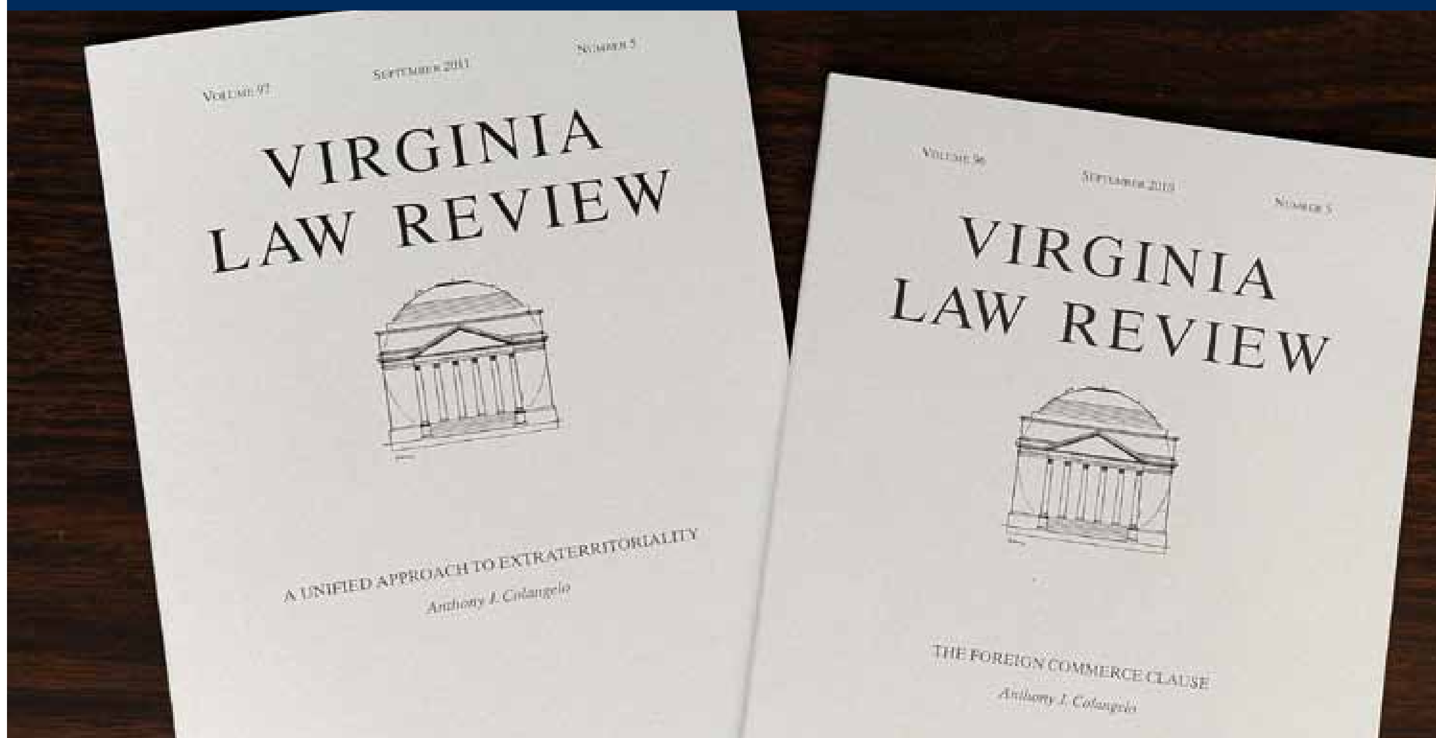
EXTRATERRITORIAL JURISDICTION AND U.S. LAW

Assistant Professor Anthony J. Colangelo recaps his recent work published in the Virginia Law Review *on the reach and application of U.S. law abroad.*



FACULTY ARTICLE

Extraterritorial jurisdiction stands uneasily at the crossroads of globalization and sovereignty. The term refers to an assertion of legal power, or jurisdiction, by a state over conduct or activity outside that state's territory. Recent years have seen the practice explode onto the legal and policy scene as one of the more complex and significant phenomena with which courts and lawmakers now must wrestle. As travel and communication media increasingly interconnect the world, state regulatory interests have enlarged to embrace a proliferating and diversified array of foreign activity. As a result, states are pushing in new and aggressive ways against limits customarily observed on the geographic reach of their laws. And the United States has been at the very forefront of this trend.

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Over the past five years or so, I've developed theories addressing this phenomenon in both international and U.S. law. In the international context, I've dealt chiefly with the highly controversial (and often highly confused) doctrine of universal jurisdiction, or the principle that any state in the world can exercise jurisdiction over certain "universal" offenses under international law wherever they occur, even absent a connection to the offense. In the U.S. context, I've concentrated principally on the power of the United States under the Constitution to project and apply U.S. law abroad. Lately I've also ventured into perennially litigated issues of statutory construction, that is, how courts should construe the reach of statutes silent on geographic scope. My two most recent articles, both in the *Virginia Law Review,*[1] together set out to give a fairly comprehensive and nuanced account of extraterritorial jurisdiction in U.S. law. And that's the topic I'll address here. I'll draw from those articles, but because space is limited I intend to leave aside much of the heavy doctrinal lifting and instead cut to the chase about when and how the United States may exercise extraterritorial jurisdiction by using a few scenarios as focal points of departure. This is not just an academic exercise; the scenarios below all pull from real cases.[2]

A brief step back is probably warranted before jumping in.

PROFESSOR ANTHONY J. COLANGELO

Three Articles Accepted into Prestigious Stanford/Yale Junior Faculty Forum

A dozen years ago Stanford Law School and Yale Law School started the Stanford/Yale Junior Faculty Forum to encourage scholarly dialogue between junior and senior members of the academy. The forum alternates each year between public and private law topics. A limited number of papers are selected on a blind basis by leading senior academics in the fields scheduled for that year.

For the second consecutive year, and for the third time in his four years of teaching at SMU Dedman School of Law, the forum selected one of Assistant Professor Anthony Colangelo's papers.

"Stanford and Yale have done a terrific job bringing together junior and senior scholars in a vibrant, rich, and friendly exchange," said Professor Colangelo. "I have learned a great deal and my scholarship has benefitted tremendously from the experience."

Anthony J. Colangelo

Assistant Professor of Law

Professor Colangelo presented his paper, *A Unified Approach to Extraterritoriality*, at Stanford Law School in June. The focus of this year's forum was private law and dispute resolution. His paper was selected under the Private International Law category. Professor Colangelo's previous papers were selected in Public International Law and Constitutional Law.

In the paper he presented this year, Professor Colangelo uses the source of lawmaking authority behind a statute to discern the proper canon for construing that statute's geographic reach and to evaluate whether application of the statute violates due process. He argues that this approach holds important implications for a variety of high-stakes issues with which courts are presently wrestling, including: the proper role of the presumption against extraterritorial application of U.S. law, whether international law or federal common law should supply the rule of decision in Alien Tort Statute cases, the scope of U.S. jurisdiction over terrorism offenses, and the viability of due process objections to the application of U.S. law abroad.

Extraterritorial jurisdiction cases pose major legal and policy issues triggering serious foreign relations, separation of powers, and individual rights questions. They also tend to be novel. Which means courts are actively searching for answers without much precedent to go on, sometimes turning out extravagant reasoning riddled with loose language that portends absurdities down the line. My scholarly aim has been not only to offer a coherent way to conceptualize and think about these issues, but also to supply practical guidance to litigants and courts busy contesting and defining the cutting edge of extraterritoriality. Boiled down to its most basic, the common element tying together many of my arguments is the simple observation that when the United States seeks to apply international law to foreign conduct (by enacting a statute; I'm not talking about courts applying international law on their own) there is greater potential to exercise extraterritorial jurisdiction than if the United States seeks to apply a uniquely U.S. norm. This is so as a matter of both constitutional authority and statutory construction. Indeed, international law might even expand U.S. jurisdiction beyond where it otherwise would not reach under conventional constitutional and statutory analyses. Let's explore how.

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THE PLANE-BOMBER

A Pakistani man plants and explodes a bomb on a Filipino commercial airplane flying from the Philippines to Japan, killing a Japanese citizen and injuring others. No Americans are on board the flight. If the United States gains custody of the man at some later point, can we prosecute him for the plane bombing?

Most readers probably would want the United States to prosecute plane-bombers in U.S. custody. Yet a couple of questions immediately arise. What in the Constitution authorizes Congress to project U.S. law to activity halfway around the world having no overt link to the United States? And, does the application of U.S. law to the defendant for acts entirely outside the United States violate due process?

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FACULTY ARTICLE

Constitutional Authority

Taking up the question of constitutional authority first—that is, what in the Constitution gives Congress authority to regulate this foreign activity—there are a few options. One is the Foreign Commerce Clause, which grants Congress power "[t]o regulate Commerce with foreign Nations."[3] This might seem like an obvious choice. Airplanes are clearly instrumentalities of commerce, and foreign airplanes are clearly instrumentalities of foreign commerce. It therefore stands to reason that Congress can regulate them under the Foreign Commerce Clause. Indeed this would appear to be a very easy case if Congress had the same power over foreign commerce under the Foreign Commerce Clause that it has over domestic commerce under the Interstate Commerce Clause, which gives Congress extensive power to regulate commerce "among the several States."[4] According to the Supreme Court, this interstate power is quite broad: it authorizes Congress to create comprehensive national regulatory schemes among the states and, beefed up by the Necessary and Proper Clause, even to reach purely local conduct that threatens to undermine those schemes.

The problem with reaching the foreign plane-bomber is that the Foreign Commerce Clause doesn't give Congress an equivalently large power to regulate commerce "among foreign Nations." Rather, it grants only the power to regulate commerce "with" them. Accordingly, the commerce that is the subject of federal regulation must be not only "with" foreign nations, but also "with" the United States. It also follows that Congress cannot create comprehensive global regulatory schemes over international markets or prevent races to the bottom among the world's nations the same way it can create comprehensive national regulatory schemes over domestic markets and prevent races to the bottom among the states. Because Congress lacks primary authority to create such global schemes, it cannot claim a derivative authority to reach local foreign conduct that threatens to undercut those schemes the same way it can reach local intrastate conduct to effectuate regulation "among the several States." Keep in mind too that all of the other major reasons typically advanced for Congress's broad regulatory powers over commerce at home are inapposite when it comes to regulating commerce abroad: the Supremacy Clause covers only "the Land" of the United States, not the planet, and addresses specifically the states; unlike the states, foreign nations never ceded a portion of sovereignty to the U.S. government; and unlike the states, political mechanisms in the federal lawmaking process do not protect foreign nations from overencroachment.

But it is really the requirement that commerce "with" foreign nations also be "with" the United States that erects barriers to extending U.S. law to the wholly foreign plane bombing. Long ago, Chief Justice John Marshall famously announced that the "enumeration [of the power to regulate commerce 'among' the several states] presupposes something not enumerated": namely, the internal commerce of a state.[5] The Foreign Commerce Clause also presupposes something not enumerated: namely, commerce that is not "with" both foreign nations and the United States. That is, it presupposes the exclusion of commerce internal to foreign nations and "among foreign Nations" unconnected with the United States. If Congress's authority is deemed to reach all foreign commerce around the world, it excludes nothing, gutting the limits inherent in the Clause. On this reasoning, the plane-bomber looks out of reach.

Yet one might object here based on precedent; after all, the Supreme Court has said that Congress's foreign commerce power is "greater" than its interstate commerce power, the reason being that there are no federalism concerns when Congress regulates commerce with foreign nations.[6] To be sure, the Court has pronounced Congress's power over foreign commerce "exclusive and plenary."[7] Lower courts have seized upon this language to declare that Congress's power over commerce inside foreign nations is also "greater," and even "exclusive and plenary."[8] One might then, agreeing with those lower courts, argue that Congress can reach any foreign commerce, anywhere.

But that would misread the Supreme Court case law. All of the Court's statements indicating that Congress has greater power under the Foreign Commerce Clause relate to federal power vis-à-vis the states, not foreign nations. The reason for this greater power is to establish national uniformity in U.S. commercial dealings with other nations by representing the United States as a single economic unit. And that was, in fact, the original intent behind the Clause. On the other hand, these same cases suggest that Congress has greater control over foreign commerce in the United States precisely because the federal government has less control over foreign commerce in foreign nations. Reliance on these inapposite Supreme Court statements to justify broad power to regulate inside foreign nations therefore looks sloppy at best, and may even contradict the very decisions from which the statements were cherry-picked.

Fortunately, we don't need the Foreign

Commerce Clause to prosecute the plane-bomber. Other sources of lawmaking authority clearly authorize Congress to reach this foreign conduct, even if it has no connection "with" the United States. These bases essentially give Congress power to enact laws that implement international law. For instance, the Necessary and Proper Clause gives Congress power to implement treaties.[9] And the so-called Offences Clause—which grants Congress power to "define and punish . . . Offences against the Law of Nations"[10] —gives Congress power to implement customary international law. Customary international law can be a somewhat tricky concept; for now it is enough to know that it arises out of the general practice of states accompanied by a sense of legal obligation, or what international lawyers call *opinio juris.*

As to the plane-bomber, a treaty—the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation—clearly prohibits his conduct, the United States is a party to the treaty, and Congress has implemented this prohibition in the U.S. code. Moreover, both the treaty and the U.S. implementing legislation provide for jurisdiction based on custody of the accused. In short, the Constitution plainly authorizes the United States to reach this foreign activity by virtue of international law.

Due Process

The next question is whether application of U.S. law violates the defendant's due process rights. This is a different constitutional inquiry than the question of authorization. While the discussion until now has dealt with Congress's power to project U.S. law to the defendant's activity in the first instance, this inquiry asks, even if Congress has the power to extend U.S. law, does the application of U.S. law nonetheless violate the defendant's rights?

The next question is whether application of U.S. law violates the defendant's due process rights.

Courts have uniformly held that the application of U.S. law abroad cannot be arbitrary or fundamentally unfair under the Due Process Clause. And a leading test in the Courts of Appeal requires a U.S. connection, or "nexus" as the courts are fond of saying, to the foreign activity for the United States to regulate it.

This test didn't materialize out of nowhere. It basically replicates in the international context under the Fifth Amendment the governing test in the interstate context under the Fourteenth Amendment. In the interstate context, the Supreme Court has held "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[11] On the face of it, the Due Process Clause and the nexus requirement in particular appear to interpose a fairly solid shield against the application of U.S. law to the plane-bomber on the facts presented. Again, he is a Pakistani national, the aircraft was Filipino traveling from the Philippines to Japan, and there weren't even any Americans on board. On these facts, a U.S. nexus seems conspicuously absent.

Yet perhaps there is a way to move the due process shield aside by shifting the foundation upon which it is built. In the interstate context, contacts are required for a U.S. state constitutionally to apply its law in order to protect both the sovereignty of other U.S. states and the defendant's reasonable expectations—specifically, to ensure that the defendant was sufficiently on notice of the law applicable to his conduct when he engaged in it. The concern about other states stems more from the Full Faith and Credit Clause than the Due Process Clause, and accordingly does not constrain the federal government vis-à-vis foreign nations. So that concern largely drops out. As for reasonable expectations, no nexus is needed. If the U.S. law applies and enforces an international law that already prohibits the defendant's conduct wherever it occurs, he can't claim lack of notice of the applicable law and due process is satisfied. It just so happens that plane bombing falls into this category.

A final point of clarification on the due process issue: the analysis above relates only to the choice of law, not the choice of forum. A defendant, especially a civil defendant, still may have an objection that hailing him into a U.S. forum as a matter of personal jurisdiction violates his due process rights (for better or worse, on the criminal side physical custody of the accused generally moots this challenge). That is a separate question, governed by separate doctrines of jurisdiction, and I put it aside for purposes of this article.

"ANY SECURITY" & PIRACY BY "ANY PERSON"

Another persistently nagging and exceedingly vexing issue courts routinely confront in extraterritoriality cases involves statutes that simply don't say where they apply. For instance, a statute might prohibit fraud in relation to "the purchase or sale of . . . any security," or it might just apply to "any seaman" or even "any person." The question is whether this language ought to be taken at face value (a plain meaning rule suggests it should) to apply to literally any purchase or sale of any security, or any person, anywhere. Faced with this remarkably frequently litigated issue, courts have had to divine the geographic ambit of statutory coverage and variously have looked to whether some part of the activity takes place in the United States, whether activity abroad has an effect in the United States, whether activity abroad involves U.S. citizens, and so forth. The list goes on, and if nothing else it reveals that this

inquiry invariably involves a judicial judgment call about what connection with the United States is strong enough to warrant the application of U.S. law.

Statutory Construction

The Supreme Court recently, and heavily, weighed in on this question in relation to the Securities Exchange Act, reinvigorating the traditional "presumption against extraterritoriality" and limiting the Act's coverage to purchases and sales that take place on national exchanges or U.S. soil. According to the Court, "when a statute gives no clear indication of an extraterritorial application, it has none."[12] The quoted language suggests that the Court intends this reinvigorated presumption to apply broadly to other statutes silent on geographic scope, not just the Exchange Act, and that is indeed how lower courts have read it.

The presumption against extraterritoriality has been around for a long time, and is fundamentally about avoiding unintended discord with foreign nations. Note the separation of powers angle here, captured by the word "unintended." The canon is not worried about *all* potential discord with foreign nations. Sometimes it may well be in the United States's overriding national interest to project U.S. law abroad even if doing so sparks discord with other nations. Rather, the canon is designed only to guard against the judiciary making this call, as opposed to the political branches. In other words, if we're going to project U.S. law inside foreign nations and thereby create foreign relations frictions, it should be the political branches, not the courts, that do so.

And this made complete sense when jurisdictional rules were strongly territorial in nature. If the world is divided up into mutually exclusive units of jurisdiction, anytime one state extends jurisdiction into the territory of another, it could be viewed as jurisdictional overreaching. What's more, that extraterritorial extension of U.S. law could conflict with foreign law inside foreign territory. So there are a couple of sources of potential friction: the jurisdictional overreaching itself, and conflicts of law, specifically U.S. law conflicting with foreign law inside foreign territory. A presumption against extraterritoriality is obviously going to avoid these sources of potential friction. And I think it does, at least when it comes to projecting abroad uniquely U.S. laws like the securities laws.

But what about when the United States applies international law? In my view, the answer here changes. Concerns about jurisdictional overreaching and conflicts of law largely disappear or are substantially minimized. Unlike the old territorial rules of jurisdiction, modern international law has evolved to authorize, encourage, and sometimes even obligate extraterritoriality. Furthermore, the law being applied is not a uniquely U.S. law, but a U.S. law implementing an international law also operative in the foreign territory, thereby substantially reducing or altogether eliminating true conflicts of law.

In fact, sometimes a presumption against extraterritoriality may perversely achieve what it was designed to avoid—by stripping the United States of extraterritorial jurisdiction where international law might now direct or even require the United States to exercise such jurisdiction. Suppose Congress enacts a statute implementing an international norm that carries with it the encouragement or obligation to exercise extraterritorial jurisdiction. If courts apply the presumption to that statute, it will have accomplished exactly what it was designed to avoid by *blocking* fulfillment of U.S. international legal obligations, and consequently could create discord with foreign nations. Piracy is a good example. Or torture. Or plane bombing, for that matter. International law encourages and in some situations obliges states to exercise extraterritorial jurisdiction over these offenses. Yet if courts were to cramp U.S. jurisdiction through the presumption against extraterritoriality, the United States would fail to carry out that responsibility. The better view, to my mind, is to construe the geographic scope of statutes that implement substantive rules of international law according to jurisdictional rules of international law. This way of construing statutes is captured by another age-old tool of construction, the *Charming Betsy* canon, under which courts construe ambiguous statutes in conformity with international law.

In conclusion, the practice of extraterritorial jurisdiction promises only to grow in coming years. And as the cases show, the United States promises to remain at the forefront of this important and controversial trend. Now more than ever, lawyers, courts, and policymakers need a sophisticated account of this phenomenon and the high-stakes struggle of interests it implicates: of governments to apply their laws, of plaintiffs to see justice done, of defendants not to be unfairly subjected to laws of which they may have had no notice, and, not least, of the international system itself to avoid destabilization through jurisdictional overreaching by some members to the affront and provocation of others. This is the larger puzzle in both U.S. and international law that will occupy me going forward. ▪

[1] Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 Va. L. Rev. 949 (2010); Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 Va. L. Rev. 1019 (2011).

[2] Naturally, I've had to simplify some of the facts to facilitate cleaner analysis in limited space. For more extensive and nuanced analysis, *see id.*

[3] U.S. Const. art. I, § 8, cl. 3.

[4] *Id.*

[5] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194–95 (1824).

[6] Japan Line, Ltd. v. County of L.A., 441 U.S. 434, 448 (1979).

[7] Bd. of Trustees of Univ. of Ill. v. United States, 289 U.S. 48, 56 (1933).

[8] United States v. Clark, 435 F.3d 1100, 1109 (9th Cir. 2006).

[9] U.S. Const. art. I, § 8, cl. 18.

[10] *Id.* at art. I, § 8, cl. 10.

[11] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981)).

[12] Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869, 2878 (2010).