate a myriad of phenomena in the world that have, or are perceived as having, a negative effect on U.S. interests, the United States has tended to ignore those situations where its government or corporate entities have had a negative effect on others. The environmental damage caused by Texaco in its operations in Ecuador is a prime example of this problem. There certainly are “effects” from

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[1] Imposing constitutional standards whenever the Government acts reflects an understanding of our common humanity in an increasingly interdependent world. Instead of viewing ourselves as living apart from the world and reserving to ourselves our constitutional protections, we should recognize that the interdependence of individuals, societies and nations requires acceptance of “human rights” as inhering in all individuals.

Lobel, supra note 44, at 87.

57 See supra note 36 and accompanying text.

58 Id.

59 Id.

60 Jennifer K. Rankin, U.S. Laws in the Rainforest: Can a U.S. Court Find Liability for Extraterritorial Pollution by a U.S. Corporation? An Analysis of Aguinda v. Texaco, Inc., 18 B.C. INT’L & COMP. L. REV. 221 (1995). As Rankin points out, although the Ecuadorian Constitution guarantees a clean environment, class action suits are not allowed and there is no meaningful discovery in Ecuadoran courts. Thus, unless U.S. courts—and U.S. laws—apply, there might be no effective remedy for the environmental carnage that has been brought about by a U.S. corporation. Id. at 222.
Texaco’s operations; however, under the current reading of the law, all such effects are simply in Ecuador, not the United States. Apparently because of this, and notwithstanding the fact that it is an American corporation that is causing this damage, U.S. law does not apply. What furthers the problem—at least from the perspective of the citizens of Ecuador—is that given the primitive nature of the Ecuadoran legal system, there is little likelihood that any action will ever be taken against Texaco.61

In addition to being underinclusive, the extraterritorial application of U.S. law is at times overinclusive as well. For example, certain U.S. laws, such as antiterrorist measures and drug enforcement laws, apply (in theory, and perhaps in fact) against the entire world population. Very few countries, however, have the ability to apply and enforce their laws against U.S. nationals, at least while these individuals are physically present in the United States.

Finally, there are also ways in which the extraterritorial application of U.S. law has been both underinclusive and overinclusive at the same time. The reason for this is that extraterritoriality has been applied as an either/or proposition. That is, either U.S. law is applied extraterritorially, in which case it applies to every country in the world, notwithstanding the domestic law in particular countries, or else it is not applied extraterritorially, in which case it only applies in the United States. The problem with this, however, is the degree to which countries differ rather dramatically in terms of the legal protections that they offer.

Consider the sale of nuclear reactors to other countries.62 Some receiving countries—the Philippines for example—have had scant experience in this field, possess little or no meaningful regulatory apparatus, and have shown extraordinarily poor judgment in terms of their track record with regard to nuclear power.63 On the other hand, other countries—such as France—have one of the most highly developed regulatory schemes in the world. The point is that the sale of nuclear reactors to these two countries is nowhere close to being the same. What I am also suggesting is that the territorial restriction of U.S.

61 Id. Of course, the Texaco example is by no means the first case of this. For a discussion of another tragedy, the Union Carbide disaster in Bhopal, India, and the perpetuation by multinational corporations of two sets of standards—domestic versus international—see Ratna Kapur, From Human Tragedy to Human Rights: Multinational Corporate Accountability for Human Rights Violations, 10 B.C. THIRD WORLD L.J. 1 (1990).

62 See supra note 8 and accompanying text.

63 Id.
nuclear regulatory law is underinclusive with respect to the sale of a nuclear reactor to the Philippines because of the severe shortcomings in that country’s regulatory scheme combined with the enormous level of devastation that a nuclear power accident could bring about. Conversely, applying U.S. nuclear regulations to France is probably overinclusive, for just the opposite reason.

It is essential to address these problems of over and underinclusive-ness, but particularly the latter. The Restatement (Third) of the Law of Foreign Relations provides some advance in this area by positing a number of factors to be considered in determining the appropriateness of extending domestic law to other countries. The purpose of

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64 Section 402, Bases of Jurisdiction:

Subject to § 403, a state has jurisdiction to prescribe law with respect to
(1) (a) conduct that, wholly or in substantial part, takes place within its territory;
(b) the status of persons, or interests in things, present within its territory;
(c) conduct outside its territory that has or is intended to have substantial effect within its territory;
(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Section 403, Limitations on Jurisdiction to Prescribe:
(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of having such jurisdiction is unreasonable.
(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those to whom the regulation is designed to protect;
(c) the character of the activity to be regulated, the importance of the regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
(d) the existence of justified expectations that might be protected or hurt by the regulation;
(e) the importance of the regulation to the international political, legal or economic system;
(f) the extent to which the regulation is consistent with the traditions of the international system;
(g) the extent to which another state may have an interest in regulating the activity; and
(h) the likelihood of conflict with regulation by another state.
(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state’s interest in exercising
section 403 is to limit the extraterritorial application of U.S. law to those instances where it would be “reasonable” to do so. In fact, U.S. law has been applied extraterritorially in a variety of ways where there is some “reasonable” effect within the United States. The real problem, however, is not overinclusiveness as much as it is underinclusiveness. What the Restatement also needs to address is “reasonableness” from the other side, namely, instances where it would be “unreasonable” not to apply the elements or the protections of U.S. law.

Consider, for example, that while there is a ban on the domestic sale and use of pesticides such as DBCP, no American law prohibits the sale or use of these same poisons outside the United States. Because of these differing standards, a chemical that is known to be dangerous (and is banned in the United States) continues to be manufactured in the United States and sold overseas, oftentimes by U.S. multinational corporations. This dichotomy is decidedly wrong, and it is not “reasonable” that U.S. law only seeks to protect those living within this country’s territorial borders.

This is not meant to suggest that all U.S. law should be applied extraterritorially, or should be presumed to be. In fact, given the lack of extraterritorial reciprocity, one might well make the argument that too much American law is enforced overseas. What is needed, however, is some attempt at balance, so that the United States does not continue to perpetuate a system whereby the enforcement provisions of its laws are readily applied extraterritorially, but without any of the protections of these same laws.

jurisdiction, in light of all the relevant factors. Subsection (2); a state should defer to the other state if that state’s interest is clearly greater.

Restatement (Third) of Foreign Relations, §§ 402, 403 (1986).

65 Id.

66 In 1977 the chemical, dibromochloropropane, or DBCP, was found to cause sterility in men working at an Occidental Petroleum plant in Lathrop, California, prompting an immediate ban on its use in California, and sharply restricting its use elsewhere in the continental United States (a total ban was enacted in 1979). For several years thereafter, however, several U.S. manufacturers of the chemical continued to sell it in their overseas operations, and a number of U.S. food growers continued to spray their crops in a number of Third World countries with the substance. A lawsuit has recently been filed in the United States on behalf of 20,000 foreign workers claiming that the pesticide caused sterility, cancer and birth defects. See Diana Jean Schemo, U.S. Pesticide Kills Foreign Fruit Pickers’ Hopes, N.Y. Times, Dec. 6, 1995, at A8.

67 For an extended discussion of this issue see Henry Shue, Exporting Hazards, 91 Ethics 579 (1981).

68 Born, supra note 4 (courts should apply a rebuttable presumption that Congress intended federal statutes to extend extraterritorially when contemporary principles of private international law would so allow).
The two most important considerations in determining the degree to which the protections of U.S. law ought to be applied extraterritorially are: (1) the degree of harm that might ensue; and (2) the degree to which other countries are able or willing to prevent this harm from taking place. If serious harm to people, the environment, or to wildlife is likely to occur, and if it appears that the receiving country will do little or nothing about this, then the United States has a moral obligation, which should form the basis for a legal obligation, to prevent this serious harm from occurring.69

The easy response, of course, is to say that it is the responsibility of these other countries to protect their own workers, or it is the responsibility of the multinational corporations who are doing business in this country; it is not the responsibility of the United States government. This is a fair criticism. However, when there are indications that these other countries, or the corporate entities themselves, are not taking protective measures, then there is a duty on the U.S. government (as well as the governments of other countries whose corporations are doing business in a similar fashion) to apply extraterritorially the same or similar protective measures that exist within our domestic sphere.

IV. CONCLUSION

Although there has been a veritable explosion in the extraterritorial application and enforcement of U.S. law,70 there has been scant reflection for how this phenomenon fits into our governmental scheme. The reason for this is that there are few domestic consequences from the extraterritorial application of U.S. law. Instead, these consequences—both positive and negative—are much more apparent in those other countries where American law is being applied. Extraterritoriality is an anathema to the United States democratic system because those who make and enforce the law (us) are not accountable to those individuals in other countries who are bound by it (individuals in other countries).

69 Perhaps the leading work in the area of transnational duties is Henry Shue's book BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY (1980). Shue argues that there are three duties that we all have: (1) the duty to avoid depriving others; (2) the duty to protect others from deprivation; and (3) the duty to aid those who have been deprived. Id. at 52.

An excellent example of a situation where there would be a duty to act would be to halt the atrocious working conditions that many foreign toy manufacturers in the Third World—making toys for children in the industrialized world—have their employees work under. Michael Pangelinan, Lost Lives to the Overseas Toy Industry: A Call for Action, 16 Loy. L.A. Int'l & Comp. L.J. 735 (1994).

70 See generally Nadelmann, supra note 25.
It has been argued that, because of this, special protective measures ought to be taken to ensure some form of representation for those who are bound by U.S. law, but who are essentially voiceless in the American political system.

To address these concerns two things must change. First, our institutions of government must begin to perform the same role in the extraterritorial context that they do domestically. What is particularly important is that the judiciary play the same kind of protective role that it has played domestically in ensuring some form of representation for the politically powerless. Secondly, the development of normative principles that would guide the extraterritorial application of U.S. law is crucial. In establishing these principles the United States should begin by recognizing some of the realities of extraterritoriality: that extraterritoriality is seldom reciprocal, but rather is based on positions of relative power; that the protections offered by American law and the American Constitution have certainly not followed the extraterritorial application and enforcement of U.S. law; and finally, that the very selective extraterritorial application of U.S. law has essentially served the interests of the United States government and its corporate entities, but not necessarily the interests of those now living under the commands of U.S. law.

Rather than living under this kind of legal system (or, more accurately, rather than having others live under it), we need far more balance in the extraterritorial application of U.S. laws than we have had to date. For one thing, the United States must create a system where the protections of U.S. law coincide with the enforcement of U.S. law. The United States must also apply its laws extraterritorially to ensure that it does not continue to exploit and harm others. Finally, the United States must recognize that at the base of any legal system in the true sense of the word is some notion of justice and some measure of fairness. These qualities are not currently reflected in the extraterritorial application of U.S. law.