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NOTE

DUE PROCESS LIMITATIONS ON EXTRATERRITORIAL TORT LEGISLATION

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INTRODUCTION

The core concern of legislative jurisdiction is the extent to which a sovereign may create or affect legal rights through the lawmaking process.[1] Because a state undoubtedly has sovereign authority within its geographic borders,[2] questions of legislative jurisdiction arise pri-

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1 *See* Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1587 (1978) (defining legislative jurisdiction as "the power of a state to apply its law to create or affect legal interests"). Judicial jurisdiction, a related concept, is concerned with the competency of a particular court to entertain a particular cause of action. *See* KEVIN M. CLERMONT, CIVIL PROCEDURE: TERRITORIAL JURISDICTION AND VENUE 2 (1999). A party may prevail in court only when both legislative and judicial jurisdiction are satisfied; the cause of action must be valid in that it is created by duly enacted legislation, and the court must be competent to adjudicate that cause of action. *Cf.* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813–14 (1993) (Scalia, J., dissenting) (distinguishing judicial jurisdiction, referred to as "adjudicative jurisdiction," from legislative jurisdiction, called "jurisdiction to prescribe," and noting that a plaintiff's claim may be barred if either jurisdictional barrier is present). For the sake of consistency, this Note refers to these concepts as "legislative jurisdiction" and "judicial jurisdiction," respectively.

2 *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 42 cmt. a (1934) ("Within the territory of a state, unless the state is limited by a constitutional restriction applying to it and one or more other states . . . the jurisdiction of the state is absolute . . . .").

marily when a state seeks to apply its law to foreign conduct or actors.[3] Industrialization and globalization have led to countless scenarios in which these questions arise. For example, the development of electronic commerce has prompted debate concerning the ability of a state to regulate foreign actors whose use of electronic media has in-state effects.[4] It is currently unclear just how far a state's reach may extend when enacting legislation meant to protect its citizenry.[5]

Judicial jurisdiction, a related concept,[6] similarly has had to respond to social and commercial globalization.[7] One might expect that because both judicial and legislative jurisdiction draw upon similar constitutional principles, they developed in tandem in response to national and global integration. This is not the case, however. The modifying effect that *International Shoe Co. v. Washington*[8] and its progeny had on *Pennoyer v. Neff*'s[9] strict adherence to geographical boundaries as the outer limits of judicial jurisdiction is a foundation of many Civil Procedure courses;[10] it is also the subject of much scholarship and debate. Legislative jurisdiction, on the other hand, has attracted significantly less attention from courts and academics.[11] While not all issues surrounding the scope of judicial jurisdiction are settled, liti-

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3 *See* Reese, *supra* note 1, at 1587.

4 *See, e.g.*, Tapio Puurunen, *The Legislative Jurisdiction of States over Transactions in International Electronic Commerce*, 18 J. MARSHALL J. COMPUTER & INFO. L. 689 (2000) (discussing issues arising from national legislation that regulates e-commerce and exploring possible solutions to the resulting jurisdictional conflicts).

5 For an extended discussion of this lack of clarity and the confusion it has caused, see *infra* Part III.

6 *See supra* note 1.

7 *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 309 (1980) (Brennan, J., dissenting) ("The model of society on which the *International Shoe* Court based its opinion is no longer accurate. Business people, no matter how local their businesses, cannot assume that goods remain in the business' locality. Customers and goods can be anywhere else in the country usually in a matter of hours and always in a matter of very few days.").

8 326 U.S. 310 (1945).

9 95 U.S. 714 (1878).

10 To summarize, the Supreme Court in *International Shoe* read the Due Process Clause to require an inquiry into the reasonableness of a particular exercise of judicial jurisdiction; prior to *International Shoe*, judicial jurisdiction had been based solely on a power inquiry under which a state's power flowed from its geographical borders. *See* CLERMONT, *supra* note 1, at 17–19.

11 *See* Reese, *supra* note 1, at 1587 ("While almost a plethora of cases and of secondary writings have been directed to judicial jurisdiction, the field of legislative jurisdiction nonetheless remains relatively unexplored."). Since the publication of Reese's article in 1978, there has been little exploratory or clarifying literature on legislative jurisdiction. Furthermore, what jurisprudence and scholarship has been written subsequent to Reese's article has not been consistent. *See, e.g.*, Allen Rostron, *The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law*, 2003 MICH. ST. L. REV. 115, 116 (arguing that the latest Supreme Court jurisprudence regarding legislative jurisdiction is a misinterpretation of earlier precedent, conflicts with the legal trends of the past century, and "cannot be correct without rendering unconstitutional a vast number of the products liability and other tort claims that courts hear every day").

gants may at least consult a wealth of precedent to frame arguments and derive guiding principles. States unsure of the limits of their legislative jurisdiction, however, have much less guidance upon which to operate.

The fundamental question left to states then is this: To what extent may a state enact legislation to protect its citizenry against foreign actors whose out-of-state conduct has in-state effects? Should the due process principles underlying judicial jurisdiction be extended by analogy to legislative jurisdiction, so that a state may enact extraterritorial legislation if there is a sufficient nexus between the legislating state and the legislation's target? If due process principles are so extended to legislative jurisdiction, would they nevertheless present a broader limit on legislative jurisdiction than they would on judicial jurisdiction?

In addressing these questions, it will be helpful to consider the following example taken from a recent case in the District of Columbia.[12] A consortium of gun manufacturers challenged the constitutionality of a D.C. statute that rendered the manufacturers vulnerable to significant liability.[13] The statute, known as the Strict Liability Act (SLA),[14] granted D.C. residents who were victims of semiautomatic-gun violence a strict liability right of action against the guns' manufacturers in D.C. courts.[15] Importantly, since the District of Columbia expressly prohibited the manufacture or sale (absent a valid registration certificate) of firearms within its borders while the statute was in force, all potential defendants and their conduct were necessarily "foreign."[16]

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12 Dist. of Columbia v. Beretta, U.S.A. Corp., 872 A.2d 633 (D.C. 2005) (en banc), *cert. denied*, 126 S. Ct. 399 (2005). The District of Columbia is not a state, but the District's legislative powers equal those of the various states. The Constitution grants Congress the power to "exercise exclusive Legislation" over the District of Columbia. U.S. CONST. art. I, § 8, cl. 17. However, in 1973 Congress delegated the bulk of its authority to exercise legislative jurisdiction over the District to the District itself when it passed the District of Columbia Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. CODE §§ 1-201–207.72 (2001)). This grant of authority was "subject to all the restrictions and limitations imposed upon the states" by Article I, §10 of the Constitution. D.C. CODE § 1-203.02.

13 *Beretta*, 872 A.2d at 651.

14 Officially, the statute is called the District of Columbia Assault Weapons Manufacturing Strict Liability Act, D.C. CODE §§ 7-2551.01–.03.

15 *Id.* § 7-2551.02. The District of Columbia itself is also a viable plaintiff and can seek subrogated damages stemming from the costs incurred by responding to and treating victims of gun violence. *See Beretta*, 872 A.2d at 653 (citing D.C. CODE § 4-602(a), which grants the District "an independent, direct cause of action against [a] third party for the unreimbursed value or cost of . . . health-care assistance" whenever the District has "provide[d] health-care assistance to a beneficiary who has suffered an injury or illness under circumstances creating liability in [that] third party").

16 *See* D.C. CODE §§ 7-2502.01–.02 (prohibiting the sale of any firearm within the District of Columbia to any person or organization unless the person or organization holds a

The gun manufacturers challenged the constitutionality of the SLA on several grounds. Fundamentally, they argued that the SLA was an impermissible attempt by the District of Columbia to project its policy choices onto the national marketplace in violation of the dormant Commerce Clause and the Due Process Clause of the U.S. Constitution.[17] Although both clauses limit a state's ability to enact extraterritorial legislation, this Note will focus on the Due Process Clause for two main reasons. First, the dormant Commerce Clause is a narrower restriction on legislative jurisdiction because it is concerned only with legislation that has commercial consequences.[18] The Due Process Clause, on the other hand, presents a limiting principle for all extraterritorial legislation.[19] Second, an analytical framework for dormant Commerce Clause challenges already exists.[20]

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valid registration certificate); *id.* § 7-2504.01(a) (prohibiting the manufacture of any firearm within the District of Columbia). The District of Columbia allows limited sales to and possession by individuals such as law enforcement officers and military officials; weapons so sold are exempted from the SLA. *See id.* §§ 7-2502.01–.02. The principles governing legislative jurisdiction apply similarly to both federal authority over international actors and state authority over actors from other states and overseas. Accordingly, this Note will use "foreign" generally to refer to the citizens or corporations of a sister state, although the due process principles evaluated in this Note could be applied in the international context as well. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 cmt. d (1987) ("Unless otherwise indicated, 'international law' as used in this Restatement is law that applies to states and international (intergovernmental) organizations generally."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 10 (1971) ("The rules in the Restatement of this Subject apply to cases with elements in one or more States of the United States and are generally applicable to cases with elements in one or more foreign nations."). There are instances in which international choice of law questions will be treated differently than interstate choice of law questions, however. *See id.* For one such example, see Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 984–85 (2002) (contrasting the ability of states versus nations to criminally prosecute citizens for extraterritorial acts, noting that "[f]ederal relations to other nations are simply not the same as relations between states that are bound by the comity imposed by the constitution").

17 *See* Petition for Writ of Certiorari at 7–9, Beretta, U.S.A. Corp. v. Dist. of Columbia, 126 S. Ct. 399 (2005) (mem.) (No. 05-118).

18 The dormant Commerce Clause limits "the power of a state to legislate in areas of interstate commerce when Congress has remained silent." Peter C. Felmly, Comment, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467, 468 (2002).

19 This is not necessarily the case; it is, however, one of this Note's central arguments. The Due Process Clause of the Fourteenth Amendment literally requires only that states not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1, cl. 2. The clause has been read more expansively in the context of judicial jurisdiction, however, to address both individual fairness and federalism concerns. *See infra* note 43. If the clause is constructed similarly in the contexts of both judicial and legislative jurisdiction, as this Note argues it should, it would place a broader limit on states' legislative jurisdiction because it would encompass all federalism concerns, not just those related to interstate commerce. For a detailed argument advancing the Due Process Clause as the most relevant constitutional limit on legislative jurisdiction, see *infra* Part I.A.

20 *See, e.g.*, Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 578 (1986) ("This Court has adopted what amounts to a two-tiered approach to ana-

Furthermore, this Note is limited in scope to the legislative jurisdiction issue posed in *Beretta*—specifically, to what extent may state tort legislation target actors who performed conduct in sister states. Issues concerning power to prescribe legislation having international extraterritorial impact, while relevant and ripe, are beyond the scope of this Note.

Part I of this Note provides a brief overview of legislative jurisdiction, discussing one scholar's attempt to formulate a coherent balancing approach to analyzing extraterritorial legislation and describing recent Supreme Court precedent that has been read as imposing new limits on extraterritorial tort legislation. Part II discusses the merits of *District of Columbia v. Beretta, U.S.A. Corp.* to illustrate how litigants have employed recent Supreme Court precedent to argue against interest balancing and in favor of strict territorial limits on legislative jurisdiction. Part III highlights the negative consequences arising from the present confusion over legislative jurisdiction and introduces possible solutions to the problem. Finally, Part III advocates the adoption of an interest-balancing framework for Due Process challenges to legislative jurisdiction while at the same time recognizing the need for authoritative principles to guide interest-balancing.

Before proceeding, it is important to note that the Supreme Court denied the gun manufacturers' petition for certiorari in October 2005[21] likely because of pending federal legislation specifically targeting the SLA.[22] Indeed, Congress passed the Protection of Lawful Commerce in Arms Act the month the Court denied certiorari.[23] Although it is unlikely the Court will weigh in on the constitutional questions posed by *Beretta* in the immediate future, the case continues to be an important illustration of the legislative jurisdiction questions

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lyzing state economic regulation under the Commerce Clause. When a statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." (internal citations omitted)). As this Note argues *infra* Part I.B, recent Supreme Court cases have caused confusion over what role the Due Process Clause plays in legislative jurisdiction and, correspondingly, how due process challenges to legislative jurisdiction should be analyzed.

21 Beretta, U.S.A. Corp. v. Dist. of Columbia, 126 S. Ct. 399 (2005) (mem.).

22 *See, e.g.*, Lyle Denniston, Court Puts Off Hamdan Appeal, SCOTUSblog, Oct. 3, 2005, http://www.scotusblog.com/movabletype/archives/2005/10/02-week ("The Court refused to defer acting on [*Beretta*] while Congress considers [a bill that overturns the D.C. court's decision and bars sucb lawsuits].").

23 *See* Protection of Lawful Commerce in Arms Act, 15 U.S.C.A. §§ 7901–7903 (2006). In addition to prohibiting all future actions against gun manufacturers for harm inflicted by criminal third parties, *see id.* § 7902(a), Congress dismissed all pending actions, *see id.* § 7902(b).

explored in this Note—questions that affect product manufacturers in a variety of industries.[24]

I
OVERVIEW OF LEGISLATIVE JURISDICTION

A. Legislative Jurisdiction Defined: A Theoretical Background and the Reese Framework

The scope of legislative jurisdiction has ebbed and flowed since the nineteenth century perhaps due to courts' changing beliefs about state sovereignty and the fact-specific content of the legislation at issue in various cases.[25] Nevertheless, one may derive certain first-order principles from the sometimes conflicting jurisprudence and scholarship in this area. Fundamentally, legislative jurisdiction refers to "the authority of a state to make its laws applicable to particular conduct, relationships, or status."[26] Furthermore, "unless a state possesses legislative jurisdiction over the issue in question, its law may not properly be selected by choice of law analysis."[27]

Over which issues, then, will states possess legislative jurisdiction? There is no doubt that a state possesses legislative jurisdiction over purely intrastate affairs. A state "can exercise legislative jurisdiction with respect to all persons and things subject to its jurisdiction,"[28] and "[w]ithin the territory of a state, unless the state is limited by a constitutional restriction applying to it and one or more other states, as the Constitution of the United States, the jurisdiction of the state is abso-

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24 *See, e.g.*, Petition for Writ of Certiorari, *supra* note 17, at 7 ("This case presents important and recurring questions of constitutional law that are not limited to the firearms context, but apply to all product manufacturers engaged in interstate commerce."); *see also id.* at 18 (arguing that legislation similar to the SLA could affect automobile manufacturers).

25 *Compare* BMW of N. Am., Inc., v. Gore, 517 U.S. 559, 568–75 (1996) (imposing a flat restriction on states' ability to award punitive damages on extraterritorial conduct), *with* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164–70 (2004) (adopting a balancing test for extraterritorial application of antitrust law).

26 GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 491 (3d ed. 1996) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987), which defines legislative jurisdiction as the authority of a state to "make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court").

27 BORN, *supra* note 26, at 491 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 cmt. b (1971), which states that "[a]t least two things are implied when the local law of a state is applied to create or affect local interests. The first is that the state has jurisdiction to apply its local law. The second may be either that the state is the state of the applicable law under choice-of-law principles, or, when the applicability of a statute of the forum is the point in issue, that a proper construction of the statute leads to its application in the given case").

28 RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 62 (1934).

lute."[29] Persuasive authority suggests that a state may also exercise legislative jurisdiction over foreign conduct that has consequences within its boundaries,[30] although a state exercising jurisdiction on this ground would be limited by applicable constitutional restrictions.[31] The extent to which the Supreme Court will accept such effects-based jurisdiction for extraterritorial tort legislation and the constitutional provisions on which the Court might rely in doing so are the fundamental questions posed by this Note.

The precise constitutional source of restrictions on legislative jurisdiction is subject to debate. Recent challenges to states' extraterritorial legislation, including *Beretta*,[32] cite the dormant Commerce Clause as a constitutional limit on legislative jurisdiction.[33] Other arguments advance the Full Faith and Credit Clause as the true constitutional limit on legislative jurisdiction.[34] This Note argues, in accord with several scholars who have treated the subject,[35] that while the dormant Commerce Clause and the Full Faith and Credit Clause are relevant to the scope of legislative jurisdiction, the Due Process Clause most completely defines its boundaries.

The dormant Commerce Clause certainly restricts a state's legislative authority, but its restrictions target only the means by which a state's legislation regulates conduct and not the conduct itself. In other words, legislation that violates the dormant Commerce Clause does not necessarily exceed a state's legislative jurisdiction; the state may be able to enact alternative legislation that achieves the same result without violating the dormant Commerce Clause.[36] On the other hand, a state may never enact legislation targeting particular conduct

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29 *Id.* § 42 cmt. a.

30 *See id.* § 65 cmt. a ("A state may impose a liability upon any person whose conduct produces consequences within the state. Thus, one who does an act in one state which causes injury to a person in another state is subject to the legislative jurisdiction of the second state for harm so caused to the person in that state. Under the rule stated in § 64, he is also subject to the legislative jurisdiction of the state in which his acts are performed.").

31 *See id.* § 42 cmt. a.

32 872 A.2d 633 (D.C. 2005) (en banc), *cert. denied*, 126 S. Ct. 399 (2005).

33 *See* Petition for Writ of Certiorari, *supra* note 17, at 9.

34 *See, e.g.*, Frederic L. Kirgis, Jr., *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94 (1976); James A. Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185 (1976) (arguing that because the Full Faith and Credit Clause "incorporates established concepts of mutual respect among sovereigns," it "provides a better analytical aid than reference to due process concepts" in understanding leading cases in the area).

35 *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 (1971); Reese, *supra* note 1, at 1587–91.

36 *See* Bradley W. Joondeph, *Rethinking the Role of the Dormant Commerce Clause in State Tax Jurisdiction*, 24 VA. TAX. REV. 109, 128–29, 131–32 (2004) (arguing that extraterritoriality itself does not offend the Commerce Clause).

if the state and the targeted conduct lack sufficient nexus.[37] Accordingly, the dormant Commerce Clause does not sufficiently address all of the fairness concerns relevant to legislative jurisdiction.

While the dormant Commerce Clause does not restrict all exercises of legislative jurisdiction, the Full Faith and Credit Clause might thrust too broadly when it comes to restricting legislative jurisdiction. Professor Willis Reese argued that the Full Faith and Credit Clause is an affirmative command that cannot be the governing principle of legislative jurisdiction because if it were it would "obscure[ ] two other roles that full faith and credit is properly called upon to play."[38] To be sure, the Due Process Clause does work beyond limiting legislative jurisdiction; however, the Due Process Clause's other imperatives are similarly negative limitations on the extent of state power. The Full Faith and Credit Clause, on the other hand, provides an affirmative command that more appropriately informs a choice of law inquiry. Accordingly, a Due Process analysis might be most appropriate to determine which states' laws constitutionally could control a matter, while a Full Faith and Credit analysis might be most appropriate to determine which of those laws actually will control the matter.

That due process reaches both fairness and federalism concerns is not a logical necessity. The text of the Due Process Clause seems only to be concerned with protecting the life, liberty, and property of individuals; it does not mention safeguarding state sovereignty.[39] Yet courts have read the Clause more expansively in the context of judicial jurisdiction,[40] and Reese contends that there is no reason to read

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37 *See* Reese, *supra* note 1, at 1591–94 (noting that there is no precise formulation of a nexus requirement in the legislative jurisdiction context akin to *International Shoe*'s "minimum contacts" standard for nexus inquiries in the judicial jurisdiction context and suggesting that nexus inquiries in the legislative context should encompass an analysis of the legislating state's interests, sister states' interests, and federal system values); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402–403 (1987) (offering a list of eight factors relevant to determining whether a sufficient nexus exists between a legislating state and the legislation's targeted conduct); *infra* notes 42–56 and accompanying text (providing more detail on Reese's articulation of the fairness concerns essential to nexus in the legislative jurisdiction context).

38 *Id.* at 1590. These two additional roles are (1) to limit a state's ability to close its courts' doors to claims arising under the law of a sister state, and (2) to compel the application of a particular state's law when due process would allow for the application of the law of any one of several states. *See id.*; *see also* Martin, *supra* note 34 (advancing the Full Faith and Credit Clause as the controlling constitutional provision). For a more complete treatment of the role that the Full Faith and Credit Clause plays in legislative jurisdiction jurisprudence, see BORN, *supra* note 26, at 525–37.

39 *See* Reese, *supra* note 1, at 1587 ("On its face, due process would appear to be concerned only with the protection of the life, liberty, and property of individuals rather than with the interests of states.").

40 *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980) (noting that "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment" (citation omitted)); Hanson v. Denckla, 357 U.S. 235, 251 (1958) (finding due process restrictions "a

the language more narrowly when considering its application to legislative jurisdiction.[41] Reese thus argues that the Due Process Clause serves a two-fold purpose in limiting legislative jurisdiction analogous to the Clause's purpose in limiting judicial jurisdiction: to protect individuals from being unfairly subjected to laws and to further interstate values.[42]

The first requirement of Reese's two-part test—that application of a state's law be fair to the parties involved—is "clearly comprehended within the literal language of the due process clause,"[43] although Reese finds subtle distinctions between the fairness inquiry in the judicial and the legislative settings.[44] While the fairness inquiry in the judicial setting focuses on convenience to the parties and the economic burden imposed by litigating in a particular forum, fairness concerns in the legislative context are those of "reliance and expectation, whether a party has acted in justifiable reliance upon the application of a given law or at least with the reasonable expectation that his contract or other transaction would be held valid and effective and would not be stricken down by the application of some unforeseen law."[45]

Reese offers various scenarios to illustrate a one-dimensional spectrum of fairness concerns.[46] At one end of the spectrum, there is the patently unfair attempt by a state to assert its legislative authority over an individual for conduct that took place in a sister state, was required by the sister state, and for which the individual could not reasonably foresee any effects outside of the sister state.[47] A scenario under which extraterritorial application of a state's laws is logically fairer is a state imposing its law upon a foreign citizen for conduct that occurred in a sister state, was consciously designed to be lawful in the state where it occurred but nevertheless had foreseeable negative consequences in the legislating state.[48] Reese suggests that subjecting the foreign citizen to the differing laws of another state might "disappoint [the foreign citizen's] expectations" given his conscious effort to act lawfully in the state where the conduct occurred, but the fairness con-

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consequence of territorial limitations on the power of the respective States" when applying the "minimal contacts" test). *But see* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) ("[T]he Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.").

41 Reese, *supra* note 1, at 1587–89.

42 *See id.* at 1589 (defining "interstate system values" as values "that work for the good of the interstate or international systems").

43 *Id.* at 1592–93.

44 *See id.* at 1595.

45 *Id.*

46 *See id.*

47 *See id.* (stating that "[s]o far as is known, there has been no case of this sort").

48 *See id.* at 1595–96.

cerns at the heart of due process would still exist if the foreign citizen had intended or should have foreseen that his conduct would have effects outside the state in which he was acting.[49]

The second step of Reese's test balances the interests of all states who either are parties to or otherwise have a stake in the litigation. The purpose of this inquiry is to prevent one state's law from unduly impinging upon another state's interests.[50] Addressing this federalism step in turn involves a two-fold analysis.[51] First, one must ask whether applying the law of the state in question furthers any of that state's interests or policies. Second, to what extent would applying that state's laws impinge upon the interests and policies of another state?[52]

Whereas the fairness inquiry consisted of one axis ranging from unfair to fair, Professor Reese visualizes the federalism inquiry as a two-dimensional chart with an X and a Y axis, with one axis representing the interest of the legislating state and the other representing the level of impingement upon the interests of other states.[53] At one extreme, the legislating state has a high interest in applying its law, and the law's application would not adversely affect any other states.[54] At the opposite extreme, a state has no interest in applying its law, while the law's application would severely impinge other states' interests.[55] In between the extremes lie realistic situations wherein the legislating state and its sister states each have interests that conflict in varying degrees.[56]

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49 *See id.* at 1596.

50 *See id.* at 1599–1607. Comity among the states and sovereignty are among the interests to be considered when determining this second, federalism-focused step of the legislative jurisdiction analysis. *See id.* at 1602 ("[T]he question will usually be whether such an application [of the sister state's law] would extend beyond the reasonable scope of the state's regulatory power or, otherwise stated, would entail too great a sacrifice of the interests of other states."). These considerations contribute to Reese's argument that the Full Faith and Credit Clause is not a sufficient constitutional source for legislative jurisdiction. Whereas that clause requires consideration of only a limited subset of state interests, a broad reading of the Due Process Clause, strongly suggested by the settled understanding of due process within the adjudicatory judicial context, necessarily requires consideration of a larger set of conceivable state interests. *See supra* text accompanying note 39.

51 *See* Reese, *supra* note 1, at 1599–1601.

52 *See id.*

53 *See id.*

54 *See id.* at 1601 (citing as two examples of this scenario situations in which all the states involved have the same rule on the subject, or situations in which, although the states involved have different rules, the purpose or policy underlying only one of the rules would be served by applying it in a given situation).

55 *See id.* at 1599–1600.

56 *See id.* at 1601–06.

B. The Supreme Court on Legislative Jurisdiction and Extraterritoriality

The principle of strict territorialism controlled early Supreme Court jurisprudence governing jurisdiction.[57] Joseph Story's influential commentary detailed the prevailing view in the nineteenth century that each nation or state has exclusive sovereignty and jurisdiction within its geographic territory and no farther.[58] This understanding of territorialism drove the Court's early articulation of due process limitations on judicial jurisdiction.[59] The Supreme Court held in its landmark *Pennoyer v. Neff* decision[60] that each state's judicial jurisdiction over any class of persons and things was limited geographically because of the "elementary principle[ ] that the laws of one State have no operation outside of its territory."[61]

With regard to legislative jurisdiction, early Court decisions routinely invalidated the application of state laws to extraterritorial conduct.[62] For example, in *Allgeyer v. Louisiana*,[63] the Court struck down Louisiana's attempt to punish its citizens for making offensive insurance contracts in New York and held that "[the state's] power does not and cannot extend to prohibiting a citizen from making contracts . . . outside of the limits and jurisdiction of the state."[64] Twelve years after *Allgeyer*, the Court required state statutes to be strictly construed because of the "general and almost universal rule" that conduct can be regulated only by the sovereign controlling a particular geographic location.[65]

When considering the limits of both judicial and legislative jurisdiction, the Court resisted any approach that halanced interests or

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57 *See* Kreimer, *supra* note 16, at 979 ("Within a decade after the Fourteenth Amendment's adoption in 1868, the Supreme Court began to read the territorial restrictions on state sovereignty into the definition of due process."); Rostron, *supra* note 11, at 123–24 ("In the nineteenth century, the dominant principle overriding all questions of jurisdiction was that each state had authority over everything that occurred inside its territorial borders and nothing beyond them.").

58 JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19–22 (1834).

59 *See* CLERMONT, *supra* note 1, at 6 ("Prompted by the tensions among states in a federation, however, America early adopted a theory of exclusive power based on territoriality . . . .").

60 95 U.S. 714 (1877).

61 *Id.* at 722.

62 *See, e.g.*, Rostron, *supra* note 11, at 124 ("Courts construed statutes as having no extraterritorial application, citing the 'general and almost universal rule' that conduct must be governed wholly by the law of the territory in which it occurs.").

63 165 U.S. 578 (1897).

64 *Id.* at 591. The Court later foresaw the future demise of strict territorial limits on legislative jurisdiction, however, as it subsequently held that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it" could constitutionally be subject to prosecution in that jurisdiction. Strassheim v. Daily, 221 U.S. 280, 285 (1911).

65 *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).

questioned the fairness of extraterritorial litigation.[66] Rather, at the turn of the century, the Court framed the issue as a one-part test: Did the conduct in question occur within a state's borders? If the answer was "no," then neither judicial nor legislative jurisdiction existed.[67]

Strict territorialism in the judicial jurisdiction context did not endure the marked rise of interstate commerce, however. In 1945, the Court in *International Shoe Co. v. Washington*[68] considered the extension of traditional conceptions of personal jurisdiction to corporations.[69] Chief Justice Harlan Stone, writing for the majority, noted that a corporation is a legal fiction whose physical presence can be determined only by "activities carried on in its behalf by those who are authorized to act for it."[70] Thus, as regards corporations, "presence within the territorial jurisdiction of [a] court [that] was prerequisite to its rendition of a judgment personally binding him" under *Pennoyer* was no longer feasible.[71] Under *International Shoe*, "due process requires only that in order to subject a defendant to judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[72]

Professor Reese noted, in 1978, that despite defining in *International Shoe* due process as it related to judicial jurisdiction, the Court had "not yet attempted to define what principle underlies legislative jurisdiction."[73] As a result, territorialism continued to guide courts' legislative jurisdiction decisions. However, the Court in *Richards v. United States*,[74] decided in 1962, cast doubt on the endurance of strict territorialism in the legislative setting when it stated that "[w]here more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity."[75] Professor Reese recounts the difficulty that commentators have had in deriving workable principles from this lan-

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66 *See* Rostron, *supra* note 11, at 124 (noting the Court's "quintessential" articulation of territorialism in *Pennoyer*, which limited a state's ability to exercise jurisdiction only over persons or things within its borders).

67 *See id.* ("[C]ourts developed mechanical choice of law rules turning on the location of selected elements of causes of action.").

68 326 U.S. 310 (1945).

69 *See id.* at 316.

70 *Id.*

71 *Id.*

72 *Id.* (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

73 Reese, *supra* note 1, at 1592.

74 369 U.S. 1 (1962).

75 *Id.* at 15.

guage.[76] Furthermore, *Richards*'s requirement that a state have "substantial contact" with the activity in question would seem to be more stringent than *International Shoe*'s "minimum contact" requirement.

Meanwhile, lower courts have upheld extraterritorial legislation based on the "effects doctrine," permitting it when the targeted foreign conduct has in-state effects and when a sufficient nexus exists between those effects and the legislation's target. For example, Judge Learned Hand declared it "settled law" that a state may impose liability on foreign conduct that has in-state consequences.[77] The Supreme Court has approved the effects doctrine as well, although it has done so with limited application in an international antitrust context.[78]

Two recent Supreme Court cases, *BMW of North America, Inc. v. Gore*[79] and *State Farm Mutual Automobile Insurance Co. v. Campbell*,[80] have called into question the applicability of the effects doctrine as regards domestic legislative jurisdiction.[81] However, commentators disagree on these cases' place in the Court's jurisprudence. One scholar argues that "the unbroken rejection of extraterritorial state-enforced moralism for the first 150 years of the Republic retains relevance,"[82] while others suggest that *BMW* and *State Farm* incorrectly adopt prior Court dicta and that current arguments advancing strict territorialism are a sharp departure from accepted due process principles.[83]

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76 *See* Reese, *supra* note 1, at 1592 n.28 (noting the efforts of Professors Weintraub and Overton to extrapolate a principle from the *Richards* language regarding "substantial contact").

77 *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945).

78 *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164–70 (2004) (applying a balancing test to determine the reasonableness of the extraterritorial application of U.S. antitrust laws).

79 517 U.S. 559 (1996).

80 538 U.S. 408 (2003).

81 *See* Rostron, *supra* note 11, at 135–40 (discussing, in part, the significance of *BMW* for strict territorialism and the effects doctrine).

82 Kreimer, *supra* note 16, at 980. Kreimer's article was written in response to an article that categorized modern case law as a distinct departure from earlier due process jurisprudence. *See* Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855 (2002).

83 *See* Rostron, *supra* note 11, at 118–19. Rostron places the "resurrection of strict territorialism" in the Court's 1982 decision *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). *Id.* at 127. The *Edgar* plurality held that the Constitution "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." 457 U.S. at 642 (plurality opinion). Rostron notes that the *Edgar* plurality located this extraterritoriality restriction in the Commerce Clause but specified that the rule existed independently of the traditional Commerce Clause balancing test. *See* Rostron, *supra* note 11, at 128. As a result, Rostron thus characterizes the plurality's rule as "a strict prohibition against extraterritorial regulation." *Id.* *BMW* cites *Edgar*, and the case undoubtedly contributed to the recent application of strict territorialism discussed here. *See id.* at 137–38. However, this Note, which is focused on

In *BMW*, the Court considered the constitutionality of a $2 million punitive damages award imposed by an Alabama court against BMW for the car manufacturer's failure to disclose defects in a car that caused $4,000 in consequential damages to an Alabama citizen.[84] In granting certiorari, the Court expressly aimed to announce a standard for unconstitutionally excessive damages,[85] although the opinion discusses the territoriality principle of legislative jurisdiction and choice of law at length.[86] After highlighting principles of American federalism, the Court concluded that "it is clear" that Alabama could not impose via legislation its policy choices on the whole nation or on neighboring states.[87]

One may read the *BMW* Court's discussion of extraterritorial legislation as a harsh rebuke of the trial court for imposing severe punitive damages that impermissibly considered BMW's activities outside of Alabama.[88] Whatever the Court's motive, however, its reliance on early cases that espoused strict territorialism calls into question the continued validity of the effects principle in the realm of tort legislation.[89] By stating that "Alabama does not have the power . . . to punish BMW for conduct that was lawful [elsewhere] *and that had no impact on Alabama or its residents*,"[90] the Court appeared to affirm the effects doctrine by negative implication. In other words, with this language, the Court seemed to imply that Alabama might punish conduct that is lawful elsewhere if that conduct had a sufficient impact on Alabama or its residents.

However, the Court's next statement in the opinion that "Alabama [may not] impose sanctions on BMW *in order to deter conduct that*

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states' prescriptive jurisdiction when enacting tort legislation, will primarily discuss *BMW* and *State Farm* because they are more recent authority and because they deal specifically with tort law. For a more extensive description of modern Supreme Court precedent advocating strict territorialism, see *id.* at 127–40.

84 *See BMW*, 517 U.S. at 562–64.

85 *See id.* at 562–63.

86 *See id.* at 568–74.

87 *See id.* at 570–71. Alabama's policy would have required full disclosure of all presale repairs to automobiles. *See id.*

88 *See id.* at 573–74. The Alabama Supreme Court declared such a punitive damages calculus impermissible, though it only reduced the award from $4 million to $2 million. *See id.* at 567.

89 One of the cases cited by the Court in *BMW* for the extraterritoriality principle is *Bigelow v. Virginia*, 421 U.S. 809 (1975). *See BMW*, 517 U.S. at 571 n.16. *Bigelow* addressed the applicability of a state's law to its own citizen when the citizen engages in conduct in a foreign jurisdiction that, while legal in the foreign jurisdiction, is illegal in the citizen's home state. *See id.* at 822–24. The "effects" of the citizen's extraterritorial conduct are far more remote in such a case. The two other cases cited for the extraterritoriality principle, decided much earlier, were *New York Life Insurance Co. v. Head*, 234 U.S. 149 (1914) and *Huntington v. Attrill*, 146 U.S. 657 (1892). *See BMW*, 517 U.S. at 571 n.16.

90 *Id.* at 572–73 (emphasis added).

is lawful in other jurisdictions"[91] would seem to contradict such an interpretation. This language suggests that a state legislature's *intent* is more relevant to its legislative jurisdiction than an objective nexus inquiry into the effects that foreign conduct has within a state. Should one take the position that tort law in part operates with the intent to deter harmful conduct, the Court's latter sentence seems to flatly prohibit a state from enacting legislation to protect its citizenry whenever the legislation's targeted conduct occurs legally in a sister state, regardless of in-state effects.[92]

Seven years after *BMW*, the Court in *State Farm* reiterated that states may not impose any sanction to deter out-of-state conduct that is legal in the other state.[93] Again addressing the constitutionality of excessive punitive damages awards, the Court cited *BMW* and the same series of early territoriality cases supporting *BMW* in order to affirm territorial limits on states' legislative jurisdiction.[94] The *State Farm* Court went even further than *BMW*, however, declaring that, "as a general rule, a State [does not] have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction."[95] The Court's language emphasizes the importance of a state legislature's intent and categorically reduces a legislating state's interest to zero if it has some intent to punish conduct that is lawful in sister states.[96]

BMW and *State Farm* have given rise to the current confusion surrounding legislative jurisdiction.[97] Despite *International Shoe*'s modernizing effect on judicial jurisdiction and despite judicial approval of the effects doctrine in certain legislative circumstances, *BMW* and *State Farm* have called into question the extent to which the effects doctrine applies in a domestic setting and whether a legislating state's subjective intent might defeat legislative jurisdiction regardless of the objective nexus between the legislating state and the targeted conduct.

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91 *Id.* at 573 (emphasis added).

92 A state's ability to impose compensatory damages upon extraterritorial conduct was not expressly decided by the *BMW* Court. Rather, the Court addressed legislation aimed at deterrence, *see id.* at 573–74, and has elsewhere contrasted punitive damages aimed at deterrence with compensatory damages aimed at redressing concrete loss. *See, e.g.*, State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) (citing Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) and RESTATEMENT (SECOND) OF TORTS § 903 (1979)).

93 *See State Farm*, 538 U.S. at 421.

94 *See id.*; *supra* note 92.

95 *Id.*

96 *See id.*

97 For a detailed discussion of this confusion, see *infra* Part III.

II
THE PROBLEM AS POSED BY *BERETTA*

The Strict Liability Act (SLA)[98] sought to regulate extraterritorial conduct that was legal in other states, although it limited recovery to compensatory damages.[99] According to the SLA:

> Any manufacturer, importer, or dealer of an assault weapon or machine gun shall be held strictly liable in tort, without regard to fault or proof of defect, for all direct and consequential damages that arise from bodily injury or death if the bodily injury or death proximately results from the discharge of the assault weapon or machine gun in the District of Columbia.[100]

The teeth of the SLA, beyond its imposition of strict liability, laid in the breadth of the definitions it employed.[101] The phrase "assault weapon" referred to an enumerated list of products,[102] while the phrase "machine gun" included almost all semiautomatic firearms.[103] The D.C. Court of Appeals in affirming the constitutionality of the statute noted that the D.C. legislature had drafted the SLA's broad language so that it included "a class of weapons [that the D.C. Council] found have little or no social benefit but at the same time [have] pernicious consequences for the health and safety of District residents and visitors."[104] The manufacturers, on the other hand, argued that the District of Columbia's broad definitions of "assault weapon" and "machine gun" were far more inclusive than the federal definitions, and thus created liability for widely used firearms that are "legal to make, sell, and own in virtually every state in the nation."[105]

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98 D.C. CODE §§ 7-2551.01–.03 (2001).

99 *See State Farm*, 538 U.S. at 421. Interestingly, the District of Columbia enacted the SLA in 1990, and the Act lay unchallenged for ten years until the *Beretta* suit. *See* Dist. of Columbia v. Beretta, U.S.A. Corp., 872 A.2d 633 (D.C. 2005) (en banc), *cert. denied*, 126 S. Ct. 399 (2005).

100 D.C. CODE § 7-2551.02.

101 *See* D.C. CODE § 7-2551.01; Petition for Writ of Certiorari, *supra* note 17, at 2.

102 *See* D.C. CODE § 7-2551.01.

103 *See* D.C. CODE § 7-2501.01(10) (defining "machine gun" as "any firearm which shoots, is designed to shoot, or can be readily converted or restored to shoot: (A) [a]utomatically, more tban 1 shot by a single function of the trigger [or] (B) [s]emiautomatically, more than 12 shots without manual reloading").

104 *Beretta*, 872 A.2d at 651.

105 *See* Petition for Writ of Certiorari, *supra* note 17, at 3. In addition to invoking due process concerns, the petitioners raised objections to the broad reach of the statute as a part of their dormant Commerce Clause claim. The petitioners argned that while the SLA purported to impose strict liability, it in fact imposed absolute liability because it did not regard fault or defect. *See id.* Petitioners asserted that the onerous standard of liability, coupled with the broad definitions encompassing almost all semiautomatic firearms, exposed the manufacturers and distributors to such severe liability as to threaten the entire industry. *See id.* at 17.

It is likely that the D.C. legislature did not have any one motive in mind when it drafted and passed the SLA, yet some of the Act's underlying purposes seem clear. Prior to enactment, the District of Columbia had conducted extensive research on the issue of gun violence.[106] Based on its findings, the legislature decided to favor gun violence victims over gun manufacturers.[107] In deciding that gun manufacturers rather than victims should bear the social costs of gun violence,[108] the District of Columbia was in effect projecting its policy choices across state lines.[109] On the other hand, the D.C. Court of Appeals emphasized the Act's intent of providing monetary redress to specific individuals injured by firearms.[110] It is both logical and reasonable for the D.C. legislature to have passed the SLA with the dual intent of deterring the general use of firearms in the District of Columbia (likely with the knowledge and perhaps even the intent that this might deter lawful firearms manufacturing in sister states) and also allowing monetary redress for gun violence victims. As this Note will demonstrate, multipurpose legislation like the SLA poses analytical problems under *BMW* and *State Farm.*

The high stakes riding on the outcome of *Beretta* may partially explain its complicated procedural history. The case was first filed in 2000.[111] The plaintiffs included nine individuals injured by gun violence within the District of Columbia and the D.C. government.[112] In 2002, a trial judge in the D.C. Superior Court dismissed the case on the pleadings, finding in part that the SLA was unconstitutional.[113] On appeal roughly one-and-a-half years later, a three-judge panel of the D.C. Court of Appeals upheld the dismissal in part but reversed the finding that the SLA was unconstitutional.[114] Both the plaintiffs

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106 37 D.C. Reg. 8482, 8483 (1990).

107 *See* D.C. CODE § 2(2); 37 D.C. Reg. at 8483 (finding that the manufacture and sale of assault weapons "expos[es] the citizens [of] and visitors to the District [of Columbia] to a high degree of risk of serious harm" and "[a]s between the manufacturer or dealer of an assault weapon on the one hand and the innocent victim on the other hand, the manufacturer or dealer is more at fault than the victim").

108 *See* 37 D.C. Reg. at 8483.

109 This was an essential argument mounted by the gun manufacturers who claimed that such projections were contrary to *State Farm* and *BMW. See* Petition for Writ of Certiorari, *supra* note 17, at 13. The manufacturers argued that the District of Columbia's choice did indeed project its own policy across state lines because, as they claimed, the only way to avoid crushing liability in the District would be to remove lawful handguns from the national market. *See id.*

110 *See* Dist. of Columbia v. Beretta, U.S.A. Corp, 872 A.2d 633, 652 (D.C. 2005) (en banc), *cert. denied,* 126 S. Ct. 399 (2005).

111 *See id.* at 637.

112 *See id.*

113 Dist. of Columbia v. Beretta, U.S.A. Corp., No. Civ. A. 0428-00, 2002 WL 31811717, at *44 (D.C. Super. Dec. 16, 2002) (declaring the SLA unconstitutional because it projects the legislation of one state's regulatory regime into the jurisdiction of another state).

114 847 A.2d 1127, 1129 (D.C. 2004).

and defendants filed for a rehearing en banc,[115] and the entire panel of the D.C. Court of Appeals issued the final judgment.[116]

In affirming the dismissal of the plaintiffs' negligence and public nuisance claims, the court found that the SLA was neither an unconstitutional violation of the dormant Commerce Clause nor, importantly for this Note, a violation of the Due Process Clause.[117] The court began its due process analysis by quoting a 1933 Supreme Court opinion that seemed to support the effects doctrine: "A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument."[118] The court then emphasized the SLA's limitation of liability to injuries occurring within the District of Columbia's borders.

Because the manufacturers based their due process challenge on *BMW* and *State Farm*,[119] the court's rejection of their argument necessarily distinguished those two cases.[120] First, the court succinctly interpreted *BMW*'s "due process link"[121] as a prohibition on "punish[ing] a person because he has done what the law plainly allows him to do."[122] This narrow reading of *BMW* suggests that the D.C. Court of Appeals was wary of the manufacturers' claim that *BMW* was in fact a resurrection of strict territoriality.[123] Additionally, the court, in the context of the SLA, seemed to take for granted the distinction between punitive damages and compensatory damages addressed in *BMW* and *State Farm*.[124] Without saying more, the court found that *State Farm* "made [the distinction between punitive and compensatory damages] explicit," and thus brushed aside the petitioners' reliance on *State Farm* as misapplied.[125]

Although it is true that the Supreme Court in *State Farm* distinguished punitive damages from compensatory damages,[126] *State Farm*'s "general rule" that states may not impose punitive damages to deter lawful foreign conduct would also seem to be applicable to compensa-

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115 *See* 868 A.2d 858 (D.C. 2004) (per curiam).

116 *Beretta*, 872 A.2d at 633. For a discussion of the Supreme Court's denial of the petitioners' request for a Writ of Certiorari, see *supra* notes 21–24 and accompanying text. This Part of the Note will focus on the D.C. Court of Appeals's due process analysis.

117 *See Beretta*, 872 A.2d at 656–59.

118 Young v. Masci, 289 U.S. 253, 258 (1933), *quoted in Beretta*, 872 A.2d at 658. Interestingly, the Supreme Court did not cite this case in either *BMW* or *State Farm*.

119 *See* Petition for Writ of Certiorari, *supra* note 17, at 13–15.

120 *See Beretta*, 872 A.2d at 658–59.

121 *Id.* at 659.

122 *Id.* (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 573 n.19 (1996)).

123 *See id.*

124 *See id.*; *supra* note 92.

125 *See* 872 A.2d at 659.

126 *See supra* note 92.

tory damages if those damages were imposed for the purpose of deterring conduct that is lawful elsewhere.[127] Moreover, *State Farm* relied heavily on *BMW*, which, though similarly addressing punitive damages, used broad language to prohibit states from imposing any sanction for the purpose of deterring conduct that is legal in other states.[128]

While the D.C. Court of Appeals relied on *State Farm*'s distinction between punitive and compensatory damages, it implicitly affirmed the D.C. legislature's policy findings regarding the harmful effects of gun violence.[129] If *BMW* and *State Farm* can truly be distinguished because they dealt with punitive damages only, then the D.C. Court of Appeals might have been correct in upholding the SLA's constitutionality, and those cases would simply be inapt. However, the strong language and general tenor of *BMW* and *State Farm* suggest that, regardless of how damages are classified, states cannot legislate with the intent to push their policy choices across state lines.[130] If this is the case, then one might argue that the D.C. Court of Appeals should have been more skeptical when analyzing the D.C. legislature's findings and the intent underlying its enactment of the SLA, or at the least should have been more concerned with sister states' interests.[131]

Ultimately, the *Beretta* petitioners' due process argument failed to convince the D.C. Court of Appeals.[132] But regardless of whether *Beretta* was decided correctly, it seems likely that the court's affirmation of the SLA—legislation that would likely deter conduct lawful in sister states—runs counter to the spirit of *BMW* and *State Farm*. Moreover, even if *Beretta* was correct in distinguishing *BMW* and *State Farm* because the SLA imposed compensatory, rather than punitive, damages, it is unclear what kind of interest-balancing calculus should be employed to determine the constitutionality of similar, future legislation.

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127 *See supra* text accompanying note 95. The D.C. Court of Appeals decision did not emphasize this language from *State Farm*. *See* 872 A.2d at 659.

128 *See supra* text accompanying note 95.

129 *See supra* notes 106–11 and accompanying text.

130 *See supra* notes 88–96 and accompanying text.

131 Twelve states filed an amicus brief in support of the petitioner gun manufacturers, arguing that because the SLA was intended to control lawful commerce occurring entirely within the borders of sister states, the SLA was unconstitutional and should be struck down by the court. *See* Brief of the States of Utah et al. as Amici Curiae Supporting Petitioners at 2, Beretta, U.S.A. Corp. v. Dist. of Columbia, 126 S. Ct. 399 (2005) (mem.) (No. 05-118), 2005 WL 2034939.

132 *See* 872 A.2d 633, 659 (D.C. 2005) ("[N]o due process issue is raised by legislation that seeks to redress injuries suffered by District residents and visitors resulting from the manufacture and distribution of a particular class of firearms whose lethal nature far outweighs their utility.").

III
THE CONSEQUENCES OF CONFUSION IN THE COURTS AND POSSIBLE SOLUTIONS

In the wake of *BMW* and *State Farm*, states are unsure of their ability to redress concrete loss through tort legislation. In addition, product manufacturers are unsure of the validity of foreign statutes that would expose them to significant liability. The D.C. Court of Appeals' seemingly inconsistent interpretation of *BMW* and *State Farm* is not an isolated occurrence.[133] For instance, in a California appellate court case in which a non-California resident claimed damages under a California employment discrimination statute, the court purposely avoided "serious constitutional concerns" by construing the state statute to not grant compensatory damages for extraterritorial conduct.[134]

While some lower courts have interpreted *BMW* as invalidating extraterritorial legislation on dormant Commerce Clause grounds, others simply continue to apply the same effects-based legislative jurisdiction analysis that *BMW* and *State Farm* called into question.[135] The *Beretta* petitioners, on the other hand, called for a substantial departure from prior balancing approaches and asked the U.S. Supreme Court to "dispel the confusion by holding that the *per se* ban on direct regulation of out-of-state commerce applies to all types of statutes with extraterritorial reach."[136]

One way to resolve these issues would be to adopt the *Beretta* petitioners' position and affirm strict territoriality.[137] This approach would find its legs in *BMW* and *State Farm*, which arguably proscribe any imposition of one state's policy decisions upon sister states.[138]

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133 *See* Rostron, *supra* note 11, at 140 ("The Supreme Court's decisions have charted no clear path for other courts to follow. Lower courts have applied the strict territorial rule in haphazard fashion, usually based on assumptions about its relevance rather than any form of analysis, and have not been able to draw any clear or consistent line as to which forms of state law should be allowed to reach out-of-state conduct with in-state effects."). *See id.* at 140–47 (surveying the confusion in lower court decisions on the issue of legislative jurisdiction).

134 *See* Campbell v. Arco Marine, Inc., 50 Cal. Rptr. 2d 626 (Cal. Ct. App. 1996).

135 For a sample of such cases, see Rostron, *supra* note 11, at 142 n.151. Among others, Rostron cites *Jaurequi v. John Deere Co.*, 986 F.2d 170 (7th Cir. 1993), which allowed Missouri to apply its products liability law to an Illinois manufacturer who sold the product to an Indiana dealer); *In re Disaster at Detroit Metro. Airport*, 750 F. Supp. 793 (E.D. Mich. 1989), which allowed Michigan to apply its punitive damages law to actions performed by a Missouri airplane manufacturer that took place in California, *Feldt v. Sturm, Ruger & Co.*, 721 F. Supp. 403 (D. Conn. 1989), which upheld the application of Georgia products liability law to a Connecticut manufacturer who sold a firearm to an Illinois distributor that sold it to an Illinois dealer.

136 Petition for Writ of Certiorari, *supra* note 17, at 21.

137 *See id.*

138 *See supra* notes 79–97 and accompanying text.

This approach would abdicate use of the effects doctrine entirely and require invalidation of all legislation reaching extraterritorial conduct regardless of the impact the conduct has on the legislating state. However, some scholars criticize this approach as a misapplication of precedent and an improper upheaval of the current principles governing choice of law.[139] Furthermore, this approach arguably violates principles of federalism by assigning no weight to the legislating state's interests and by preventing a state from exercising its police power to protect its citizenry.

This Note argues that despite the *Beretta* petitioners' construction of *BMW* and *State Farm*, Professor Reese's two-fold due process inquiry is both legal and preferable.[140] As a practical matter, it simply cannot be the case that, in today's busy interstate marketplace, a state has absolutely no legislative power to award its citizens compensatory redress for concrete loss suffered within its borders.[141] As a legal matter, the need for effects-based legislation has been recognized by the U.S. Supreme Court in an international antitrust context[142] and accepted by lower courts in domestic contexts.[143] Furthermore, Professor Reese's approach would be the logical outgrowth of *International Shoe*'s "minimum contacts" test as it applies to judicial jurisdiction.[144]

Support for Reese's approach can also be found in the Restatement (Third) of Foreign Relations Law, which enumerates specific factors to consider in each step of a legislative jurisdiction inquiry.[145] Specifically, the Restatement takes the position that "a state may exercise jurisdiction based on effects in the state, when the effect or intended effect is substantial and the exercise of jurisdiction is

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139 *See, e.g.*, Rostron, *supra* note 11, at 116 ("[The Supreme Court's statements regarding legislative jurisdiction in recent cases] hark back to a conception of state authority that prevailed throughout the law a century ago but appeared to be dead until the Supreme Court's recent comments revived it. The statements have no support in modern precedent, they arose in part from a Supreme Court opinion's error in citation of authority, and they cannot be correct without rendering unconstitutional a vast number of the products liability and other tort claims that courts hear every day.").

140 *See supra* notes 43–56 and accompanying text.

141 *Cf.* Puurunen, *supra* note 4, at 689 (discussing ways in which recent technological innovations in international electronic commerce have challenged legal paradigms to "measure up with societal goals"). This is because, as Justice William J. Brennan noted in *World-Wide Volkswagen Corp. v. Woodson*, the interstate flow of people and commerce has become so ubiquitous that to prevent states from protecting their citizens against foreign actors who utilize the flow of commerce would nearly extinguish the states' protective powers. *See* 444 U.S. 286, 309 (1980) (Brennan, J., dissenting).

142 *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164–70 (2004).

143 *See, e.g.*, *supra* note 135.

144 *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) ("[T]be Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed."); *supra* note 72 and accompanying text.

145 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402–03 (1987).

reasonable under § 403."[146] Section 403 lists eight factors relevant to the reasonableness inquiry, including the nexus between the activity and the territory of the legislating state, the connections between the legislating state and the principally regulated community, the character of the regulated activity and the legislation itself, the impact the legislation would have on justified expectations (if the conduct is legal where it is performed), the impact tbe legislation would have in the broader interstate context, and the interests of other states in regulating or not regulating the targeted conduct.[147]

While the Restatement identifies particular factors relevant to Reese's two-fold inquiry, its list of reasonableness factors is not exhaustive, and it does not assign any weight to the factors provided.[148] The only discussion of the weight of interests is in § 403(3), which declares that when two states would not be unreasonable in exercising legislative jurisdiction over particular conduct, and those two states' interests conflict, "a state should defer to the other state if that state's interest is clearly greater."[149]

Beretta provides an example of a case in which it would be difficult to determine whose interests are "clearly greater" under § 403. The District of Columbia, based on its findings, asserted that it had a pressing interest in redressing the epidemic of gun violence plaguing it.[150] The gun manufacturers, and the states where they do business, claimed that enforcement of the SLA would cause a halt to lawful business and have dire economic consequences.[151]

In all likelihood, no formula could ever definitively resolve thorny federalism questions like those raised in *Beretta*. Nevertheless, the Supreme Court could provide authoritative guidance on how lower courts should analyze these issues. For instance, the Court might resolve whether the Due Process Clause is to be given similar construction in both the legislative and judicial jurisdiction contexts. Additionally, the Court might weigh in on the relevance of Restatement § 403 to domestic issues of legislative jurisdiction and help assign weight to the individual reasonableness factors. Doing so would enable courts to more uniformly address issues of legislative jurisdiction, give greater guidance to state legislatures seeking to enact tort legislation, and provide some measure of predictability to product

146 *Id.* § 402 cmt. d.

147 *See id.* § 403.

148 *See id.* § 403 cmt. b ("The list of considerations in Subsection (2) is not exhaustive. No priority or other significance is implied in the order in which the factors are listed. Not all considerations have the same importance in all situations; the weight to be given to any particular factor or group of factors depends on the circumstances.").

149 *See id.* § 403(3).

150 *See supra* note 107.

151 *See supra* note 105 and accompanying text.

manufacturers who question whether they will be subject to foreign liability. Until the Court does so, it will remain unclear whether product manufacturers may successfully raise arguments similar to those raised in *Beretta*, and courts will continue to uphold or strike down state legislation in a patchwork fashion.

CONCLUSION

In contemporary society, it is not uncommon for foreign conduct to adversely affect a state's residents. Although states have a duty to enact legislation that protects their citizens, the extent to which they may do so in a manner that targets foreign conduct with in-state effects is unclear. Recent Supreme Court cases have been cast as a revival of strict territorialism, which prohibits a state from enacting any legislation with extraterritorial application. While it is clear that states' prescriptive authority is limited, as argued in this Note by the Due Process Clause of the Fourteenth Amendment, it is impracticable and unwise to restrict state legislatures in such an absolute fashion. Furthermore, applying such restrictive principles seems to violate principles of federalism.[152]

Although the effects doctrine is a viable alternative that would facilitate a principled analysis of extraterritorial legislation, its constitutional parameters remain inadequately defined. Professor Reese's two-fold due process inquiry,[153] which the Restatement's list of factors complements,[154] provides helpful tools for framing due process challenges to extraterritorial legislation. Even so, gaps in the analysis remain. In particular, the Supreme Court should address two issues. First, how attenuated can the link be between foreign conduct and in-state effects for there to be an insufficient jurisdictional nexus? Second, how should a state balance its interests against the competing interests of its sister states?

While the *Beretta* manufacturers must themselves be satisfied with the resolution that Congress afforded them,[155] the challenges they raised may have a significant impact on states, their legislatures and citizens, as well as product manufacturers well into the future. At present, state legislatures' ability to enact tort legislation imposing compensatory damages on extraterritorial conduct having in-state effects is unclear and warrants authoritative treatment.

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152 *See supra* note 147 and accompanying text (discussing § 403's recognition of the interest a legislating state may have in regulating extraterritorial conduct).

153 *See supra* notes 43–56 and accompanying text.

154 *See supra* text accompanying note 147.

155 *See supra* note 23.