NOTES

THE CANON AT THE WATER'S EDGE

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What motivates substantive presumptions about how to interpret statutes? Are they like statistical heuristics that aim to predict Congress's most likely behavior, or are they meant to protect certain underenforced values against inadvertent legislative encroachment? These two rationales, fact-based and value-based, are the extremes of a continuum. This Note uses the presumption against extraterritoriality to demonstrate this continuum and how a presumption can shift along it. The presumption operates to diminish the likelihood that a federal statute will be read to extend beyond the borders of the United States. The presumption has been remarkably stable for decades despite watershed changes in the principles—customary international law and conflict of laws—that once supported it. As the presumption's normative justifications have diminished, a new justification has grown in importance. Today, the presumption is often justified as a stand-in for how Congress typically legislates. This Note argues that this change makes the presumption less defensible but even harder to overcome in individual cases.

INTRODUCTION

Substantive canons of statutory interpretation are judicial rules of thumb about how to read the language of a statute and are derived from extratextual policy rationales. By definition, they support one reading of a statute and cast doubt on others. Given competing plausible interpretations of a statute, why should courts rely on a rule that consistently favors one set of outcomes over another? Reasons vary across canons, and justifications for individual canons may not remain fixed, but instead may evolve over time. As Judge Posner has put it, "[o]ld rules sometimes accrete new rationales as the original rationales fall to changed circumstances."[1] Because legal reasoning depends not only on outcomes but also on rationales, new rationales should be analyzed according to their own merits to determine whether they truly support the old rules they are meant to justify.

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[1] Tregenza v. Great Am. Commc'ns Co., 12 F.3d 717, 719 (7th Cir. 1993).

The presumption against the extraterritorial application of statutes is an example of a substantive canon of statutory interpretation. For nearly two centuries, the presumption has served to resolve statutory ambiguities by narrowly tailoring federal statutes to prevent their application beyond the territorial boundaries of the United States. In its earliest, eighteenth-century form, this presumption was a transsubstantive rule of comity designed to prevent clashes with the laws of other nations. Soon thereafter, this presumption fused with another value and became justified by a similar desire to avoid constructions of statutes that might violate the robust, territorial notion of sovereignty that was the paradigm of international law at the time.[2] With such a strong background norm in favor of territoriality, a strong presumption against interpretations of statutes that violated this territorial view of sovereignty was warranted. Since territorial sovereignty applied across nearly all areas of the law,[3] the presumption against extraterritoriality applied widely as well.

During the twentieth century, the neat identity between the rationale and the scope of the presumption began to break down. Notions of sovereignty became more complex than they had been in the early nineteenth century. In many areas of law—particularly those in which the effects of violations could be felt across borders—spheres of jurisdiction began to overlap.[4] Despite these changes in the normative background that once girded the presumption against extraterritoriality, the presumption itself remained, and remains, quite strong. The Supreme Court continued to apply this canon of statutory interpretation consistently even though its justifications for doing so changed. Most recently, in searching for supplemental justifications, the Court has begun to articulate the presumption as a norm of adherence to typical congressional behavior, enforcing statutory interpretations it believes to be consonant with the way in which Congress ordinarily legislates.[5] This transformation suggests a puzzle: While justifications for the presumption against extraterritoriality have changed, the presumption itself has not. How can this result be explained?

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[2] *See infra* Part II.B.2 (describing the territorial theory of jurisdiction).

[3] *See* Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 10–16 (1992) (explaining the territorial sovereignty approach to law widely accepted by courts in the eighteenth and nineteenth centuries).

[4] *See infra* Part II.B.2 (describing the decline in territoriality using antitrust and procedural due process as examples).

[5] *See infra* Part II.B.3–5 (describing the evolution of the new rationale for the extraterritoriality presumption).

Recently, the Supreme Court used its discretionary supervisory power to reinforce the strength of the presumption against extraterritoriality. In *Morrison v. National Australia Bank Ltd.* (*Morrison*),[6] the Court reprimanded the Court of Appeals for the Second Circuit for disregarding this "longstanding principle of American law"[7] and catalogued the various ways in which the court of appeals had contorted its decisions to avoid applying the presumption.[8] According to the Court, the Second Circuit's alternate doctrines lacked "a textual or even extratextual basis."[9] The Court marshaled to its cause a phalanx of scholarly criticism of the Second Circuit's approach.[10] However, the Second Circuit's decision, which the Supreme Court ultimately affirmed despite the biting nature of the majority opinion,[11] rested on relatively straightforward jurisdictional grounds and reached essentially the same result.[12]

This fuss about a mere canon of statutory interpretation seems quixotic, especially given Professor Llewellyn's famous demonstration that canons are so plastic that they often can be self-refuting.[13] Given

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[6] 130 S. Ct. 2869 (2010). In *Morrison*, the Court reasoned that section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (2006), does not apply extraterritorially because there is no "affirmative indication" of such application in the legislation. *Morrison*, 130 S. Ct. at 2883.

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

[8] *See id.* at 2878–79 (surveying Second Circuit jurisprudence using the conduct and effects tests for when the Securities Exchange Act applies).

[9] *Id.* at 2879.

[10] *See id.* at 2880–81 (citing commentators who noted the inconsistent extraterritorial application of the Securities Exchange Act and argued that Congress's silence on the issue did not mean the statute applies extraterritorially).

[11] *See id.* at 2888 (affirming the dismissal of the complaint). Although *Morrison* involved two interlocked questions—the territoriality question and the question of subject matter jurisdiction under the Securities Exchange Act—the Court clarified that it affirmed on the basis that the complaint had failed to state a claim on which relief could be granted under the statute. *Id.* The decisions below had dismissed the complaint on the grounds that the District Court lacked subject matter jurisdiction over the case. *See id.* at 2876 (explaining the procedural history of the case). The line between the subject matter jurisdiction question and the merits question of extraterritoriality is very difficult to draw in this context.

[12] *Id.* at 2888 (affirming the decision of the Second Circuit on the grounds that petitioner failed to state a claim on which relief could be granted); *see also* Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 177 (2d Cir. 2008) ("This particular mix of factors . . . add[s] up to a determination that we lack subject matter jurisdiction."), *aff'd*, 130 S. Ct. 2869 (2010). Justice Stevens, joined by Justice Ginsburg, concurred in the judgment and wrote an opinion that would have also dismissed the claim but did not apply the presumption. *Morrison*, 130 S. Ct. at 2888 (Stevens, J., concurring).

[13] *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (showing that "there are two opposing canons on almost every point" by contrasting twenty-eight canons and counter-canons).

the Supreme Court's limited docket, why would the Court grant certiorari to enforce precedent that has seemingly little policy impact? Although it is undoubtedly the Court's prerogative to ensure uniformity in the interpretation of federal law,[14] the aggressiveness and rhetorical force of the Court's opinion in *Morrison* suggest additional motivations. Even as the Court was deciding *Morrison*, it granted certiorari in another case involving the presumption against extraterritoriality[15]—only to deadlock 4-4[16]—suggesting that the Court will continue to address the presumption.[17] This urgency to address cases touching on the presumption against extraterritoriality, combined with the cases' significance, suggests that the Justices take the continued vitality of the presumption extremely seriously.[18]

The presumption against extraterritoriality is interesting not solely for its impact on case outcomes but also because it demonstrates the way in which canons of interpretation can change over time. At times, the presumption against extraterritoriality has been described as a "clear statement" rule.[19] Such rules operate when judges decline to interpret statutes as having a certain type of application unless the statutory language meets a high threshold of clarity. Unlike textual canons, clear statement rules are rarely normatively neutral—in fact, one of their most common justifications is that they serve to ensure underenforced values like federalism.[20] Because of

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[14] *See* Eugene Gressman, *Much Ado About Uniformity*, 52 GEO. L.J. 742, 755 (1964) (arguing, and collecting statements of Supreme Court Chief Justices to the effect that, the purpose of Supreme Court certiorari practice is to ensure uniformity of federal law); *cf.* Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 158–59 (1953) (arguing that lower-court federal-question jurisdiction, supervised by the Supreme Court, promotes uniformity better than would a system in which the Supreme Court directly reviewed state court decisions implicating questions of federal law).

[15] Costco Wholesale Corp. v. Omega, S.A., 130 S. Ct. 2089 (2010).

[16] Costco Wholesale Corp. v. Omega, S.A., 131 S. Ct. 565 (2010) (per curiam).

[17] The case dealt with the extraterritoriality *vel non* of the "first sale" doctrine of copyright law. Both parties' merits briefs in the Supreme Court included extended discussions of the presumption against extraterritoriality. Brief for the Petitioner at 29, *Costco*, 131 S. Ct. 565 (No. 08-1423), 2010 WL 2690584, at *29; Brief for Respondent at 13–14, *Costco*, 131 S. Ct. 565 (No. 08-1423), 2010 WL 3426268, at *13–14. Justice Kagan recused herself. *Costco*, 131 S. Ct. at 565.

[18] *See Morrison*, 130 S. Ct. at 2895 (Stevens, J., concurring) (arguing that the Court's decision in *Morrison* was part of a "continuing campaign to render the private cause of action under § 10(b) toothless").

[19] *See, e.g.*, EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 258 (1991) (observing "Congress's awareness of the need to make a clear statement that a statute applies overseas"), *superseded by statute*, Civil Rights Act of 1991 § 109(a), Pub. L. No. 102-166, 105 Stat. 1077 (codified at 42 U.S.C. § 2000e(f) (2006)), *as recognized in* Arbaugh v. Y&H Corp. 546 U.S. 500, 512 n.8 (2006).

[20] *See infra* note 31 and accompanying text (noting such an argument).

this feature, clear statement rules have been controversial, particularly in constitutional law.[21]

This Note proposes a different way of understanding the presumption against extraterritoriality—one that stems from the observation that not all judicial presumptions are grounded in values. Some presumptions are merely rough-cut approximations for the way the world is normally ordered. Particularly in common law areas like contracts and property, presumptions are frequently justified by factual claims about the way private parties most often stand in relation to one another.[22] For example, Professor Listokin has argued that courts often reach outcomes that are consistent with the statistical application of background base rates when interpreting contracts in a Bayesian fashion.[23] That is, courts take into account facts about cases that are factually similar to the ones before them—but that are not actually before them—to determine the meaning of contracts. The "base rate" in Listokin's case is the likelihood that any set of contracting parties would prefer a particular interpretation of the contract. A court will balance the base rate against parties' specific contract terms that the court must interpret. The further the base rate is from the intent of the parties in an individual case, the clearer they must state their intentions to give it legal effect. This type of justification—one that makes resort to something like a statistical claim—is just what the Supreme Court has developed to support the continuing application of the presumption against extraterritoriality.[24]

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[21] *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 946 (1992) ("The tendency of courts to require clear legislative articulation of changes in private liberty or property interests is not without its critics."). Professor Popkin argues that clear statement rules embody an "Article III" approach to statutory interpretation that is fundamentally at odds with "Article I" approaches like textualism and purposivism. William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 Ind. L.J. 865, 881 (1993). Similarly, Professor Eskridge has claimed that normative canons are "a means by which the Court expresses its underlying ideology in statutory interpretation cases." William N. Eskridge, Jr., Dynamic Statutory Interpretation 297 (1994).

[22] *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 21–22 (1991) (explaining that the default rules in corporate contracts should look to what the parties would have done had they bargained explicitly); Jules L. Coleman, Douglas D. Heckathorn & Steven M. Maser, *A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law*, 12 Harv. J.L. & Pub. Pol'y 639, 707–09 (1989) (arguing for the use of context in applying default rules for contracts).

[23] *See* Yair Listokin, *Bayesian Contractual Interpretation*, 39 J. Legal Stud. 359 (2010) (arguing that courts should use Bayesian probabilities—i.e., base rates—to read contracts because this use would identify situations in which the plain reading of a contract is unlikely to effectuate the parties' intent).

[24] *See infra* Part II.B.5 (describing how the modern Supreme Court uses primarily fact-based justifications for the presumption against extraterritoriality).

In fact, there is a spectrum between fact- and value-based canons of interpretation. It is not a pure dichotomy. For instance, canons of interpretation in private law contexts have moved along this spectrum from value-based justifications to fact-based justifications, but this phenomenon is rarer in the federal statutory interpretation context.[25] However, as value-based justifications come under increasing criticism from scholars and judges, other presumptions may follow the presumption against extraterritoriality and move in this fact-based direction.[26] Although many value-based presumptions are grounded in values that are at least indirectly derived from the Constitution, these quasi-constitutional values—such as federalism—historically have been especially subject to change.[27]

This Note argues that, as the presumption against extraterritorial application of statutes has changed over time, becoming less obviously justified by any normative concerns, it has become qualitatively different from the value-based type of presumption. Instead, factual claims about the way Congress typically legislates now provide the primary justification for the presumption against extraterritoriality. A bizarre consequence of this shift from a normative to a factual justification is that the presumption against extraterritoriality may be harder for litigants to overcome in individual cases, rendering the presumption even stronger than it was when more robust normative values and notions of territorial sovereignty justified it.

This Note seeks to illustrate the way in which canons of interpretation may move along a spectrum of fact- and value-based rationales over time, using the presumption against extraterritoriality as an

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[25] *See* Shapiro, *supra* note 21, at 925 (arguing that statutory canons are designed to preserve continuity in the law).

[26] For example, in describing the federalism canon, which is traditionally considered a "normative" canon, the Supreme Court sometimes slips back and forth between describing how Congress *should* act and how Congress is presumed to act. *Compare* Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) ("This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."), *with* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984) (requiring "an unequivocal expression of congressional intent" to overturn sovereign immunity because of "the vital role of the doctrine of sovereign immunity in our federal system").

[27] As early as 1789, there was significant debate about the importance of federalism in the new national system. Some New England Federalists were even willing to submit to some form of republican monarchy. *See* GORDON S. WOOD, EMPIRE OF LIBERTY 54–55 (2009) ("By 1789 many of the Federalists had lost faith in the Revolutionary dream of 1776—that America could exist with a minimum of government."). After the Jeffersonian Revolution, the pole of power swung back to the states. *Id.* at 467 ("Although the power of the federal government certainly declined in the decades following Jefferson's election as president, the public authority, the police powers, and the regulatory rights of the states and their municipalities grew stronger.").

example. Part I defines the endpoints of the spectrum, introducing a schema that sorts canons of statutory interpretation into two groups: ones that are justified by claims about values and ones that are justified by factual claims. Part II demonstrates that the presumption against extraterritoriality has moved along the spectrum from a value-based to a fact-based presumption. This Part traces the presumption's history from its early roots as the *Charming Betsy* canon[28] through its application in *Morrison*, paying particular attention to the justifications articulated for the presumption across time. Part III evaluates the presumption in light of its transformation and determines two types of hurdles to rebutting it in individual cases—one definitional and one practical. The Note concludes by considering the perverse result that fact-based canons may be harder to rebut with case-specific facts than their value-based counterparts. This result suggests that a weaker form of the presumption would better accord with its current, weaker justifications and practical applications. The broader conclusion is that, to the degree more and more presumptions are justified by empirical claims, they ought to be empirically contestable.

I
A Spectrum of Judicial Presumptions

Judicial presumptions generally require justification. This is particularly true in the statutory interpretation context because of the role assigned to judges. The traditional understanding of the judicial function is that judges do their best to ascertain the meaning of a law and apply it to the facts of particular cases.[29] When a judge employs a presumption, she adopts an interpretation that may differ from the one she would have developed relying solely on the text—and perhaps legislative history—of the statute in question. While a presumption may not by itself be sufficient to authorize broad departure from the plain meaning of a statute, it will often justify moderate departures in cases of statutory ambiguity. The question then becomes, what kinds of justifications are necessary to support a presumption?

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[28] *See infra* notes 84–85 and accompanying text (explaining the *Charming Betsy* canon).

[29] *See, e.g.*, Andrei Marmor, Interpretation and Legal Theory 134 (2d ed. 2005) (justifying an intentionalist approach to statutory interpretation by reference to a Razian account of authority); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 Geo. L.J. 281, 284 (1989) ("[I]t is the courts' role to carry out congressional directives in light of their understanding of the Constitution.").

In this Part, I propose that justifications for canons of statutory interpretation may be usefully categorized along a spectrum with two endpoints. The first endpoint characterizes presumptions based wholly on normative values, often imported from other parts of the law. In general, value-based presumptions promote equilibrium between conflicting areas of law by helping judges mediate between opposing legal values. For example, one value-based presumption is the canon that counsels judges to interpret statutes so as to avoid creating constitutional problems.[30] One justification for this canon is that statutes can impinge particularly sharply against values that are hard to define, like structural constitutional values such as federalism.[31] These canons help to expand the scope of the judge's view beyond one narrow provision of law to include the vast web of sources of legal authority, parts of which may conflict with the apparent meaning of the statute at issue.[32] The result is a body of law that is more harmonized.

The second endpoint of the spectrum of rationales describes presumptions that are rooted in facts about the world. Rather than incorporating other legal authorities, these fact-based presumptions bring additional facts to bear on a question of interpretation. Fact-based presumptions avoid focusing narrowly on the circumstances that prompted a legislature to enact a particular law by referring to the universe of facts that motivates similarly situated, actual legislatures. Presumptions with fact-based rationales are comparatively less familiar in the statutory interpretation context, even though they may be very familiar to common law judges. For example, judges in probate disputes very often interpret wills to conform to the intent of similarly situated grantors.[33]

Other scholars' proposals for categorizing canons of interpretation differently have failed to identify the category of fact-based canons as derived from empirical observations about congressional behavior. For example, Professor Ross proposes a distinction between

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[30] Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1585–93 (2000) (arguing that the constitutional avoidance canon is "a useful mechanism for realizing important constitutional values").

[31] *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 403 (2010) ("[S]ome defend such rules as judicially administrable tools for protecting so-called 'underenforced constitutional norms'—principles such as the separation of powers and federalism, which are integral to the constitutional scheme but whose details often cannot be convincingly articulated at the level of individual cases.").

[32] *See* Shapiro, *supra* note 21, at 960 (arguing that courts use canons when interpreting statutes to fulfill their "responsibility to accommodate change to a complex and relatively stable structure of rules and principles").

[33] *See* Browning v. Sacrison, 518 P.2d 656, 659 (Or. 1974) (affirming a trial court that used a "construction which conforms more closely to the intent commonly prevalent among conveyors similarly situated" to interpret the remainder provision of a devise).

"descriptive" and "normative" canons, in which "descriptive" canons "involve predictions as to what the legislature must have meant."[34] Despite Ross's recognition that likely legislative intent plays an important role for some canons, his "descriptive" category includes canons such as *ejusdem generis* and presumptions against internal inconsistency that are not obviously fact-based.[35] Similarly, Professor Bamberger describes "normative" canons as those that are "inspired . . . by the substantive and structural concerns of the Constitution."[36] In the same vein, Professors Frickey and Eskridge have drawn the distinction between "substantive," "textual," and "extrinsic source" canons.[37] In other words, most of the categories for distinctions among canons of interpretation are either overinclusive or underinclusive compared to the distinction this Note proposes because they do not identify those canons that are neither textual nor normative. The following two sections explore in more depth my distinction between value- and fact-based presumptions in order to facilitate a discussion in Part II about how the presumption against extraterritoriality has shifted along the spectrum over time.[38]

A. *Value-Based Presumptions*

According to the model this Note proposes, value-based presumptions are justified by piggybacking on the desirable features of their underlying values. These presumptions are worthwhile because they help to promote the values upon which they are based, which in turn are things society thinks are worth promoting. This two-step relationship—the instrumental worth of the presumption and the ultimate desirability of the underlying values—is both a strength and a weakness of value-based justifications. On one hand, value-based presumptions often bootstrap a convincing menu of rationales for their use: the reasons supporting the underlying value. On the other hand, value-based presumptions cannot capture all of the benefits of the

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[34] Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992).

[35] Indeed, it is difficult to know whether Congress meant for like terms to be given like meaning, since that is the very question interpreting courts must decide.

[36] Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 66 (2008).

[37] *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 97 (1994) (categorizing in an appendix the Rehnquist Court's canons of statutory interpretation). Eskridge and Frickey categorized the presumption against extraterritoriality as a common law "substantive policy" canon. *Id.* at 107.

[38] In the following sections, I speak of "value-based presumptions" and "fact-based presumptions" for simplicity, but I intend to draw a distinction between the endpoints on the spectrum of rationales underlying presumptions.

underlying value because the presumption might not apply in all circumstances in which the value would be relevant. Put differently, value-based presumptions may inefficiently safeguard putatively underenforced norms because they promote the norm in a derivative or incomplete manner.

At least in theory, this second-order relationship between presumptions and their underlying values allows individual litigants to rebut the application of a value-based presumption when the values the presumption protects are not implicated by a particular case. Consider the example of federalism, a value that, for the moment, may be assumed to be worth promoting for its own sake. There are many ways to promote federalism. One of those ways is with a presumption that statutes be read not to upset the state-federal balance. By applying a presumption in all cases to all statutes, however, courts may overenforce federalism by assuming that Congress never intended to change the state-federal balance when Congress may have possessed that intent. Conversely, federalism issues may appear in many contexts other than statutes, and if courts rely on a canon of interpretation as the primary way to promote that value, underprotection of state power may result. Thus, value-based presumptions do not ensure perfect fidelity to the values they pursue.

Perhaps the best examples of value-based canons of statutory interpretation are so-called "clear statement rules."[39] They are a subset of judicial presumptions that require a heightened level of textual clarity to resolve statutory ambiguity in the direction of certain real-world applications.[40] The most commonly invoked clear statement rules protect—and are therefore justified by reference to—constitutional values like federalism[41] and separation of powers[42] that judges believe would be underenforced otherwise. For example, the federalism clear statement rule is justified by, among other things, promotion of state experimentation, protection from tyranny, efficiency, individual choice, and citizen participation.[43] To the extent that

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[39] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595–96 (1992) [hereinafter Eskridge & Frickey, *Quasi-Constitutional Law*] (describing substantive canons and clear statement rules of statutory interpretation as "value choices").

[40] *Id.* at 611–27 (describing the evolution of "super-strong clear statement rules" based on federalism and the level of clarity each rule requires).

[41] *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242–43 (1985) (requiring a clear statement of congressional intent to override sovereign immunity).

[42] *See* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 465–66 (1989) (requiring "firm evidence" to overcome the judicial presumption of constitutional avoidance surrounding a separation of powers issue).

[43] For one account of the values of federalism, see Robert P. Inman & Daniel L. Rubinfeld, *Rethinking Federalism*, 11 J. ECON. PERSP. 43, 44–53 (1997). The Supreme

those ends are worthwhile, that federalism achieves them, and that the clear statement rule protects federalism, the clear statement rule is instrumentally valuable in achieving those desired ends.

Clear statement rules have drawn scrutiny in the scholarly literature because they lack textual authority in the specific statutory provision being interpreted. This broad criticism can be broken down into two parts: attacks against the underlying values and attacks against judicial implementation. First, some observers criticize clear statement rules as vehicles for imposing unjustified values. For example, clear statement rules may be framed as imposing an arbitrary "clarity tax" on certain forms of legislation.[44] Similarly, Eskridge and Frickey argue that clear statement rules may be used to advance normative values that are not desirable from a policy perspective.[45] Second, clear statement rules arguably are an arbitrary or undemocratic way of achieving otherwise acceptable policy goals. This criticism takes issue with the uncertain stringency of the requirement that Congress issue a "clear statement."[46] A stronger version of this criticism is that it is not obvious at the point of drafting what level of clarity will be required for a statute to apply in a particular instance, and therefore the intent of Congress may be thwarted arbitrarily.[47]

As with all value-based presumptions, clear statement rules vary widely in scope, applicability, and justification.[48] For example, many—

Court has cited values such as protection of liberty, sensitivity to the varied needs of a diverse society, experimentation, and competition. *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (listing these as virtues of federalism).

[44] Manning, *supra* note 31, at 403 ("[C]lear statement rules do impose something of a clarity tax upon legislative proceedings in particular areas . . . .").

[45] Eskridge & Frickey, *Quasi-Constitutional Law*, *supra* note 39, at 629–45 (expressing skepticism that the imposition of values through clear statement rules is desirable). Of course, which normative values one finds undesirable is largely a question of one's own political beliefs.

[46] *See* Michael P. Lee, Note, *How Clear Is "Clear"?: A Lenient Interpretation of the* Gregory v. Ashcroft *Clear Statement Rule*, 65 U. CHI. L. REV. 255, 256 (1998) ("Uncertainty over the precise nature of the *Gregory* [clear statement] test has led federal courts to disagree over the applicability of important federal legislation to the states.").

[47] *See* ESKRIDGE, *supra* note 21, at 280–85 (describing how clear statement rules, and the presumption against extraterritoriality in particular, may be inconsistent and plastic in their applicability from case to case); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 85–86 (1998) (noting that the strength of the presumption against extraterritoriality has changed over time); Manning, *supra* note 31, at 442 ("[A] free-form version of structural inference [based on a background value] authorizes judges to go outside—that is, to shift—the level of generality set by those who bargained over the means, as well as the ends, of the relevant constitutional provisions.").

[48] Eskridge and Frickey identify at least a dozen clear statement rules, among them a presumption in favor of judicial review, a presumption in favor of tribal immunity from state regulation, and a host of federalism canons. Eskridge & Frickey, *Quasi-Constitutional Law*, *supra* note 39, at 601–02, 609–11, 619–29.

but by no means all—clear statement rules are grounded in nontextual constitutional values, often called constitutional penumbras.[49] The legitimacy of these judicial rules depends upon the legitimacy and desirability of the normative values on which they rest. Put another way, clear statement rules that enforce nontextual constitutional norms are acceptable only so long as the norms exist and apply, and then only so long as such judicial rules constitute an acceptable means by which to enforce those norms.[50] In practice, value-based presumptions, including clear statement rules, are rebuttable in individual cases when their underlying normative values do not apply as strongly or when they are counterbalanced by competing values.[51] Evidence that a particular construction of a statute would not substantially implicate the values that a particular presumption is designed to protect may be adduced relatively easily in individual cases.

B. Fact-Based Presumptions

Nearly all of the traditional clear statement rules seem to be justified by reference to values. However, I propose that factual assumptions alone can also give rise to presumptions. For example, fact-based presumptions may rest on the hypothetical intent of similarly situated parties—be they counterparties to a contract, grantors in a will, or legislatures. This conception may then be used as an aid to interpreting a particular text or legal question. Unlike value-based presumptions, which bring abstract legal authorities to bear on a statute or other text,[52] fact-based presumptions use facts to ascertain the actual meaning of the text.

A nonlegal example is instructive for understanding how fact-based presumptions operate. Consider a friend who, when meeting you for lunch, always specifies one o'clock as the designated meeting time. After months of consistently scheduling one o'clock lunches, the

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[49] *See* Manning, *supra* note 31, at 406–17 (defining clear statement rules as derived from constitutional penumbras).

[50] *See* Eskridge & Frickey, *Quasi-Constitutional Law*, *supra* note 39, at 642 (arguing that enforcing disfavored constitutional values "at the sub-constitutional level" lacks legitimacy, even if it is normatively desirable); Manning, *supra* note 31, at 404 (arguing that constitutional values enforced by clear statement rules do not "meaningfully" relate to the Constitution and therefore may lack legitimacy).

[51] For example, Congress need not use a clear statement when altering the federal-state balance pursuant to its powers under the Fourteenth and Fifteenth Amendments. Courts justify this distinction in part because the Reconstruction Amendments "already altered the constitutional balance of federal and state powers." Bd. of Cnty. Comm'rs v. EEOC, 405 F.3d 840, 850 (10th Cir. 2005). In these cases, the value of federalism is balanced against the concerns that animated the Reconstruction Amendments.

[52] *See* Manning, *supra* note 31, at 404–05 (criticizing value-based presumptions on the ground that abstract values lack provisions to define their scope and limitations).

friend leaves a telephone message asking to meet for lunch; unfortunately, the meeting time is unintelligible in the recorded message. Your friend's months of consistent behavior could give rise to a presumption in favor of meeting at one o'clock. This presumption would largely be devoid of value-based content. Similarly, any situation in which the past behavior of two similarly situated parties can be assumed to be a fair guide for future behavior might give rise to a fact-based presumption.

Fact-based presumptions, like their value-based counterparts, rely in part on some broadly applicable legal values. For example, most fact-based presumptions will rely on the, perhaps charitable, assumption that parties act in a consistent and logical way over time or that parties in fact possess certain intentions. Fact-based presumptions assume that the preferences of the reference class of similarly situated parties will change slowly over time, if at all. Finally, they rely on the substantive value that consistency in legal outcomes is worthwhile. However, such values are so diffuse and pervasive in legal reasoning as to be practically useless for distinguishing among types of presumptions. The distinguishing characteristic of fact-based presumptions is that they rely on real-world circumstances for interpretive guidance.

It is important to recognize what fact-based presumptions are not. Occasionally a court requires legislators or litigants to make certain factual findings before it will authorize action pursuant to a secondary rule.[53] For example, in *United States v. Morrison*,[54] the Supreme Court struck down a secondary rule for which Congress made insufficient factual findings.[55] In that case, Congress used facts to buttress what amounted to a legal claim: namely, that the power to regulate interstate commerce included the power to create a federal private cause of action against those who commit violent crimes against women. This congressional Act did not create a fact-based presumption, which, by contrast, would operate to describe how a

[53] I use the term "secondary rule" in the same sense that Professor Hart did: A rule is secondary if it facilitates the creation or alteration of rules of conduct rather than itself being a rule of conduct. *See* H.L.A. HART, THE CONCEPT OF LAW 94 (2d ed. 1994) ("[I]n the sense that while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves."). In this way, secondary rules are typically directed at officials. Courts can impose conditions on official action that, if met, provide the structure for creating new laws. For example, a court might impose a majority-vote requirement on an act of Congress before it becomes valid.

[54] 529 U.S. 598 (2000).

[55] *Id.* at 614–15 (holding that Congress's factual findings that "gender-motivated violence affects interstate commerce" were insufficient).

party such as a legislature has historically acted. Put another way, the findings in *United States v. Morrison* were facts not about the way Congress operates, but rather about the object of a particular piece of legislation. Fact-based presumptions always must incorporate some facts about the party whose language or actions are being interpreted.

Fact-based presumptions may become quite difficult for litigants to overcome if the pattern of behavior underlying the presumption is, or is perceived to be, very strong.[56] Rebutting a fact-based justification requires either exceptional clarity in the statute—which is naturally absent in the sort of case in which presumptions of any kind become relevant—or proof that the facts are false. Proving that the facts are false is often difficult because the nonexistence of a fact is difficult to establish conceptually and evidence that would prove it empirically can be difficult to acquire.[57] Further, to say that "similarly situated" parties "usually" take a particular course of action implies a stable notion of which parties are similarly situated and what parameters are accurate to evaluate historical tendencies. Given the difficulty in overcoming fact-based presumptions, it is particularly important that courts understand the reasons why they continue to apply such presumptions whose original rationales may be questionable or may have changed. In other words, courts must be careful to determine, to the extent possible, whether the factual basis for a longstanding presumption actually exists.

The spectrum that divides fact- and value-based canons is a useful tool for analyzing how canons evolve over time. Although most federal canons of statutory interpretation seem to be primarily value-based, some of the most robust value-based canons contain a fact-based dimension. Further, political and other nonlegal developments may dislodge the original value underlying a canon, initiating a shift toward factual justifications. Envisioning a generalized spectrum of justifications between values and facts may provide a way to explain a canon's continued existence after such transformations occur.

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[56] For more discussion regarding the difficulty in overcoming fact-based presumptions, see *infra* Part III.

[57] *Cf.* 11 BERTRAND RUSSELL, *What Is an Agnostic?*, *in* THE COLLECTED PAPERS OF BERTRAND RUSSELL 549, 550 (John G. Slater ed., 1997) ("If I were asked to *prove* that Zeus and Poseidon and Hera and the rest of the Olympians do not exist, I should be at a loss to find conclusive arguments.").

II
Illustrating the Spectrum with the Presumption Against Extraterritoriality

In this Part, I introduce the presumption against extraterritoriality and explain the way it works before demonstrating how this presumption illustrates the spectrum discussed above. The clearest way to understand the variety of presumptions on this spectrum is by tracing the presumption against extraterritoriality over time. While the presumption against extraterritoriality has become essentially a fact-based canon, important values once underlay it, and its evolution toward a fact-based presumption has been gradual.

A. The Mechanics of the Presumption Against Extraterritoriality

The Supreme Court has defined the presumption against extraterritoriality simply: "When a statute gives no clear indication of an extraterritorial application, it has none."[58] "Extraterritorial" means outside "the territorial jurisdiction of the United States."[59] Therefore, federal statutes[60] will not apply abroad—even to United States citizens—unless Congress expresses a clear intention that they do so.[61] The Court also has explained that, to overcome the presumption, it must find "the affirmative intention of the Congress clearly expressed."[62] Of course, the Court carefully observes that Congress has the authority to legislate beyond its borders.[63] However, whether

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

[59] *Aramco*, 499 U.S. 244, 248 (1991) (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)) (internal quotation marks omitted) (explaining that the presumption assumes that Congress meant legislation "to apply only within the territorial jurisdiction of the United States").

[60] The limits on the extraterritorial application of state law are more stringent: State laws are intended to have effect only within the boundaries of the individual state. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985) (holding that the application of Kansas law to a nationwide class action was "sufficiently arbitrary and unfair as to exceed constitutional limits" and remanding to consider the possibility that the law of each class member's state apply to his or her claim).

[61] Occasionally the Supreme Court has referred to the presumption as a clear statement rule, but this is largely a misnomer. Its status as a clear statement rule is at least controversial. In *Aramco*, Justice Marshall objected that the majority's opinion transformed a mere presumption against extraterritoriality into a full-fledged clear statement rule. *Aramco*, 499 U.S. at 266 (Marshall, J., dissenting) ("[A] court is not free to invoke the presumption against extraterritoriality until it has exhausted all available indicia of Congress' intent on this subject.").

[62] *Id.* at 248 (majority opinion) (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)) (internal quotation marks omitted).

[63] *Id.* ("Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.").

Congress has done so in a particular instance is a matter of statutory interpretation.[64]

To understand the presumption against extraterritoriality, it is useful to examine the facts of *EEOC v. Arabian Am. Oil Co.* (*Aramco*). Although this is a more contemporary application of the presumption, *Aramco*—and its facts—places the values that are at stake with the presumption in clear relief and is therefore instructive. Ali Boureslan was an American citizen working for an American corporation, Arabian American Oil Co. (Aramco), which was incorporated in Delaware with its principal place of business in Saudi Arabia.[65] He began working for an Aramco subsidiary in Houston, Texas, in 1979, but shortly thereafter asked for, and was granted, a transfer to work for Aramco in Saudi Arabia. When he was fired by Aramco in 1984, Boureslan filed charges with the Equal Employment Opportunity Commission (EEOC) and then filed suit in the District Court for the Southern District of Texas against Aramco and its subsidiary for, among other things, violations of Title VII of the Civil Rights Act of 1964—specifically, employment discrimination on the basis of race, religion, and national origin.[66] Aramco filed a motion to dismiss, alleging that the court lacked subject matter jurisdiction over Boureslan's claim because Title VII did not apply to discrimination by American corporations against American citizens when the discrimination did not occur within the United States. The district court granted Aramco's motion, although it observed that the statutory language and legislative history were ambiguous.[67]

The Supreme Court, in a 6-3 decision, affirmed the decision of the Court of Appeals for the Fifth Circuit, which had affirmed the district court opinion.[68] Chief Justice Rehnquist, writing for the majority, first laid out the scope and details of the presumption against extraterritoriality.[69] He then considered the petitioners'—both

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[64] *Id.* ("Whether Congress has in fact exercised [the] authority [to legislate beyond U.S. borders] in these cases is a matter of statutory construction.").

[65] *Id.* at 247.

[66] *See id.*; *see also* Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (2006) (prohibiting employment discrimination on the basis of race, ethnicity, religion, sex, or national origin).

[67] *See* Boureslan v. ARAMCO, 653 F. Supp. 629, 630 (S.D. Tex. 1987), *aff'd*, 857 F.2d 1014 (5th Cir. 1988), *aff'd en banc*, 892 F.2d 1271 (5th Cir. 1990), *aff'd sub nom. Aramco*, 499 U.S. 244 (1991). It is worth noting that the district court cited *Foley Bros.* for the proposition that "the absence of a clearly expressed intent creates a presumption that Congress did not intend extraterritorial application." *Id.* (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949)); *see also infra* Part II.B.3 (describing how *Foley Bros.* made the presumption fact-based).

[68] *See Aramco*, 499 U.S. 244.

[69] *See id.* at 248.

Boureslan and EEOC in the consolidated case—two primary arguments. First, the petitioners argued that the broad terms "employer" and "commerce" as defined in Title VII expressed a congressional intent that the statute apply to American firms that employ American citizens abroad.[70] Because the statutory definition of "commerce" included activity "between a State and any place outside thereof," the petitioners asserted that Congress intended Title VII to have at least some extraterritorial effect.[71] Aramco responded that the definition was intended to limit applicability to activity that involved United States territory in some significant way and to exclude activity that occurred entirely within the territorial borders of a foreign country.[72] Second, the Court considered and rejected the petitioners' argument that the statute's "alien exemption provision" implicitly included Americans working abroad within the reach of the statute.[73]

In addressing the petitioners' first argument, the Supreme Court found no need to resolve the ambiguity implied by the definition of "commerce," "as [it] would be required to do in the absence of the presumption against extraterritorial application."[74] The Court accepted that each side's interpretation was "plausible," although not entirely persuasive, particularly since the language on which the petitioners relied was common to many statutes that had never been held applicable outside of the United States.[75] Instead, the Court applied the presumption, thus siding with Aramco, and explicitly invited Congress to alter the result by amending Title VII should it so desire.[76]

The stronger of the petitioners' arguments was that the jurisdictional provisions of Title VII logically implied evidence of intent that the statute should apply extraterritorially. Specifically, the "alien exemption provision says that the statute 'shall not apply to an employer with respect to the employment of aliens outside any State.'"[77] Petitioners argued that to interpret the statute not to apply to American citizens abroad would render the alien-exemption provi-

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[70] *Id.* at 248–49.

[71] *Id.* at 249–50 (quoting 42 U.S.C. § 2000e(g) (1982)).

[72] *Id.* at 250; *see also* Brief for Respondents Arabian American Oil Co. & Aramco Services Co. at 21 n.14, *Aramco*, 499 U.S. 244 (Nos. 89-1838, 89-1845), 1990 WL 511309, at *21 n.14.

[73] *Aramco*, 499 U.S. at 253–55 (rejecting the petitioners' argument because their interpretation would apply Title VII to foreign employers without clear congressional intent); *see also infra* notes 77–79 and accompanying text (describing the provision).

[74] *Aramco*, 499 U.S. at 250.

[75] *Id.* at 250–51.

[76] *See id.* at 259 ("Congress, should it wish to do so, may similarly amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot.").

[77] *Id.* at 253 (quoting 42 U.S.C. § 2000e-1 (1982)).

sion surplusage.[78] Legislative history cited by EEOC in its brief and quoted by Justice Marshall in his dissent supported this view.[79]

Although the Court found the petitioners' alternate readings of the "alien exemption provision" persuasive, it concluded that the negative inference to be drawn from the provision was not a sufficiently clear statement of congressional intent to give extraterritorial effect to Title VII.[80] *Aramco* thus squarely raised the question of how clear a statute must be in order to exert extraterritorial effect. In his dissent, Justice Marshall noted the Court accepted a negative inference—similar to the petitioners' surplusage argument with respect to the alien-exemption provision—in *Pennsylvania v. Union Gas Co.*[81] as sufficiently strong evidence of congressional intent to overcome the "dense armor" of the "clear-statement abrogation rule of *Atascadero State Hospital v. Scanlon*."[82] Clearly, *Aramco* demonstrates the strength of the presumption against extraterritoriality: Interpretations that would give extraterritorial effect to a statute will not apply unless they meet a threshold requirement of clarity, even if they are as plausible—or even more plausible—than interpretations that avoid such an effect.

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[78] *See* Brief for the EEOC at 12–13, *Aramco*, 499 U.S. 244 (Nos. 89-1838, 89-1845), 1990 WL 511330, at *12–13 ("Congress could not rationally have enacted an exemption for the employment of aliens abroad if it intended to foreclose *all* potential extraterritorial applications of the statute.").

[79] *See* H.R. REP. NO. 88-570, at 4 (1963) (clarifying that the purpose of the alien-exemption provision was to prevent conflicts of laws in cases in which American companies employed alien workers outside the United States); *see also Aramco*, 499 U.S. at 272 (Marshall, J., dissenting) (citing to and agreeing with the House report); Brief for the EEOC, *supra* note 78, at 15–17 (same).

[80] *See Aramco*, 499 U.S. at 255 ("Without clearer evidence of congressional intent to do so than is contained in the alien-exemption clause, we are unwilling to ascribe to that body a policy which would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce.").

[81] 491 U.S. 1 (1989), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (2006).

[82] *See Aramco*, 499 U.S. at 267–68 (Marshall, J., dissenting) (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242–43 (1985)). *Atascadero* required Congress to "express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." 473 U.S. at 243. In *Union Gas*, the Court held that a negative inference was unmistakable enough to satisfy the *Atascadero* clear statement rule. *See Union Gas*, 491 U.S. at 7–8. It is worth noting, however, that the majority opinion in *Union Gas* was authored by Justice Brennan, who also authored a dissenting opinion in *Atascadero*, in which he scathingly critiqued the Court's new clear statement rule. *See Atascadero*, 473 U.S. at 258 (Brennan, J., dissenting) (cataloguing as some of the probable results of the decision "the unprecedented intrusion on Congress' lawmaking power and consequent increase in the power of the courts[and] the development of a complex set of rules to circumvent the obviously untenable results that would otherwise ensue").

After *Aramco*, the presumption against extraterritoriality enjoyed something of a renaissance.[83] Moreover, turning the presumption into a text-only clear statement rule effectively precludes inquiry into nontextual sources like legislative history and strengthens the presumption, at least unless or until Congress fully internalized the new interpretive regime and changed the way it wrote laws. However, *Aramco* is not representative of the way in which the Supreme Court always justified the presumption. Instead, the presumption's history suggests that it changed over time, and may be continuing to evolve in contemporary decisions. The next Section traces the presumption's shift from being justified entirely by substantive values grounded in international law to its heavy modern reliance on facts about how Congress "ordinarily" legislates. This shift has important practical consequences for litigants who argue that statutes should apply extraterritorially and logical consequences for the strength of the presumption itself.

B. The Evolution of the Presumption Against Extraterritoriality

The presumption against extraterritoriality slowly evolved from a value-based presumption to a fact-based presumption. Therefore, this presumption operates both as an exemplary case for explaining the differences between value- and fact-based presumptions and as a noteworthy example of a presumption with justifications that are in flux. By tracing the history of the presumption, this Section illustrates how the spectrum of justifications for canons of statutory interpretation proposed in Part I affects judicial presumptions' justifications and applications.

1. The Presumption as Value-Based: Avoidance of International Law Violations

The presumption against extraterritoriality has a history that spans more than two centuries. In its earliest form, the presumption resulted from a fusion of the presumption that Congress does not ordinarily intend to violate the law of nations, known as the *Charming Betsy*[84] canon, and the nineteenth-century belief in strict territorial

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[83] *Cf.* Eskridge & Frickey, *Quasi-Constitutional Law*, *supra* note 39, at 616–17 ("What ties together *Aramco* and [other Rehnquist Court international law decisions] is the theme that the Court is now making it harder for Congress to subject United States companies to new duties and obligations when they are acting transnationally.").

[84] Murray v. Schooner Charming Betsy (*Charming Betsy*), 6 U.S. (2 Cranch) 64, 118 (1804).

limitations on state sovereignty.[85] This territorial limitation, however, was not always absolute.[86] For example, courts in the nineteenth century never disclaimed the ability of Congress to apply laws to United States citizens abroad.[87] Thus, in its early form, the presumption against extraterritoriality was based largely on the value of territorial limitations on sovereignty and analogous paradigms of international law. That is, according to both domestic and international law at the time, the laws of two nations should not overlap, and, furthermore, it was politically undesirable domestically to violate the law of nations, which hewed to this territorial view of state sovereignty.[88]

Charming Betsy involved a Danish ship that was seized by French privateers and then subsequently seized by the *U.S.S. Constellation*.[89] The owner of the Danish ship filed suit for damages against the captain of the *Constellation*. On appeal to the Supreme Court, the captain argued that the Danish ship had violated United States law—specifically, an embargo against France[90]—and therefore was subject to confiscation.[91] Chief Justice Marshall's opinion articulated the canon that has come to be associated with the case:

> [A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations *as understood in this country*.[92]

This principle led the Court to limit the scope of the Act creating the embargo to the territorial borders of the United States and to hold that the *Charming Betsy* was not confiscable. However, the final pro-

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[85] *See* Born, *supra* note 3, at 10 ("During the nineteenth century, a common application of the *Charming Betsy* presumption was to incorporate the American understanding that international law forbids the extraterritorial application of national laws.").

[86] *See id.* at 13–14 (describing some extraterritorial bases of jurisdiction that existed during the nineteenth century).

[87] This principle is most famously affiliated with *Blackmer v. United States*. *See* 284 U.S. 421, 437 (1932) (holding that it cannot "be doubted that the United States possesses the power inherent in sovereignty" to require a citizen abroad to return to the United States to respond to a subpoena). However, the more general point that Congress may extend the law outside its own borders "as regards its own citizens" has a longer history. *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824).

[88] *See* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932, 947–48 (2010) (arguing that the Constitution was an attempt to ensure that the United States could "meet its international commitments," including those imposed by the law of nations, in order to earn other nation-states' trust).

[89] *See Charming Betsy*, 6 U.S. (2 Cranch) at 115–16.

[90] *See* Act of June 13, 1798, ch. 53, 1 Stat. 565 (establishing an embargo against France).

[91] *See Charming Betsy*, 6 U.S. (2 Cranch) at 117.

[92] *Id.* at 118 (emphasis added).

viso of the quoted language foreshadowed one way in which the *Charming Betsy* canon could be qualified: The presumption that Congress does not violate the law of nations may be susceptible to changing domestic notions of what the law of nations might be. Chief Justice Marshall seemed to acknowledge that the value underlying the earliest version of the presumption could change and perhaps undercut its strength.

At least for the first half of the nineteenth century, the Court was likely to apply the *Charming Betsy* canon when it came to reviewing Congress's ability to impose its laws on noncitizens abroad.[93] Over time, this application came to rely additionally on the close link between territorial sovereignty and customary international law—an even more robust version of the normative value at issue in *Charming Betsy*. The Court reaffirmed this strong normative value in *The Apollon*,[94] which also occurred against a background of heightened international conflict with France. The French ship *Apollon* tried to land her cargo at a port bordering the United States in order to avoid the payment of an American tonnage fee on French cargo.[95] The Court narrowly construed the statute that authorized the tonnage fee so that failure to pay the fee would not give rise to forfeiture.[96] This portion of the opinion sounded very much like *Charming Betsy*. However, the second half of the opinion established the territorial principle—not the law of nations—as the basis for the decision. Responding to the plaintiff's argument that the ship was properly seized because it was in a river bounding the United States,[97] the Court held that the ship had not entered United States territory[98] and therefore could not have been seized:

> The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own

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[93] *See* Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 213–14 (1993) ("The progeny of *Charming Betsy* apply a strict presumption against extraterritorial applications in the face of countervailing international principles.").

[94] 22 U.S. (9 Wheat.) 362 (1824).

[95] *See id.* at 363–65 (describing the steps that the *Apollon* took to avoid the fee).

[96] *See id.* at 367–68 (holding that the statute only provides an action in personam against the ship's master, not in rem for forfeiture of the ship or its cargo).

[97] At the time, the St. Mary's River represented the northernmost border of Spanish Florida. MARK STEIN, HOW THE STATES GOT THEIR SHAPES 66 (2008). The plaintiff argued that the *Apollon* had entered United States waters and so was subject to the jurisdiction of federal statutes. *Cf. The Apollon*, 22 U.S. (9 Wheat.) at 368–69 (noting that "it is said" that the forfeiture law applied to the *Apollon* because "the ship had entered the district of St. Mary's" and left without making a report).

[98] *The Apollon*, 22 U.S. (9 Wheat.) at 369–70.

> jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction.[99]

In so holding, Justice Story fused the territorial concept of jurisdiction with the *Charming Betsy* canon against violating the law of nations.

Therefore, in *The Apollon*, the Court began to erect the presumption against extraterritoriality against the background of the substantive law of nations as addressed by *Charming Betsy*. A state's power could not extend beyond its own borders, so its laws could not either. Justice Story's opinion demonstrated that this notion of territorial sovereignty was so firmly entwined with the presumption that the Court did not need to offer any additional justifications for it. The territorial sovereignty notion remained the dominant justification for the presumption against extraterritoriality through the late nineteenth century, acting even as a restraint on the authority of the individual states.[100]

Applied in this way, the presumption changed again as it came to span the more modern split between public and private international law. Justice Story, in his *Commentaries on the Conflict of Laws*,[101] adapted the principle of what was then known as the law of nations to the developing corpus of conflict-of-laws authorities, with influential results.[102] As a result, conflict-of-laws principles provided an independent, alternate justification for the presumption against extraterritoriality.[103] The presumption remained value-based, but the value on which the presumption was based continued to change. While the law of nations had once limited whether a state could legislate outside its borders, conflict-of-laws doctrine provided reasons not to apply laws extraterritorially even once a state intended to do so.

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[99] *Id.* at 370.

[100] *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714 (1878) (applying a territorial theory of sovereignty to impose strict limitations on the jurisdiction of state courts over absent nonresident defendants).

[101] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS (1834).

[102] *See* Kurt H. Nadelmann, *Joseph Story's Contribution to American Conflicts Law: A Comment*, 5 AM. J. LEGAL HIST. 230, 250 (1961) (noting the influential value of Story's *Commentaries* on the development of the law); *see also* Born, *supra* note 3, at 17 ("Later, the *Commentaries* provided the foundation for the 'vested rights' theory developed in Joseph Beale's highly-influential conflict of laws treatise, and thus indirectly for the first *Restatement of Conflict of Laws*." (footnote omitted)).

[103] *See* Born, *supra* note 3, at 16–19 (explaining that the notion that a nation could only apply its laws within its territory became almost universally accepted during the nineteenth century and was based in part on conflict-of-laws principles).

In the early twentieth century, conflict-of-laws principles fused with the presumption against extraterritoriality in *American Banana Co. v. United Fruit Co*.[104] In *American Banana*, an Alabama corporation alleged that a rival New Jersey corporation had, through various scandalous turns on the Panamanian road to independence, deprived it of ownership of one of its banana plantations in Panama in violation of antitrust laws.[105] The plaintiff brought suit for violations of the Sherman Act.[106] Writing for the Court, Justice Holmes rejected the plaintiff's contention that United States law applied to the dispute. Justice Holmes observed that law "commonly is confined to such prophecies or threats [as those] addressed to persons living within the power of the courts."[107] This territorial sovereignty notion, reminiscent of *The Apollon*, incorporated a robust theory of conflict of laws given the majority's view that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[108] These combined principles, in turn, gave rise to a new rule of construction in cases of uncertainty: "The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."[109]

Thus, the Court in *American Banana* combined a theory of territorial sovereignty with a substantive principle of international law—i.e., a principle derived from conflict of laws—just as the Court in *The Apollon* combined territorial sovereignty theory with *Charming Betsy*'s value of law-of-nations avoidance. In both *The Apollon* and *American Banana*, the strength of the proposed presumption rested almost entirely on a thick notion of territorial sovereignty. Absent this notion, the Court's justifications for the presumption would have been very weak indeed.

The decisions in *The Apollon* and *American Banana* share an articulation of the presumption against extraterritoriality derived not from a judicial understanding about how the world of international law actually is, but rather how it *ought* to be. Under such an understanding, a judge's role is to interpret legislation that might potentially offend the law of nations or create conflicts of law so as to avoid such

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[104] 213 U.S. 347 (1909).

[105] *See id.* at 354–55 (describing the defendant's efforts to monopolize the banana market in Panama).

[106] 15 U.S.C. §§ 1–8 (2006).

[107] *Am. Banana*, 213 U.S. at 356–57.

[108] *Id.* at 356.

[109] *Id.* at 357.

troublesome legal outcomes. This interpretive move is justified by the assumption that if legislative actors ought not to do something, they can be presumed not to have done it in the case of ambiguous legislation. After *American Banana*, then, if changes in substantive law eliminated conflicts of laws, the presumption presumably would become unnecessary because the value of conflict avoidance no longer has force. This potential for change foreshadows later changes in the presumption against extraterritoriality.

2. *Erosion of the Underlying Value: The Instability of Strict Territoriality*

The decline of the notion of territorial sovereignty did not occur all at once. Rather, it took place gradually over the course of the first half of the twentieth century.[110] Two cases decided in 1945 provide a useful benchmark against which to measure this broad decline: *United States v. Aluminum Co. of America* (*Alcoa*)[111] and *International Shoe Co. v. Washington*.[112] The fact that these cases dealt with entirely distinct areas of the law—antitrust and constitutional due process, respectively—illustrates that there was a broad sea change that undermined the original justifications for the presumption against extraterritoriality.

The *Alcoa* court was confronted squarely with the precedent of *American Banana*, which apparently foreclosed the Sherman Act's application to conspiracies formed outside the United States. Judge Learned Hand's opinion[113] dealt gingerly with *American Banana*. While acknowledging that the presumption against extraterritoriality incorporated conflict-of-laws principles, Judge Hand recognized an exception in the form of an "effects" test.[114] *Alcoa* thus rejected—

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[110] *See* Born, *supra* note 3, at 29–54 (cataloguing different areas of law in which territorial theories were gradually abandoned or reconsidered).

[111] 148 F.2d 416 (2d Cir. 1945).

[112] 326 U.S. 310 (1945). The importance of the timing of these and other decisions expanding the territorial jurisdiction of United States courts has not gone unnoticed. *See, e.g.*, Kal Raustiala, *The Evolution of Territoriality: International Relations and American Law*, *in* TERRITORIALITY AND CONFLICT IN AN ERA OF GLOBALIZATION 219, 229 (Miles Kahler & Barbara F. Walter eds., 2006) (arguing that strict territorialism decreased as the U.S. economy became increasingly nationalized).

[113] The case was referred to the Second Circuit by designation because the Supreme Court failed to assemble a quorum to hear the case. At that time, antitrust cases were appealable directly to the Supreme Court from the district court. *See Alcoa*, 148 F.2d at 421 (noting that the case was referred to the Second Circuit because the Supreme Court lacked a quorum).

[114] As Judge Hand put it, "courts are not to read general words . . . without regard to the limitations . . . which generally correspond to those fixed by the 'Conflict of Laws.' . . . On the other hand, it is settled law . . . that any state may impose liabilities, even upon persons

because of changed legal circumstances—the notion that conflicts principles imposed strong territorial limits on the Sherman Act, which is surprising because Judge Hand simultaneously recognized—citing *American Banana*—that those principles had previously done so.[115] Judge Hand thus struck a blow to the doctrinal international law justification for the presumption against extraterritoriality.

International Shoe similarly marked the decline of territorial notions of sovereignty. Much as *Alcoa* synthesized the changes in the law since *American Banana*, *International Shoe* sought to eliminate the Ptolemaic epicycles that had accumulated in personal jurisdiction doctrine in the decades following *Pennoyer v. Neff*'s territorial holding.[116] While *International Shoe* did not deal with extraterritoriality in the strictest sense, it is illustrative of the broader changes in the applicable paradigm of jurisdiction, which is relevant to the international extraterritoriality cases. Chief Justice Stone's sparse opinion in *International Shoe* observed both the historical limitations of territorial jurisdiction and the circumstances that had changed since due process required a defendant's physical presence to exert jurisdiction.[117] As in *Alcoa*, past precedent already had laid the groundwork for abandoning territorial theories, but the full break was not evident until its explication in this watershed opinion. Once the link between territorial borders and the jurisdiction of courts was severed, the ques-

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not within its allegiance, for conduct outside its borders that has consequences within its borders." *Id.* at 443.

[115] *See* Born, *supra* note 3, at 32 ("What *Alcoa* really said is that if Congressional enactments were to be interpreted in light of concerns about international law, conflict of laws and 'international complications,' then these concerns ought to reflect contemporary realities and international law doctrine."). Although the road from *American Banana* to *Alcoa* was well-worn with precedent, *see* R.Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146, 161–64 (1957) (describing the erosion of *American Banana*'s territorial principle), the decision was nonetheless the subject of scrutiny and criticism abroad, *see id.* at 175 ("There is no doubt that in some of the antitrust cases of recent years the United States have pushed their claims to extraterritorial jurisdiction to extreme limits."); *see also* M. Sornarajah, *The Extraterritorial Enforcement of U.S. Antitrust Laws: Conflict and Compromise*, 31 INT'L & COMP. L.Q. 127, 127 (1982) ("The position taken by the courts of the United States as to the extraterritorial reach of the Sherman Act and other U.S. antitrust laws has caused considerable concern to the States belonging to the Commonwealth." (footnote omitted)).

[116] 95 U.S. 714 (1878); *see also supra* note 100 and accompanying text (describing *Pennoyer*). Professor Rutherglen noted *International Shoe*'s paradigm shift: "*International Shoe* replaced this network of detailed exceptions [to a strict territorial principle] with a single overriding principle . . . ." George Rutherglen, International Shoe *and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 348.

[117] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("[N]ow that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, . . . he have certain minimum contacts with [the forum] . . . .").

tion whether a state's laws applied outside its borders became a much more complex inquiry.

3. *From Value to Fact:* Foley Bros.

With the substantive law values that once gave force to the presumption against extraterritoriality drastically altered in the wake of decisions like *Alcoa* and *American Banana*, the status of the presumption itself was uncertain. In 1949, *Foley Bros., Inc. v. Filardo*[118] presented the Supreme Court with the opportunity to reconsider the operation of the presumption. *Foley Bros.* concerned the applicability of the Eight-Hour Law[119] to an employment contract between a United States company and a private contractor on foreign soil. Consistent with existing principles of sovereignty, Congress's power to apply the law to contracts outside the United States was uncontested.[120] The question, therefore, was whether as a matter of statutory interpretation Congress had in fact done so.[121]

In determining the proper construction of the Eight-Hour Law, the *Foley Bros.* Court invoked the presumption against extraterritoriality, but in so doing it offered a new justification for use of the presumption. The Court's opinion starts with the presumption: "The canon of construction . . . teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . ."[122] The Court explained the role of the presumption even though the normative conflicts-avoidance value it had previously defended no longer applied. The presumption nonetheless remained "a valid approach whereby unexpressed congressional intent [could] be ascertained."[123] This statement bears unpacking, because it is both novel and exemplary of how the presumption would later come to be justified.

To say that the presumption is a method of determining unexpressed congressional intent means that the presumption is a way of filling in what Congress intended the law to say, even though it did not say it. On this reasoning, because Congress usually drafts laws that apply only within the territorial boundaries of the United States, courts may assume that Congress intends for its laws not to apply

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[118] 336 U.S. 281 (1949).

[119] Eight-Hour Law, ch. 352, 27 Stat. 340 (1892) (repealed 1962). The law provided an eight-hour limitation on the workday of federal laborers and mechanics, even if employed as contractors. *Id.*

[120] *Foley Bros.*, 336 U.S. at 284 (citing Blackmer v. United States, 284 U.S. 421 (1932)).

[121] *Id.* at 284–85.

[122] *Id.* at 285.

[123] *Id.*

extraterritorially in any individual case when such intent is uncertain. If such unexpressed congressional intent underlies the presumption, then the presumption—by the time of *Foley Bros.*, stripped of its normative theory of territorial sovereignty—is concerned with ensuring fidelity to congressional intent rather than the protection of a value. The way to assure fidelity to congressional intent, the Court suggested, was to employ knowledge about how Congress typically acts to determine how Congress actually acted in a particular instance. Putting aside for one moment whether the presumption tends to achieve the fidelity it seeks or whether Congress actually tends to legislate within the territorial boundaries of the United States, the presumption's justification in *Foley Bros.* differs greatly from its justification in *American Banana*, even though the presumption appears to operate in much the same way.

The petitioners in *Foley Bros.* shared the Court's understanding of the justification for the presumption. The petitioners explained that the presumption and other related ones "are recognized as aids to statutory interpretation only because they express the normal intention of a legislative body with respect to the territorial scope of its enactments."[124] Their conception of the presumption was as a default rule that gained legitimacy because it constitutes the most common congressional action when Congress faces analogous circumstances. The understanding at the time, as reflected in the Court's opinion in *Foley Bros.*, was that the presumption was grounded in facts about the world, namely that Congress usually wrote laws that were designed to regulate events within United States territorial boundaries.

4. *Confusion Between Value and Fact:* Aramco *Rejuvenates the Presumption*

The Court applied the presumption somewhat erratically in the wake of *Foley Bros.*[125] The next major decision applying the presumption was *Aramco*, more than forty years later.[126] *Aramco* offered

[124] Brief for Petitioners at 15, *Foley Bros.*, 336 U.S. 281 (No. 91), 1948 WL 47265, at *15. The respondent—unsurprisingly—did not rely on the presumption in attempting to persuade the Court to give extraterritorial effect to the statute, nor did it object to the petitioners' characterization of the presumption. *See* Brief for Respondent at 12–16, *Foley Bros.*, 336 U.S. 281 (No. 91), 1948 WL 47266, at *12–16 (arguing that the petitioners, through their characterization of the presumption, have placed themselves in the "unenviable and anomalous position of supporting alien labor to the detriment of American laborers").

[125] *See* Dodge, *supra* note 47, at 91–92 & 91 n.44 (describing cases that dealt with extraterritoriality issues but were sufficiently distinguishable from extraterritoriality cases to justify the Court's decision not to apply the presumption).

[126] *See supra* notes 65–83 and accompanying text (discussing *Aramco*).

yet another novel vision of the presumption—one that came with added justifications. After quoting the language from *Foley Bros.* discussed above,[127] Chief Justice Rehnquist explained that the presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[128] *Aramco* thus presented two justifications for its invocation of the presumption against extraterritoriality—one based on facts about the world and another based on conflict-of-laws concerns. The factual justification came from *Foley Bros.* and reflected the newer conception of the presumption in the wake of declining notions of territorial sovereignty.[129] The conflict-of-laws value justification, however, appeared to be conditional at best: It required at least the possibility of actual clashes between laws of the United States and other countries.

To support the conflict-of-laws justification, Chief Justice Rehnquist cited *McCulloch v. Sociedad Nacional de Marineros de Honduras*,[130] a 1963 case that addressed whether the National Labor Relations Act[131] applied to foreign ships with foreign crews operating partially in United States waters. However, *McCulloch* dealt more directly with a conflict-of-laws issue than an extraterritoriality question, given that the ships in question traveled frequently in United States territory.[132] Even under a traditional notion of territorial sovereignty, it was perfectly acceptable for United States law to apply to the ships, at least while they were in United States waters. In this way, *McCulloch* and a related case, *Benz v. Compania Naviera Hidalgo, S.A.*,[133] dealt with legal issues that were importantly different from

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[127] *See supra* notes 118–24 and accompanying text (discussing the Court's interpretation of the presumption in *Foley Bros.*).

[128] *Aramco*, 499 U.S. at 248 (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20–22 (1963)).

[129] *See supra* Part II.B.2 (describing the decline of territorial notions of sovereignty in justifying the presumption).

[130] 372 U.S. 10 (1963).

[131] National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006).

[132] *See McCulloch*, 372 U.S. at 18–19 (noting that the ships "operat[ed] in a regular course of trade between foreign ports and those of the United States"). The Court in *McCulloch* quotes *Charming Betsy* to exhume the old "law of nations" presumption against extraterritoriality. *Id.* at 21 (quoting *Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)). Of course, a mere question of ambiguous congressional intent about a law's extraterritorial application would not run up against Chief Justice Marshall's concerns in *Charming Betsy*, at least not since the beginning of the twentieth century. *See supra* Part II.B.1–2 (describing the decline of the notion of territorial sovereignty over the first half of the twentieth century).

[133] 353 U.S. 138 (1957). *Benz* involved whether the Labor Management Relations (Taft-Hartley) Act applied to a picket line on a foreign-flag ship operated by foreigners while it was in U.S. waters. *Id.* at 138–39. The existence of conflicting foreign law was patent, and

the ones at issue in either *Foley Bros.* or *Aramco*.[134] Although a presumption that enforces the international law value of comity for ships traveling in territorial waters might be acceptable or even desirable,[135] it is not grounded in a factual understanding of how Congress behaves. A direct application of *Foley Bros.* would suggest the latter rationale. The most vivid demonstration of the practical difference between presumptions grounded upon each of these bases would be a case with facts similar to *McCulloch*, but in which there were no possibility of conflicting laws.[136] Would the presumption still apply? Neither *McCulloch* nor *Benz* presented this question, and neither purported to answer it. This lingering uncertainty demonstrates the difficulty of disentangling the various justifications for the presumption against extraterritoriality and the way that value-based and fact-based justifications can operate alongside each other.

Finally, the Court in *Aramco* "assume[d] that Congress legislates against the backdrop of the presumption against extraterritoriality."[137] This new factual justification for the presumption follows from the Court's plan to decline to construe statutes to have an extraterritorial effect "unless there is 'the affirmative intention of the Congress clearly expressed.'"[138] Taken together, the Court implied that there is repeated interaction between Congress and courts: Courts interpret statutes with an understanding about how Congress normally acts, and Congress legislates with an understanding about how courts normally interpret statutes. Note that, for this interplay to work, neither branch needs to follow the presumption each time it acts. It is enough that each branch follows the presumption most of the time, since isolated deviations do not alter the best guess about intent or interpretation in subsequent interactions.

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the peculiar nature of domestic jurisdiction over foreign-flag ships in American waters made the conflict-of-laws issue yet more remote:

> It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country. The exercise of that jurisdiction is not mandatory but discretionary. Often, because of public policy or for other reasons, the local sovereign may exert only limited jurisdiction and sometimes none at all.

Id. at 142 (citation omitted).

[134] *See infra* notes 158–59 and accompanying text (introducing an operationalized distinction between *McCulloch* and *Benz*).

[135] *Cf.* Eskridge & Frickey, *Quasi-Constitutional Law*, *supra* note 39, at 640 (suggesting that some value-driven clear statement rules may be examples of justifiable judicial activism).

[136] *See infra* notes 143–50 and accompanying text (discussing just such a case, Smith v. United States, 507 U.S. 197 (1993)).

[137] *Aramco*, 499 U.S. 244, 248 (1991).

[138] *Id.* (quoting *Benz*, 353 U.S. at 147).

This implied interaction between Congress and the judiciary suggests that if Congress had evidence that courts would not apply the presumption, Congress might legislate vaguely on the question of extraterritoriality. Contrariwise, if the judiciary had any evidence that Congress intended a particular statute to have extraterritorial effect, it would be appropriate to abandon the presumption. In either case, the amount of evidence required before one branch would not apply the presumption would depend on the strength of the observation of the behavior underlying the presumption.[139] The observed behavior, in turn, is a fact about the world—which is to say it is contestable, mutable, and at least in theory susceptible to empirical evaluation.

The *Aramco* Court's assumption that Congress legislates with knowledge of the presumption does not obviously fit with the value-based justifications for two reasons. First, the assumption militates for stability of canons in general rather than for any one canon or another. The same logic would apply to an entirely arbitrary rule of construction so long as Congress were presumed to know about the rule. Second, although the assumption might justify future invocations of the presumption based on congressional notice of the judicial practice, it necessarily fails to justify invoking presumptions in a specific case in which the facts would not provide Congress with notice that the presumption could apply. In such a case, a court arguably should show that Congress *in fact* legislated against the backdrop of the presumption against extraterritoriality before applying the presumption. The increased difficulty of justifying the presumption's application in individual cases does not mean that it ought not to be invoked. However, this difficulty distinguishes the factual assumption from previous value-based justifications for the presumption, which each provided value-based reasons for application in each case.

The assumption that Congress legislates against the backdrop of the presumption against extraterritoriality may provide a reason not to look beyond a statute's plain text for evidence of congressional purpose. After all, if Congress were aware that courts would not give effect to anything beyond a statute's text, it should include more detail in the statute itself, as opposed, for example, to the legislative history. This reasoning holds true only if the backdrop against which Congress legislates has the same contours as the backdrop assumed by courts. In other words, if the presumption were to change, the problem of notice would remain. In *Foley Bros.*, legislative history constituted an

[139] *Cf.* Listokin, *supra* note 23, at 369–70 (arguing that defaults can become sticky if majoritarian behavior—what most parties want—is sufficiently common).

important part of the analysis.[140] The Court discussed legislative history in *Benz* as well.[141] Such cases provided Congress with some reason to believe that a court would utilize evidence of its intent for statutes to apply territorially, if contained in legislative history.

5. *The Vitality of the New Fact-Based Justification*

Aramco left open one very important issue: whether the presumption was justified by the value of preventing "unintended clashes" between United States laws and the laws of other nations.[142] If that were the primary justification, as some language in *Aramco* suggested, then the presumption would apply with much less force in cases involving no possibility of such clashes. In two cases decided two years after *Aramco*, the Court rejected this value-based understanding of the presumption and relied solely on justifications rooted in facts about the world.

In *Smith v. United States*,[143] the Supreme Court considered the novel question of whether the Federal Tort Claims Act (FTCA)[144] applied to Antarctica, a continent without any tort law. This case is useful analytically because it involved no possibility of a clash between United States law and the law of any other sovereign. The petitioner—a survivor bringing a wrongful death suit under the FTCA for acts of negligence that occurred while the decedent worked as a carpenter at a scientific station—argued that the presumption should not apply in the absence of the possibility of a conflict of laws.[145] The Court dismissed the argument in a brief, but significant, footnote: "[T]he presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind."[146] Unfortunately, the Court did not elaborate the other considerations to which it referred.

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[140] *See* Foley Bros., Inc. v. Filardo, 336 U.S. 281, 286–88 (1949) (examining the Eight-Hour Law's legislative history).

[141] *See Benz*, 353 U.S. at 144 (examining the Labor Management Relations Act's legislative history). The opinion in *McCulloch*, however, is dismissive of legislative history. *See* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20 (1963) ("We continue to believe that if the sponsors of the original Act or of its amendments conceived of the application now sought by the Board they failed to translate such thoughts into describing the boundaries of the Act as including foreign-flag vessels manned by alien crews.").

[142] *Aramco*, 499 U.S. 244, 248 (1991).

[143] 507 U.S. 197 (1993).

[144] 28 U.S.C. §§ 2671–2680 (2006).

[145] *See* Petitioner's Brief on the Merits at 16–17, *Smith*, 507 U.S. 197 (No. 91-1538), 1992 WL 511965, at *16–17 (arguing that the presumption should not apply because "Antarctica is 'sovereignless'").

[146] *Smith*, 507 U.S. at 204 n.5.

However, *Smith* definitively weakened the possibility that avoiding a conflict of laws is the value justification for the presumption against extraterritoriality. Instead, the Court effectively promoted a fact-based justification for the presumption.

The fact-based justification for the presumption against extraterritoriality was strengthened in *Sale v. Haitian Centers Council, Inc.*[147] In *Sale*, the Court of Appeals for the Second Circuit had not applied the presumption to certain provisions of the Immigration and Nationality Act of 1952[148] because the applicable section would not interfere with other nations' laws.[149] The Supreme Court, citing *Smith*, rejected the court of appeals' reasoning, reiterating that "the presumption has a foundation broader than the desire to avoid conflict with the laws of other nations."[150] However, as in *Smith*, there was no hint of what other justifications might apply in place of the conflict-of-laws value.

A third case, *Small v. United States*,[151] did not directly concern the application of the extraterritoriality presumption, but the Court nevertheless used the case as an opportunity to elaborate on the justifications for the presumption. The *Small* Court faced the question of whether a law prohibiting gun ownership by those convicted of a crime included as underlying crimes those "entered in a *foreign* court."[152] Holding that it did not, the Court explained that "the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application" is derived from the "commonsense notion that Congress generally legislates with domestic concerns in mind."[153] The Court thus clarified its position that a set of facts about how Congress normally legislates "led the Court to adopt" the presumption against extraterritoriality.[154]

The path from a value-based to an increasingly fact-based justification for the presumption against extraterritoriality has not been perfectly smooth, and the Court still offers a value-based version of the presumption in specific contexts. For example, in *F. Hoffmann-La*

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147 509 U.S. 155 (1993).

148 Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)).

149 *Smith*, 507 U.S. at 173–74.

150 *Id.* at 174.

151 554 U.S. 385 (2005).

152 *Id.* at 388. The petitioner in the case had been convicted of a crime in Japan, for which he had served a prison term. Upon his return to the United States, he purchased a firearm and was subsequently charged with illegal possession because of his prior conviction. The petitioner challenged his illegal possession conviction, arguing that the illegal possession statute was not supposed to consider his Japanese conviction. *See id.* at 387.

153 *Id.* (quoting *Smith*, 507 U.S. at 204 n.5) (internal quotation marks omitted).

154 *Id.* at 388.

Roche Ltd. v. Empagran S.A. (*Empagran*),[155] the Supreme Court once again appeared to embrace comity as a substantive value justifying the presumption. However, *Empagran* dealt narrowly with a specific statutory amendment to an otherwise sweeping antitrust law that applied extraterritorially. Congress drafted a law exempting certain conduct having only foreign effects from the Sherman Act, which *Alcoa* had held to apply extraterritorially.[156] Thus, the Court was asked to interpret a statutory provision that was apparently explicitly designed to restrict extraterritorial application. In choosing to do so, the Court cited *McCulloch* for the proposition that it would "construe[ ] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."[157] This is a subtly different presumption than the one at work in cases like *Morrison v. National Australia Bank Ltd.* because *Empagran* relies on the value of comity,[158] and this difference further illustrates the degree to which *McCulloch* and *Benz* are not, strictly speaking, cases about the presumption against extraterritoriality. Arguably, *Empagran* is better understood as a straightforward application of the traditional *Charming Betsy* canon because it involved the actual possibility of conflicting laws.[159]

Like *Empagran*, *Microsoft Corp. v. AT&T Corp.*[160] is arguably another isolated instance of value-based justification for the presumption. In *Microsoft*, the Court suggested that the presumption against extraterritoriality "applies with particular force in patent law."[161] The Court explained that, in the intellectual property context, "foreign law may embody different policy judgments about the relative rights of inventors, competitors, and the public in patented inventions."[162] Even so, the Court tempered this subject area specific

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155 542 U.S. 155 (2004).

156 Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, § 402, 96 Stat. 1233, 1246 (codified at 15 U.S.C. § 6a (2006)).

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

158 *See supra* notes 6–18 and accompanying text (discussing *Morrison*); *infra* notes 164–73 and accompanying text (same).

159 *Cf.* John H. Knox, *The Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 355–61 (2010) (drawing a distinction between the approach in *Empagran* and the extraterritoriality canon espoused by the Rehnquist Court); *see also supra* Part II.B.1 (discussing the *Charming Betsy* canon).

160 550 U.S. 437 (2007).

161 *Id.* at 454–55.

162 *Id.* at 455 (internal quotation marks and citation omitted).

statement about the presumption by rephrasing a version of the fact-based justification.[163]

This history provides the backdrop for *Morrison v. National Australia Bank Ltd.*,[164] the Court's most recent statement of the presumption. The *Morrison* Court directly incorporated this recent body of precedent into the presumption against extraterritoriality. *Morrison* raised the question of whether section 10(b) of the Securities Exchange Act of 1934[165] applied extraterritorially.[166] This was a longstanding question of statutory interpretation on which various courts of appeals had developed significant case law.[167] Notwithstanding the substantial lower court precedent holding that section 10(b) applied extraterritorially, the Court began its exercise in statutory interpretation by reciting the presumption and citing both *Smith* and *Sale*.[168] Justice Scalia, writing for the majority, also chastised the Second Circuit and other courts for disregarding the presumption.[169]

The *Morrison* opinion also addressed two questions that lingered after *Aramco*. First, Justice Scalia confirmed that the presumption rests on an assumption that Congress legislates with the knowledge that courts apply the presumption against extraterritoriality.[170] The virtues of such an approach, as articulated in *Morrison*, are the traditional arguments in favor of stable interpretive default rules. Foremost

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[163] *See id.* ("[C]ourts should 'assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.'" (quoting F. Hoffmann-La Roche Ltd. v. Empagran, 542 U.S. 155, 164 (2004))).

[164] 130 S. Ct. 2869 (2010).

[165] 15 U.S.C. § 78j(b) (2006).

[166] *See Morrison*, 130 S. Ct. at 2875 (describing the issue as "whether § 10(b) . . . provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges").

[167] *See, e.g.*, Itoba Ltd. v. Lep Grp. PLC, 54 F.3d 118, 121–24 (1995) (using a mixture of the conducts test and an effects test to find extraterritorial application of section 10(b) of the Securities Exchange Act), *abrogated by Morrison*, 130 S. Ct. 2869. Several other circuit courts of appeals followed the Second Circuit's balancing test. *See In re* CP Ships Ltd. Sec. Litig., 578 F.3d 1306, 1313 (11th Cir. 2009) (determining the extent of subject matter jurisdiction under the Second Circuit's conduct test), *abrogated by Morrison*, 130 S. Ct. 2869; *cf.* Cont'l Grain (Austl.) Proprietary Ltd. v. Pac. Oilseeds, Inc., 592 F.2d 409, 421 (8th Cir. 1979) (using a different test to find section 10(b) applied extraterritorially), *abrogated by Morrison*, 130 S. Ct. 2869.

[168] *See Morrison*, 130 S. Ct. at 2877–78 ("The . . . presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law." (citation omitted)).

[169] *Id.* at 2878 ("Despite this principle of interpretation, long and often recited in our opinions, the Second Circuit believed that, because the Exchange Act is silent as to the extraterritorial application of § 10(b), it was left to the court to 'discern' whether Congress would have wanted the statute to apply.").

[170] *See id.* at 2881 (explaining that the Court applies the presumption in all cases to create "a stable background against which Congress can legislate with predictable effects").

among these benefits is that the presumption allows Congress to "legislate with predictable effects."[171] Second, the *Morrison* opinion addressed the relationship between the presumption and nontextual sources. Although Justice Scalia opposes on principle the use of nontextual sources like legislative history,[172] he dismissed the notion that the presumption against extraterritoriality is a clear statement rule in the sense that it prohibits the use of context beyond the literal text of the statute.[173]

Morrison left no doubt about the importance that the Supreme Court places on the application of the presumption against extraterritoriality by lower courts. It also affirmed the primacy of justifications for the presumption based not in values—like comity of international law—but in facts about the world—like ordinary congressional behavior and the fact that Congress legislates against the background of judicial interpretation. Because of the statute-by-statute manner in which the presumption must be applied, its contours will continue to be the subject of Supreme Court decisions. Last Term, for example, the Court granted certiorari to determine, among other issues, whether the presumption applied to a particular doctrine of copyright law. The case, *Costco Wholesale Corp. v. Omega, S.A.*,[174] was affirmed 4-4, with Justice Kagan recusing, a vote breakdown that practically guarantees the issue will arise again in the near future.

This Part demonstrated that the presumption against extraterritoriality has undergone a dramatic transformation over the last 200 years, focusing on the shift in justifications for the presumption. Whereas values derived from principles of the customary international law and conflict of laws once supported the presumption, now observations about the way in which Congress usually legislates are usually its basis. This shift from value-based justifications to fact-based justifications has profound implications for understanding the presumption against extraterritoriality in particular and canons of statutory interpretation in general.

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171 *Id.*

172 ANTONIN SCALIA, A MATTER OF INTERPRETATION 29–37 (1997).

173 *Morrison*, 130 S. Ct. at 2883 ("[W]e do not say, as the concurrence seems to think, that the presumption against extraterritoriality is a 'clear statement rule,' if by that is meant a requirement that a statute say 'this law applies abroad.' Assuredly context can be consulted as well." (citation omitted)).

174 131 S. Ct. 565 (2010) (per curiam).

III
Obstacles to Rebutting Fact-Based Presumptions

Describing the shift in the presumption against extraterritoriality from value-based justifications to fact-based justifications does not answer the question whether such a shift is a positive development. Some may see this as positive because they object to value-based presumptions,[175] but value-based clear statement rules have their defenders.[176] More important to assess normatively is how the presumption has shifted to a new factual basis and grown stronger at the same time. Given that the history in Part II.B showed that this change has resulted from the deterioration of its original rationale, the Court's approach may be backward: A fact-based presumption without overwhelming facts should be weaker than a value-based presumption.

This Part considers the theoretical consequences of a shift from a value-based presumption to a fact-based one. Fact-based presumptions are susceptible to two primary types of attack. First, the "facts" assumed by courts as congressional baseline behavior may not be well-defined or may be difficult to ascertain, undermining the justification for a fact-based presumption. Second, background facts may change over time, which should require the presumption to change with the facts, but that, in turn, requires the judiciary keep abreast of these changes. Given these concerns and the uncertainty surrounding the facts upon which the presumption against extraterritoriality rests, the presumption is arguably unjustifiably strong in its current form.

Consider a litigant who seeks to overcome the presumption against extraterritoriality in an individual case. Were the presumption

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[175] *See supra* notes 45 and 50 for examples of such criticism.

[176] *See, e.g.*, Young, *supra* note 30, at 1585–93 (defending constitutionally based clear statement rules); *see also* Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 Yale L.J. 2, 33–34, 40 (2008) (defending clear statement rules as a means to increase the cost on Congress to push the boundaries of constitutional values).

Whether the presumption against extraterritoriality makes sense as a value-based presumption necessarily depends on whether its underlying value is worth protecting and whether its application protects the value. Professors Bradley and Dodge have identified five primary values that the presumption supports: international law, comity, choice of law, ordinary congressional intent, and separation of powers. *See* Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 Va. J. Int'l L. 505, 513–16 (1997) (developing this list of reasons for the presumption); *see also* Dodge, *supra* note 47, at 112–22 (evaluating Bradley's justifications seriatim). But the change in underlying international law may mean that the presumption is not protecting any existing values. *See* Born, *supra* note 3, at 99–100 (arguing that the presumption should be abolished and replaced with a presumption that laws apply extraterritorially when doing so would be consistent with principles of public and private international law).

against extraterritoriality rooted solely in the idea that laws should be construed to avoid conflicts with the laws of other nations, a litigant's rebuttal of the presumption would be straightforward. She would only need to show that there was no possibility—or a very low probability—of international conflict. This sort of situation would be common when international standards were uniform across jurisdictions. Such a situation also would arise when other nations had no relevant law that could conflict with the domestic law. By contrast, when the presumption is not rooted in comity values but in an understanding about how Congress "ordinarily" legislates, it becomes very difficult for a litigant to rebut the presumption. There are two obstacles to a showing that Congress does not ordinarily legislate in a particular way: One is definitional, and the other is practical. The definitional problem is that it is difficult to determine what it means to say that Congress ordinarily behaves in a certain way, and such an understanding would be necessary for courts to identify when Congress ceases to behave in that way to allow rebuttal of the presumption. Practically, even if the definition were clear, litigants would have difficulty gathering convincing evidence about the way in which Congress actually legislates if they are trying to show that Congress did not act with the presumption in mind with respect to a particular piece of legislation.

A. The Definitional Hurdles

Three problems arise in defining a congressional tendency to legislate with respect to conditions within the United States. As explained by the Court's footnote in *Smith*, "Congress generally legislates with domestic concerns in mind."[177] But what is the denominator in the implied fraction? Likely the fraction is the number of laws with domestic concerns in mind divided by the number of all relevant laws. "Relevant laws" is a narrow group. Only a subset of the laws Congress writes could possibly apply extraterritorially, so perhaps completely domestic legislation, such as that concerning Washington, D.C., or national parks, should not weigh in the calculus of whether a law to prevent international tax fraud applies extraterritorially. Further, considerations of typical congressional behavior may also need to be sensitive to differences in substantive law. There are reasons to believe that Congress is more likely to write laws that apply extraterritorially in certain substantive areas, such as antitrust and

[177] Smith v. United States, 507 U.S. 197, 204 n.5 (1993); *see also supra* notes 143–46 and accompanying text (discussing *Smith*).

tax.[178] For example, Congress recently passed the Foreign Account Tax Compliance Act,[179] which imposes substantial extraterritorial withholding and reporting requirements on foreign financial institutions and other foreign entities.[180] If there are substantial differences in the likelihood that Congress legislates extraterritorially when it legislates with respect to different substantive areas of the law, the general presumption might become a series of varying area-specific presumptions.

It is also unclear what the terms "generally" and "ordinarily" mean when a court says it is assuming how Congress generally or ordinarily behaves.[181] Congress might legislate with respect to foreign conditions one-fourth of the time. Would that low percentage be enough to rebut the presumption? Further, Congress may change its behavior by suddenly stopping or starting to legislate extraterritorially, which would require courts to determine the length of time during which Congress must act in a particular way before that behavior becomes the way in which Congress "ordinarily" acts. Similarly, congressional behavior might change with each session, as Congress's membership changes. An extraterritorially active Congress might legislate extraterritorially in three-fourths of its laws, while the next Congress might legislate extraterritorially in only one-twentieth of its laws. This type of line-drawing problem compounds the denominator problem noted above. When combined, these two hurdles mean that it is unclear both how to calculate the relevant percentage—the number of statutes that apply extraterritorially out of some broader pool of statutes—and against which yardstick to measure that percentage.

The final definitional hurdle relates to *which* Congress is the object of the observation. Consider *Morrison*, which interpreted a portion of the Securities Exchange Act of 1934.[182] In applying the presumption against extraterritoriality, it is unclear whether the Court considered the way in which Congress ordinarily legislates by looking at the Congress that enacted the statute in 1934, or the Congress in

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[178] For a discussion of increasing extraterritoriality in the antitrust area despite comity concerns, see *Developments in the Law—Extraterritoriality*, 124 HARV. L. REV. 1226, 1269–79 (2011); *supra* Part II.B.2.

[179] 26 U.S.C. §§ 1471–1474 (Supp. IV 2010). The law was part of the HIRE Act, Pub. L. No. 111-147, 124 Stat. 71 (2010) (codified in scattered sections of 23, 26, and 49 U.S.C.).

[180] *See id.* §§ 1471–1472.

[181] *See supra* note 177 and accompanying text (noting that *Smith* assumed how Congress "generally legislates"); *supra* note 153 and accompanying text (noting that *Small* assumed what Congress "ordinarily intends").

[182] *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2875 (2010) (interpreting section 10(b) of the Securities Exchange Act of 1934).

session at the time of the decision in 2010.[183] Given the significant lengths to which legislatures go to make deals stick and bind future Congresses,[184] the difference is critical—if all Congresses had the same preferences, no precommitment would be necessary. Further, the historical frame of reference matters greatly because of the enormous developments in international law generally, and the presumption against extraterritoriality specifically, over the last two centuries.[185]

B. The Practical Hurdles

Even if the Supreme Court were to articulate a clear definition of "ordinarily," substantial hurdles would remain for individual litigants who must gather evidence to rebut the presumption. The extraterritoriality question operates on a statute-by-statute basis. Each time the question arises in the context of a particular statute, it must be answered either by the explicit language of the statute or by a judicial consideration that involves the presumption against extraterritoriality.

It may be argued that if the Supreme Court considers the extraterritoriality question once per statute, and if Congress has the power to override statutory interpretations by the Court, the problem would be solved after the first Supreme Court litigation, and few people would be affected.[186] However, this criticism overlooks the considerable scholarly and legal attention to the application of clear statement rules in general, and the presumption against extraterritoriality in particular. Further, because the Court often interprets statutes decades after their original enactment, as was true in *Morrison* and *Aramco*, the Court may set the status quo with respect to the Congress in place at the time of the decision. Put differently, it is unclear whether the Court would consider the way in which Congress "usually" legislates from the standpoint of 1934 or 2010, or even whether the Court views this distinction as important for the application of the presumption. For litigants, this renders the Court's implementation of the presumption a moving target.

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[183] Accepted judicial practice would tend to favor the former. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 313 (2001) (Stevens, J., dissenting) ("[T]he objective manifestations of congressional intent to create a private right of action must be measured in light of the *enacting* Congress' expectations as to how the judiciary might evaluate the question." (emphasis added)).

[184] *See* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002) (describing legislative attempts to bind future Congresses and intervention by courts to prevent such legislation).

[185] *See supra* Part II.B (tracing some of these developments).

[186] *See, e.g.*, Manning, *supra* note 31, at 400–01 (discussing the idea that clear statement rules allow Congress to come back and amend statutes).

The Court's last-mover power is especially strong because it allows the Court to set a policy that exists distinct from *either* Congress's preferred outcome.[187] Given the large number of cases involving extraterritoriality that also involve plaintiffs bringing suit against corporations, this policy wedge may prove to have significant political consequences. The existence of such a procedural mechanism can permanently shift the policy equilibrium.[188] A blanket rule, which was supported by an empirical observation about the behavior of Congress and did not shift over time, could give a court substantial freedom to reach a result that differs from the one that would be favored by the enacting Congress or the current congressional majority. If a court's prerogative were to provide additional protections to corporate defendants than those intended by Congress, the presumption against extraterritoriality would permit that result.

Given that the justifications for the presumption against the extraterritorial application of statutes evolved from primarily value-based to primarily fact-based, the difficulty that any litigant would have in rebutting the new form of the presumption and the potentially profound political consequences of the transformation suggest that the presumption is unjustifiably strong. I argue that a much weaker version should replace its current form, so that it only applies in the complete absence of any evidence of congressional intent on the extraterritoriality question. Further, courts ought to be vigilant about reevaluating their assumption that Congress ordinarily legislates with domestic concerns in mind: They should be sensitive to different trends in extraterritoriality in different substantive areas of the law, and they should be more explicit about the facts Congress employs. Given the scope of changes in the presumption over the 200 years since *Charming Betsy*, it is not inconceivable that a major factual claim that provides support for the modern version of the presumption could become false at some point in the future. If the presumption's factual underpinnings were false, the presumption in its general form would no longer be justifiable.

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[187] *See* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 549 (1992) (demonstrating that, under certain circumstances, "[j]udicial review introduces the Court as a decisionmaker that can create a new default position"); *cf.* KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 20–48 (1998) (presenting a theoretical framework in which being the first mover in a multistage game allows for deviation from the legislative median).

[188] *See* Eskridge & Ferejohn, *supra* note 187, at 528–33 (formalizing a positive-political theoretical model of bicameralism, presentment, and judicial review, and demonstrating how it can result in changes in the political equilibrium).

Conclusion

This Note argued that the presumption against the extraterritorial application of statutes underwent a fundamental shift starting with *Foley Bros.* While it was once supported by robust, transsubstantive notions of territorial sovereignty, the values that support the presumption against extraterritoriality are now largely limited to specific areas of law. As the values on which the presumption historically rested eroded, the presumption found a new justification. This Note proposed that the new justification is grounded in an ostensibly empirical observation about how Congress actually behaves and thus is primarily fact-based. The general story of changing justifications is one that applies to many different legal rules.

This Note also proposed a spectrum between value- and fact-based presumptions that may shed light on the way in which other canons have evolved as well. Value-based canons that are not grounded in quasi-constitutional values—such as the federalism and constitutional avoidance canons—may be the most susceptible to shifting along this spectrum, but the path of constitutional change in the United States demonstrates that even constitutional values like federalism are contestable and may shift over time. If this occurs, courts may continue to look to empirical observations about congressional behavior to ground canons of interpretation that were once based on constitutional values. These empirical observations should be testable by litigants interested in avoiding a presumption and, if found to be incorrect by courts, rebuttable because Congress did not legislate with a particular presumption in mind. Courts should frame their assumptions about congressional behavior in ways that are clear and verifiable to ensure that canons of interpretation are not retained beyond their useful life.