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William S. Dodge

UC Hastings College of the Law, dodgew@uchastings.edu

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Understanding the Presumption Against Extraterritoriality

By
William S. Dodge*

“It is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’ . . . This ‘canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained.’”¹

The presumption against extraterritoriality has been around for nearly as long as there have been federal statutes. Early in the 19th Century, the Supreme Court applied the presumption to limit the reach of federal customs and piracy laws.² Perhaps the most famous modern statement of the presumption against extraterritoriality is Justice Holmes’ opinion in *American Banana Co. v. United Fruit Co.*, which applied the presumption to limit the Sherman Act to anticompetitive conduct within the United States.³ Holmes noted 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”⁴ and this “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.”⁵

However, the influence of the presumption soon began to wane. While paying lip service to *American Banana*, both the Supreme Court and lower federal courts began to ignore its holding in antitrust cases.⁶ And although the Supreme Court continued to apply the presumption against extraterritoriality to a

* Associate Professor, University of California, Hastings College of the Law. B.A., Yale College, 1986; J.D., Yale Law School, 1991. Thanks to Ash Bhagwat, Curtis Bradley, Mary Kay Kane, Naomi Roht-Arriaza, and John Yoo for comments on an earlier draft. This Article is dedicated to my colleague Stefan Riesenfeld, who is somewhat younger than the presumption against extraterritoriality.

1. *EEOC v. Arabian American Oil Co. (“Aramco”)*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

2. *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) (Story, J.) (customs laws); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630-32 (1818) (Marshall, C.J.) (piracy laws); *see also* *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1808) (Marshall, C.J.) (holding that foreign prize law was territorial).

3. 213 U.S. 347 (1909).

4. *Id.* at 356.

5. *Id.* at 357.

6. *See, e.g.*, *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *United States v. Aluminum Co. of America (“Alcoa”)*, 148 F.2d 416 (2d Cir. 1945) (L. Hand, J.).

few statutes, particularly in the area of labor law,⁷ the Court refused to apply the presumption to other statutes like the Lanham Act.⁸ Summarizing the law in 1965, the *Restatement (Second) of Foreign Relations Law* included the presumption but framed it as a presumption that federal statutes “apply only to conduct occurring within, or having an effect within, the territory of the United States.”⁹ The *Restatement (Third)*, which appeared in 1987, dispensed with the presumption altogether. It noted Justices Holmes’ remark in *American Banana* “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,”¹⁰ but observed that “[t]his statement, though still often quoted, does not reflect the current law of the United States.”¹¹

Like Mark Twain’s death,¹² however, reports of the presumption’s demise were greatly exaggerated. In its 1991 decision in *E.E.O.C. v. Arabian American Oil Co.* (“*Aramco*”),¹³ the Supreme Court applied the presumption against extraterritoriality to Title VII, concluding that the statute did not apply to employment discrimination by an American company against an American citizen that occurred abroad. What was remarkable about *Aramco* was not just the fact that the Court again applied the presumption, but the apparent strength of the presumption it applied. There was good evidence that Congress had intended Title VII to apply extraterritorially. Specifically, Title VII exempted employers “with respect to the employment of aliens outside any State,”¹⁴ which the plaintiff in *Aramco* argued with some force would have been unnecessary unless Title VII applied abroad. The legislative history of Title VII and interpretations by both the E.E.O.C. and the Department of Justice, the two agencies charged with its implementation,¹⁵ also supported the plaintiff’s position. But none of this was enough for Chief Justice Rehnquist, who suggested that only a “clear statement” in the language of the statute itself would be sufficient to overcome the presumption.¹⁶

7. See, e.g., *Foley Bros. v. Filardo*, 336 U.S. 281 (1949) (Eight Hour Law); *New York Central R.R. v. Chisholm*, 268 U.S. 29 (1925) (Federal Employers’ Liability Act).

8. *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952). For a good account of the presumption in the Supreme Court cases between *American Banana* and *Aramco*, see Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 189-98.

9. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 38 (1965) (emphasis added).

10. *American Banana*, 213 U.S. at 356.

11. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 415, Reporters’ Note 2 (1987) (citing *Sisal Sales* and *Alcoa*). By contrast, the *Restatement (Third)* does continue to state the presumption that Congress does not intend to violate international law. *Id.* § 114 (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”).

12. See Note to London correspondent of the *New York Journal* (June 1, 1897), reprinted in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 528 (Justin Kaplan ed., 16th ed. 1992).

13. 499 U.S. 244 (1991).

14. 42 U.S.C. § 2000e-1 (1988).

15. See *Aramco*, 499 U.S. at 266-78 (Marshall, J., dissenting) (reviewing evidence that Title VII was intended to apply extraterritorially).

16. *Id.* at 258; see also *id.* at 261 (Marshall, J., dissenting) (faulting the majority for recasting the presumption as a clear statement rule).

Congress quickly amended Title VII to reverse the result in *Aramco*,¹⁷ but this did nothing to change the presumption as a general rule of statutory construction. Over the last ten years, the Supreme Court has applied the presumption against extraterritoriality not just to Title VII but also to the Foreign Sovereign Immunities Act,¹⁸ the Federal Tort Claims Act,¹⁹ and the Immigration and Nationality Act.²⁰ In a concurring opinion, Justice Stevens has also applied the presumption to the Endangered Species Act, concluding that it does not apply to activities in foreign countries.²¹ However, there has been one prominent exception to the Supreme Court's new devotion to the presumption against extraterritoriality — the Sherman Act. In *Hartford Fire Insurance Co. v. California*, the Court held that “the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”²² Justice Souter's majority opinion did not even mention *Aramco* or the presumption.²³

Although a number of scholars have suggested that the presumption against extraterritoriality is obsolete and ought to be abandoned,²⁴ the Supreme Court seems unlikely to follow this advice any time soon. In the meantime, we must try to understand the presumption against extraterritoriality. What does the presumption mean? What evidence is sufficient to rebut it?

The first step in answering these questions is to define the word “extraterritorial.” For regulatory purposes, one may distinguish between the conduct of an activity and the effects of an activity. When both the conduct and the effects of an activity occur entirely within a single state, one may safely characterize that state's regulation of the activity as “territorial.” When, on the other hand, the

17. See 42 U.S.C. § 2000e(f) (1994) (“With respect to employment in a foreign country, [‘employee’] includes an individual who is a citizen of the United States.”); *id.* § 2000e-1(c) (Title VII applies to foreign companies controlled by American companies). Congress also specified that American companies abroad are not required to comply with Title VII if doing so would require them to violate foreign law. *Id.* § 2000e-1(b).

18. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440-41 (1989).

19. *Smith v. United States*, 507 U.S. 197, 203-04 (1993).

20. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173-74 (1993).

21. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 585-89 (1992) (Stevens, J., concurring in the judgment). The majority did not reach this issue because it concluded that the plaintiffs lacked standing. *Id.* at 578.

22. 509 U.S. 764, 796 (1993). The Court suggested the possibility of an exception in the case of a conflict with foreign law, but only where foreign law “requires [the defendants] to act in some fashion prohibited by the law of the United States . . . or . . . their compliance with the laws of both countries is otherwise impossible.” *Id.* at 799.

23. Justice Scalia's dissent did, but reasoned that the presumption had been overcome by precedent. *Id.* at 814 (Scalia, J., dissenting).

24. See, e.g., Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1 (1992); Kramer, *supra* note 8; see also Jonathan Turley, “When in Rome”: *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598 (1990) (arguing prior to *Aramco* that courts should reverse the presumption and assume that statutes do apply extraterritorially absent a contrary statement of congressional intent). *But see* Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505 (1997) (defending the presumption, principally on separation-of-powers grounds).

conduct, the effects, or both occur outside the regulating state, the regulation may be characterized as “extraterritorial” to at least some degree.²⁵

What, then, does the presumption against extraterritoriality mean? There are at least three possibilities. First the presumption might mean that acts of Congress should apply only to *conduct* that occurs within the United States, unless a contrary intent appears, regardless of whether that conduct causes effects in the United States. This is the traditional view of the presumption that Justice Holmes articulated in *American Banana*.²⁶ Second, the presumption might mean that acts of Congress apply only to conduct that causes *effects* within the United States, unless a contrary intent appears, regardless of where that conduct occurs. Judge Bork adopted this view in *Zoelsch v. Arthur Anderson & Co.*²⁷ Third, the presumption might mean that acts of Congress apply to conduct occurring within *or* having an effect within the United States, unless a

25. See Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness*, 245 RECUEIL DES COURS 9; 43 (1994-I). This is not the only possible definition of “extraterritorial.” Traditionally, if the conduct occurred outside the regulating state the regulation was considered “extraterritorial” even if the effects occurred within the regulating state. Conversely, if the conduct occurred within the regulating state, the regulation was considered “territorial” even if the effects occurred abroad. See Kramer, *supra* note 8, at 181. However, this traditional definition is not helpful because it prejudges the question of when the presumption should apply, making what I call the Holmes view, see *infra* note 26 and accompanying text, seem automatically correct.

Alternatively, one might consider that the regulation of an activity was “territorial” if either the conduct or the effects of that activity occurred within the regulating state. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402, cmt. d (“Jurisdiction with respect to activity outside the state, but having or intended to have substantial effect within the state’s territory, is an aspect of jurisdiction based on territoriality, although it is sometimes viewed as a distinct category.”). Under such a definition, regulation of an activity could only be considered “extraterritorial” if both the conduct and the effects of that activity occurred outside the regulating state. This definition also prejudges the question of when the presumption should apply, making what I call the Mikva view, see *infra* note 28 and accompanying text, seem automatically correct.

Because I have deliberately defined “extraterritorial” broadly, I will tend to frame the question as whether the presumption against extraterritoriality should apply rather than whether the regulation is extraterritorial. Courts sometimes prefer to ask whether the regulation is extraterritorial or not. See, e.g., *Environmental Defense Fund v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993) (“Even where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States.”). But no matter how one frames the question, one must ultimately grapple with the basic issue of what connection to the United States is sufficient to justify the assumption that Congress would want its laws to be applied.

26. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356-57 (1909); see also *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972) (Friendly, J.) (presumption inapplicable when there has been significant conduct within the United States, even when there are no effects within the United States).

27. 824 F.2d 27 (D.C. Cir. 1987). Judge Bork wrote: “We begin from the established canon of construction that ‘legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,’ which ‘is based on the assumption that Congress is primarily concerned with domestic conditions.’” *Id.* at 31 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). This meant a court should assume “that Congress was concerned with extraterritorial transactions only if they were part of a plan to harm American investors or markets.” *Id.* at 32. He continued: “Were it not for the Second Circuit’s preeminence in the field of securities law, and our desire to avoid a multiplicity of jurisdictional tests, we might be inclined to doubt that an American court should ever assert jurisdiction over domestic conduct that causes loss to foreign investors.” *Id.*; see also *Robinson v. TCI/US West Communications, Inc.*, 117 F.3d 900, 906 (5th Cir. 1997) (presumption means that the Securities Exchange Act only rarely applies to conduct in the United States that causes no effects here).

contrary intent appears. This is how Chief Judge Mikva read the presumption in *Environmental Defense Fund v. Massey*.²⁸ Thus, the first question posed above — what does the presumption mean — comes down to whether the federal courts should adopt Justice Holmes', Judge Bork's, or Judge Mikva's view of the presumption.²⁹

The second question — what evidence is sufficient to rebut the presumption — is simpler to frame. Is the presumption a clear statement rule, as Chief Justice Rehnquist suggested in *Aramco*, or can one also look to the structure, purpose, legislative history, and administrative interpretations of a statute to determine whether the presumption has been overcome?

In Part I of this Article, I look at what the Supreme Court's decisions in *Aramco* and subsequent cases have to say about these questions. *Smith* and *Sale* make clear that the presumption against extraterritoriality is not a clear statement rule, but do not help us choose among the three views of what the presumption means because in each case both the conduct and the effects occurred outside the United States. However, *Aramco*'s distinguishing of the Lanham Act and the Supreme Court's failure to apply the presumption in *Hartford* shed more light on this question. They tend to exclude the Holmes view and suggest that application of the presumption must turn in part on whether there are effects in the United States.

In Part II, I examine how lower federal courts have understood the presumption. I show that while the courts have agreed that the presumption is not a clear statement rule,³⁰ they have divided over what the presumption means.³¹ Some courts have adopted the traditional Holmes view that acts of Congress apply only to conduct within the United States and not to conduct abroad even if that conduct causes effects in the United States.³² Others have adopted Judge Bork's view that acts of Congress should apply only to conduct that has effects

28. 986 F.2d at 531 ("There are at least three general categories of cases for which the presumption against the extraterritorial application of statutes clearly does not apply. First, . . . the presumption will not apply where there is an 'affirmative intention of the Congress clearly expressed' to extend the scope of the statute to conduct occurring within other sovereign nations. . . . Second, the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States. . . . Finally, the presumption against extraterritoriality is not applicable when the conduct regulated by the government occurs within the United States."); *see also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 38 ("Rules of the United States statutory law . . . apply only to conduct occurring within, or having an effect within, the territory of the United States.").

29. The astute reader will note that I have associated these three views with judges rather than with circuits. The Courts of Appeals have not focused on these different ways of reading the presumption sufficiently to develop consistent views of how the presumption should be understood. Thus, one finds Judges Bork and Mikva expressing quite different views of the presumption while each writing for the D.C. Circuit.

30. *See infra* notes 211-23 and accompanying text.

31. *See infra* notes 130-210 and accompanying text.

32. *See, e.g.*, *Subafilms Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1097 (9th Cir. 1994) (en banc); *In re Maxwell Communication Corp.*, 186 B.R. 807, 815-21 (S.D.N.Y. 1995); *In re Maxwell Communication Corp.*, 170 B.R. 800, 808-14 (S.D.N.Y. 1994).

within the United States, regardless of where the conduct occurs.³³ And, Judge Mikva has argued that acts of Congress apply to conduct that occurs within or has effects within the United States.³⁴

Finally, in Part III of this Article, I ask which understanding of the presumption against extraterritoriality is most consistent with the legitimate reasons for the presumption.³⁵ In a recent article, Professor Bradley has identified five possible reasons for the presumption:³⁶ (1) international law limitations on extraterritoriality, which Congress should be assumed to have observed;³⁷ (2) consistency with domestic conflict-of-laws rules; (3) the need “to protect against unintended clashes between our laws and those of other nations which could result in international discord;”³⁸ (4) “the commonsense notion that Congress generally legislates with domestic concerns in mind;”³⁹ and (5) separation-of-powers concerns — *i.e.* “that the determination of whether and how to apply federal legislation to conduct abroad raises difficult and sensitive policy questions that tend to fall outside both the institutional competence and constitutional prerogatives of the judiciary.”⁴⁰ Professor Eskridge has suggested a sixth justification for the presumption: that it provides legislators with a clear background rule which allows them to predict the application of their statutes.⁴¹

I argue that only the notion that Congress generally legislates with domestic concerns in mind is a legitimate basis for the presumption against extraterritoriality. This leads me to agree with Judge Bork that under the presumption, acts of Congress should presumptively apply only to conduct that causes *effects* within the United States regardless of where that conduct occurs. I further argue that, if this is the basis for the presumption against extraterritoriality, then the

33. See, e.g., *Robinson v. TCI/US West Communications, Inc.*, 117 F.3d 900, 906 (5th Cir. 1997); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 672-73 (S.D.N.Y. 1991).

34. *Environmental Defense Fund v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993).

35. It is not my purpose to enter the debate about whether canons of construction are generally useful or not. See, e.g., 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 (1950) (“there are two opposing canons on almost every point”); Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983) (“most of the canons are just plain wrong”). *But see*, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 275-97 (arguing that some canons may be justifiable on economic, republican, and quasi-constitutional grounds); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992) (canons provide stability to the law); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407 (1989) (arguing that canons are useful but should be substantially revised). I am merely concerned with what legitimate justifications there may be for the presumption against extraterritoriality.

36. See Bradley, *supra* note 24, at 513-16.

37. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) (“an act of congress ought never to be construed to violate the law of nations if any other possible construction remains”).

38. *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

39. *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993); see also *Aramco*, 499 U.S. at 248 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

40. Bradley, *supra* note 24, at 516. This is the justification that Professor Bradley emphasizes. See *id.* at 550-66.

41. ESKRIDGE, *supra* note 35, at 277. (“[T]he canons [of construction] may be treated as conventions, similar to driving a car on the right-hand side of the road. It is not so important to choose the best convention as it is to choose one convention and stick to it.”).

presumption should not be considered a clear statement rule and should be deemed rebutted when there is good reason to think that Congress was focused on something other than domestic conditions. Thus understood, the presumption against extraterritoriality is indeed “‘a valid approach whereby unexpressed congressional intent may be ascertained.’”⁴²

I.

THE *ARAMCO* PRESUMPTION IN THE SUPREME COURT

In 1949, the Supreme Court applied the presumption against extraterritoriality to limit the reach of the federal Eight Hour Law in *Foley Bros. v. Filardo*.⁴³ It did not apply the presumption again for 40 years.⁴⁴ This was not for lack of opportunities. In *Steele v. Bulova Watch Co.*,⁴⁵ the Court declined to apply the presumption against extraterritoriality to the Lanham Act over the objections of Justices Reed and Douglas in dissent.⁴⁶ Moreover, the Court repeatedly denied certiorari as the lower courts expanded the extraterritorial application of the Sherman Act and the Securities Exchange Act.⁴⁷

In 1989, the Supreme Court briefly applied the presumption against extraterritoriality in construing the Foreign Sovereign Immunities Act's exception for noncommercial torts,⁴⁸ but it was the decision in *Aramco*⁴⁹ that breathed new life into the presumption. Since *Aramco*, the Court has applied the presumption to the Federal Tort Claims Act⁵⁰ and the Immigration and Nationality Act⁵¹ and likely would have applied it to the Endangered Species Act had it not decided that the plaintiffs in that case lacked standing.⁵² Clearly, the Supreme Court has

42. *Aramco*, 499 U.S. at 248 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

43. 336 U.S. 281 (1949) (holding that the federal Eight Hour Law did not require a government contractor to pay an American citizen employed abroad time and a half for overtime).

44. Two Supreme Court cases that are frequently cited as applying the presumption against extraterritoriality, *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), and *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), did not in fact apply the presumption. The issue in each of those cases was the application of the National Labor Relations Act, not outside the territory of the United States, but rather to foreign-flag ships with foreign crews *inside* the territory of the United States. In each case, the Court held that the Act did not apply, based not on the presumption against extraterritoriality but largely on the possibility of a conflict with foreign law. See *Benz*, 353 U.S. at 146-47; *McCulloch*, 372 U.S. at 21-22. In *McCulloch*, the Court also relied on the separate presumption that “‘an act of congress ought never to be construed to violate the law of nations if any other possible construction remains” *McCulloch*, 372 U.S. at 21 (quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.)).

45. 344 U.S. 280 (1952).

46. See *id.* at 290-92 (Reed, J., dissenting).

47. See, e.g., *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir.), *amended*, 890 F.2d 569 (2d Cir.), *cert. dismissed*, 492 U.S. 939 (1989) (Securities Exchange Act); *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Assoc.*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985) (Sherman Act).

48. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440-41 (1989) (holding that the phrase “in the United States” does not include torts on the high seas).

49. *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244 (1991).

50. *Smith v. United States*, 507 U.S. 197, 203-04 (1993).

51. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173-74 (1993).

52. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Justice Stevens concluded that the plaintiffs did have standing and applied the presumption against extraterritoriality in concluding that the Act does not apply abroad. See *id.* at 585-89 (Stevens, J., concurring in the judgment).

rediscovered the presumption against extraterritoriality. And yet, the Court conspicuously failed to apply the presumption against extraterritoriality to the Sherman Act in *Hartford Fire Insurance Co. v. California*.⁵³ In this Part of the Article, I look at these cases for clues about how lower courts should interpret *Aramco*, before turning in Part II to examine how lower courts actually have interpreted that decision.

A. *The Aramco Decision*

The plaintiff in *Aramco* was Ali Boureslan, a naturalized U.S. citizen who was born in Lebanon. Boureslan had been hired in the United States and was subsequently transferred at his own request to work for Aramco in Saudi Arabia. After four years, he was fired, allegedly on account of his race, religion and national origin, and brought suit against Aramco under Title VII.⁵⁴ Writing for the Court, Chief Justice Rehnquist began by acknowledging “that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States” and that the Court’s task was therefore simply one of “statutory construction” — “to determine whether Congress intended the protections of Title VII to apply to United States citizens employed by American employers outside of the United States.”⁵⁵

The Chief Justice then invoked the presumption against extraterritoriality: “It is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”⁵⁶ He justified the presumption as a way of effectuating congressional intent.⁵⁷ More specifically, the Chief Justice argued that the presumption serves two purposes: first, it “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord;”⁵⁸ second, it reflects the notion that when Congress legislates it “‘is primarily concerned with domestic conditions.’”⁵⁹ Apparently the Chief Justice saw each of these purposes as reasonable assumptions about what Congress generally intends.

Chief Justice Rehnquist was not completely clear about what would be necessary to rebut the presumption against extraterritoriality. Quoting various cases, he stated that a court must “look to see whether ‘language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure

53. 509 U.S. 764 (1993).

54. *Aramco*, 499 U.S. at 247.

55. *Id.* at 248.

56. *Id.* (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

57. *Id.* (“This ‘canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained.’”) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

58. *Id.* As Professor Kramer and Mr. Born have each observed, there was no evidence that Saudi Arabia had any interest in regulating the relationship between Aramco and its American employees or that Saudi law would have required a different result than Title VII. *Aramco* seems to have presented what Conflicts scholars call a “false conflict,” in which only one state has an interest in applying its law. See Kramer, *supra* note 8, at 215-17; Born, *supra* note 24, at 77.

59. *Aramco*, 499 U.S. at 248 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

of legislative control,'⁶⁰ and that overcoming the presumption required "the affirmative intention of the Congress clearly expressed."⁶¹ Elsewhere, he referred to "the need to make a clear statement that a statute applies overseas."⁶² His rejection of arguments based on boilerplate language, implications from exemptions in Title VII, legislative history, and administrative interpretations,⁶³ however, suggested that he was looking for a clear statement from Congress in the language of the statute itself that Title VII applied extraterritorially.⁶⁴

Boureslan and the E.E.O.C. made three basic arguments to support their position that Title VII applied to discrimination by American employers against American employees abroad. First, they argued that Title VII's broad definition of "commerce" to include commerce "between a State and any place outside thereof"⁶⁵ showed an intent to apply Title VII to areas outside the United States. Chief Justice Rehnquist dismissed this as "boilerplate language."⁶⁶ He further observed that statutes passed pursuant to Congress' commerce power inevitably contain some definition of "commerce." "If we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption."⁶⁷ Second, Boureslan and the E.E.O.C. argued that Title VII's alien exemption provision, which provided that the statute "shall not apply to an employer with respect to the employment of aliens outside any State,"⁶⁸ would have been unnecessary if Title VII did not apply extraterritorially.⁶⁹ Chief Justice Rehnquist responded principally by suggesting that if Title VII applied to the employment of U.S. citizens abroad, it would have to apply equally to U.S. citizens employed by foreign employers, "which would raise difficult issues of international law."⁷⁰ And third, Boureslan and the E.E.O.C. argued that the Court should defer to administrative interpretations by the E.E.O.C. and the Justice Department that Title VII applied extraterritorially, but the Chief Justice found these interpretations "insufficiently weighty to overcome the presumption against extraterritorial application."⁷¹ While Chief Justice Rehnquist was prob-

60. *Id.* (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

61. *Id.* (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

62. *Id.* at 258.

63. See *infra* notes 65-71 and accompanying text.

64. Justice Marshall's dissenting opinion and a number of commentators have read the Chief Justice's opinion as creating a "clear statement rule." See *Aramco*, 499 U.S. at 261 (Marshall, J., dissenting); *Born*, *supra* note 24, at 56; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 616 (1992); *The Supreme Court: 1990 Term — Leading Cases*, 105 HARV. L. REV. 77, 270 (1991).

65. 42 U.S.C. § 2000e(g) (1988).

66. *Aramco*, 499 U.S. at 251.

67. *Id.* at 253.

68. 42 U.S.C. § 2000e-1 (1988).

69. Boureslan and the E.E.O.C. also pointed to the legislative history of the alien exemption provision, which stated that its intent was "to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise." H.R. REP. NO. 570, at 4 (1963) (quoted in *Aramco*, 499 U.S. at 269 (Marshall, J., dissenting)).

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

71. *Id.* at 258.

ably right to interpret Title VII's boilerplate commerce language as reflecting only Congress' intent to invoke its commerce power, the other two arguments strongly suggested that Title VII should be applied extraterritorially, at least to American companies employing American citizens. It was only by interpreting the presumption to require a clear statement in the language of the statute that the Chief Justice could conclude that the presumption had not been overcome, which led Justice Marshall to complain that the majority had transformed the presumption from an approach for ascertaining congressional intent "into a barrier to any genuine inquiry into the sources that reveal Congress' actual intentions."⁷²

Aramco strongly suggested that the Court was "reestablishing the presumption against extraterritoriality across the board."⁷³ In the course of his opinion, Chief Justice Rehnquist carved out an exception for only one statute, the Lanham Act (protecting trademarks), which the Supreme Court had held to apply extraterritorially in *Steele v. Bulova Watch Co.*, nearly 40 years earlier.⁷⁴ The defendant in *Steele* was an American citizen who had affixed the name Bulova to watches he assembled in Mexico and sold to American tourists who brought them back to the United States.⁷⁵ Chief Justice Rehnquist distinguished *Steele* on two grounds. First, the Lanham Act's commerce language was broader than Title VII's, referring to "all commerce which may lawfully be regulated by Congress."⁷⁶ Second, Chief Justice Rehnquist noted that "the allegedly unlawful conduct [in *Steele*] had some effects within the United States."⁷⁷ The first of these distinctions is utterly unconvincing. If any boilerplate "commerce" language should be read simply as an invocation of Congress' commerce power it is the Lanham Act's, which makes no mention at all of foreign nations or places outside the United States. However, the second distinction — that the conduct at issue in *Steele* was causing harmful effects within the United States — does distinguish *Steele* from *Aramco*.⁷⁸ It also suggests, as I argue below, that the presumption against extraterritoriality does not turn on where the conduct at issue occurred but on where the effects of that conduct are felt.

72. *Id.* at 278 (Marshall, J., dissenting); see also *id.* at 262 ("Clear-statement rules operate less to reveal actual congressional intent than to shield important values from an insufficiently strong legislative intent to displace them.") (emphasis added).

73. Kramer, *supra* note 8, at 182; see also *Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 71 (2d Cir. 1994) ("The Supreme Court's recent discussion of the presumption against extraterritoriality . . . seem to require that all statutes, without exception, be construed to apply within the United States only, unless a contrary intent appears.").

74. 344 U.S. 280 (1952).

75. *Id.* at 284-85, 286. The defendant had registered the name "Bulova" in Mexico, but that registration was subsequently annulled by Mexican authorities. *Id.* at 285.

76. 15 U.S.C. § 1127 (1994); see *Aramco*, 499 U.S. at 252.

77. *Aramco*, 499 U.S. at 252.

78. Effects on a U.S. citizen abroad are generally not considered to constitute effects within the United States. If they were, then effects jurisdiction, which is well accepted under international law, would also encompass the passive personality principle, which is not. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402, cmt. g; see also *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056 (E.D.N.Y. 1979) (death of American citizen abroad does not cause a direct effect in the United States for purposes of the Foreign Sovereign Immunities Act).

B. *Post-Aramco Decisions Applying the Presumption:
Lujan, Smith, and Sale*

Chief Justice Rehnquist's opinion in *Aramco* is not, however, the Supreme Court's most recent word on the presumption against extraterritoriality. The Court's decisions in *Smith v. United States*⁷⁹ and *Sale v. Haitian Centers Council, Inc.*,⁸⁰ as well as Justice Stevens' concurring opinion in *Lujan v. Defenders of Wildlife*,⁸¹ all shed light on how the Justices view the presumption.

The first of these three cases to come before the Court was *Lujan*. The Eighth Circuit had held that Section 7(a)(2) of the Endangered Species Act, which requires federal agencies to consult with the Secretary of the Interior or the Secretary of Commerce to insure that any action authorized, funded or carried out by such agencies is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species,"⁸² applied to endangered and threatened species abroad.⁸³ The Supreme Court did not reach this issue because it concluded that the plaintiffs lacked standing,⁸⁴ but Justice Stevens did. He invoked *Aramco*, observing that "[w]e normally assume that 'Congress is primarily concerned with domestic conditions.'"⁸⁵ Justice Stevens found nothing in the language or purpose of the statute that would indicate an intent by Congress to apply Section 7(a)(2)'s consultation requirement to endangered species abroad. He found the general wording of the statute insufficient, particularly in light of the express reference to foreign countries in other sections of the Act.⁸⁶ Moreover, Congress' legislative findings focused on species in the United States,⁸⁷ which supported the notion that Congress was primarily concerned with domestic conditions.

For the purposes of understanding what the presumption against extraterritoriality means, it is important to note that Justice Stevens did not focus mechanically on where the conduct at issue occurred. In fact, the activity that Section 7(a)(2) regulated was simply the decision-making process of federal agencies, which occurred largely, if not entirely, in Washington, D.C. One might have argued that since the activity being regulated occurred in the United States, the presumption against extraterritoriality did not apply at all. Indeed, that was the position Chief Judge Mikva subsequently took in concluding that the National Environmental Policy Act applied to the incineration of food wastes in Antarctica.⁸⁸ But in applying the presumption to determine congressional intent, Jus-

79. 507 U.S. 197 (1993).

80. 509 U.S. 155 (1993).

81. 504 U.S. 555, 582-89 (1992) (Stevens, J., concurring in the judgment).

82. 16 U.S.C. § 1536(a)(2) (1994).

83. *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 125 (8th Cir. 1990).

84. *Lujan*, 504 U.S. at 578.

85. *Id.* at 585 (Stevens, J., concurring in the judgment) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

86. *Id.* at 586-88 & n.4 (Stevens, J., concurring in the judgment).

87. *Id.* at 588-89 (Stevens, J., concurring in the judgment).

88. *Environmental Defense Fund v. Massey*, 986 F.2d 528, 532 (D.C. Cir. 1993) ("NEPA is designed to control the decisionmaking process of U.S. federal agencies, not the substance of agency

tice Stevens focused not on where the conduct being regulated occurred, but on where the effects of that conduct would be felt. Because Congress is generally concerned with domestic conditions, Justice Stevens reasoned that the presumption applied despite the fact that the conduct being regulated occurred in the United States. Thus, Justice Stevens appears to have adopted Judge Bork's view of the presumption: that acts of Congress, unless a contrary intent appears, apply only to conduct that causes effects within the United States regardless of where that conduct occurs.⁸⁹

The next case to come before the Supreme Court was *Smith*, in which the Court held that the Federal Tort Claims Act does not apply to claims arising in Antarctica.⁹⁰ Chief Justice Rehnquist wrote the majority opinion, but he did not employ the presumption as a clear statement rule. Rather, he looked to the language and structure of the Act, as well as its legislative history.⁹¹ Only after exhausting these sources of congressional intent did the Chief Justice turn to the presumption against extraterritoriality to resolve "any lingering doubt regarding the reach of the FTCA."⁹² Nor did he characterize the presumption as requiring a clear statement, but rather as requiring "*clear evidence* of congressional intent to apply the FTCA to claims arising in Antarctica."⁹³

The plaintiff in *Smith* had argued that the presumption against extraterritoriality should not apply because extending the FTCA to Antarctica posed no risk of conflict with foreign law.⁹⁴ Chief Justice Rehnquist responded by downplaying this reason for the presumption and emphasizing the "domestic conditions" rationale. "[T]he presumption is rooted in a number of considerations," he wrote, "not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind."⁹⁵

decisions. . . . In our view, such regulation of U.S. federal agencies and their decisionmaking processes is a legitimate exercise of Congress' territoriality-based jurisdiction, and does not raise extraterritoriality concerns."). For a further discussion of Chief Judge Mikva's opinion in *Massey*, see *infra* notes 154-67 and accompanying text.

89. See *supra* note 27 and accompanying text (explaining Bork view). Note that only if one views the conduct at issue in *Lujan* as the act of consultation does Justice Stevens fall within the Bork camp. If one were instead to view the conduct at issue as the carrying out of a project abroad, then both the conduct and the effects in *Lujan* would occur outside the United States and Justice Stevens' opinion in *Lujan*, like the Court's decisions in *Smith* and *Sale* discussed below, would be consistent with either the Bork or the Mikva view of the presumption.

90. *Smith v. United States*, 507 U.S. 197, 204 (1993).

91. *Id.* at 201-03 & n.4. The FTCA contains an exception for claims "arising in a foreign country." 28 U.S.C. § 2680(k) (1994). The Chief Justice concluded that the ordinary meaning of foreign country would include Antarctica. *Smith*, 507 U.S. at 201. He also observed that because the FTCA makes the United States "liable . . . in accordance with the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b), it would be "bizarre" for the FTCA to apply in Antarctica, "a place that has no law." *Smith*, 507 U.S. at 201-02.

92. *Smith*, 507 U.S. at 203.

93. *Id.* at 204 (emphasis added).

94. *Id.* at 204 n.5.

95. *Id.* Justice Stevens agreed with the plaintiff that the presumption was inapplicable but for different reasons. He reasoned that because Congress had waived the United States' immunity for torts arising on the high seas, it clearly intended the FTCA to apply beyond the territorial boundaries of the United States. *Id.* at 208-09 (Stevens, J., dissenting). Thus, "[t]he presumption against extraterritorial application of federal statutes simply has no bearing on this case," *id.* at 209 (Stevens, J.,

Sale is the most recent case in which the Court has applied the presumption against extraterritoriality. This time Justice Stevens wrote the opinion of the Court, concluding that Section 243(h) of the Immigration and Nationality Act, which provides that the Attorney General “shall not deport or return any alien” to a country where she would be subject to persecution,⁹⁶ did not apply to Haitians apprehended by the Coast Guard on the high seas.⁹⁷ Again, the Court did not treat the presumption as a clear statement rule. Instead, it looked to “all available evidence about the meaning of § 243(h),”⁹⁸ including its text, structure, and legislative history, to find “the *affirmative evidence* of intended extraterritorial application that our cases require.”⁹⁹

As in *Smith*, the Court downplayed the risk of conflict with foreign law as a reason for the presumption against extraterritoriality because there was no such risk.¹⁰⁰ However, unlike *Smith*, application of the presumption could not be justified on the grounds that Congress is primarily concerned with domestic conditions. As Justice Blackmun pointed out in dissent, the Immigration and Nationality Act and the Refugee Act of 1980 that amended it “regulate[] a distinctly international subject matter. . . . The ‘commonsense notion’ that Congress was looking inwards — perfectly valid in a case involving the Federal Tort Claims Act, such as *Smith* — cannot be reasonably applied to the Refugee Act of 1980.”¹⁰¹ Justice Stevens therefore attempted to justify application of the presumption on separation-of-powers grounds, stating that the “presumption has special force when we are construing . . . statutory provisions that may involve foreign and military affairs for which the President has unique responsibility.”¹⁰²

Smith and *Sale* make clear that the Supreme Court does not view the presumption as a clear statement rule and that it will examine “all available evidence”¹⁰³ of congressional intent in determining whether a statute applies abroad, employing the presumption to resolve “any lingering doubt”¹⁰⁴ about the extraterritorial reach of a statute. They also make clear that the presumption may be applied even when there is no risk of conflict with foreign law.¹⁰⁵ But

dissenting), and the only question was whether Antarctica was a “foreign country,” which Justice Stevens concluded it was not. *Id.* at 209-11 (Stevens, J., dissenting).

96. 8 U.S.C. § 1253(h)(1) (1994).

97. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 159 (1993).

98. *Id.* at 177.

99. *Id.* at 176 (emphasis added).

100. *See id.* at 174 (“the presumption has a foundation broader than the desire to avoid conflict with the laws of other nations”).

101. *Id.* at 206 (Blackmun, J., dissenting).

102. *Id.* at 188 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)). Upon examination, this justification appears unconvincing. As Justice Blackmun pointed out, “[t]he presumption that Congress did not intend to legislate extraterritorially has less force — perhaps, indeed, no force at all — when a statute on its face relates to foreign affairs.” *Id.* at 206-07 (Blackmun, J., dissenting). And while there are some areas of foreign affairs in which the President may have sole constitutional authority, immigration is decidedly not one of them. *Id.* at 207 (Blackmun, J., dissenting).

103. *Id.* at 177.

104. *Smith*, 507 U.S. at 203.

105. *See Sale*, 509 U.S. at 173-74; *Smith*, 507 U.S. at 204 n.5.

to complete the picture, one must also consider the Supreme Court's decision in *Hartford Fire Insurance Co. v. California*,¹⁰⁶ in which the Court did not apply the presumption against extraterritoriality despite a very real conflict with foreign law.

C. *The Hartford Decision*

In understanding the presumption against extraterritoriality, *Hartford* is the dog that did not bark.¹⁰⁷ The question in *Hartford* was whether Section One of the Sherman Act should be applied to an alleged conspiracy by reinsurers in London to make certain types of environmental insurance coverage unavailable in the United States. Early in the 20th Century, Justice Holmes had applied the presumption against extraterritoriality in *American Banana Co. v. United Fruit Co.* to hold that the Sherman Act did not apply abroad.¹⁰⁸ However, both the Supreme Court and lower federal courts subsequently ignored that decision in other antitrust cases. In *United States v. Sisal Sales Corp.*, the Supreme Court applied the Sherman Act to a conspiracy by U.S. persons, formed in this country but carried out abroad, to monopolize imports of sisal because of the conspiracy's effects in the United States.¹⁰⁹ In *United States v. Aluminum Co. of America* ("*Alcoa*"), the Second Circuit relied on effects in the United States in applying the Sherman Act to foreign companies acting abroad.¹¹⁰ Other circuits followed suit, developing various balancing approaches to determine when the Sherman Act applied extraterritorially, but without applying the presumption.¹¹¹

Given that the decision in *Aramco* was just two years old and that the Court had applied the presumption against extraterritoriality twice already during the Term that *Hartford* was decided, one might have expected the Court to apply this presumption to the Sherman Act as well. But Justice Souter's opinion for the Court neither invoked *Aramco* nor explained why the presumption was inapplicable. He simply observed:

Although the proposition was perhaps not always free from doubt, see *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.¹¹²

In dissent, Justice Scalia suggested that the presumption against extraterritoriality was as relevant to the Sherman Act as it was to Title VII, but he found the

106. 509 U.S. 764 (1993).

107. See Arthur Conan Doyle, *Silver Blaze*, in *THE COMPLETE SHERLOCK HOLMES* 335 (1927).

108. 213 U.S. 347 (1909).

109. 274 U.S. 268 (1927).

110. 148 F.2d 416 (2d Cir. 1945) (L. Hand, J.).

111. See, e.g., *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills, Inc. v. Congolium Corp.*, 595 F.2d 1287 (3d Cir. 1979). For an account of the extraterritorial application of the Sherman Act from *American Banana* to *Hartford*, see William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 121-43 (1998).

112. *Hartford*, 509 U.S. at 795-96.

question to be governed by precedent.¹¹³ “We have . . . found the presumption to be overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially.”¹¹⁴

However, as Professor Kramer has observed, no precedent prior to *Hartford* required that the Supreme Court apply the Sherman Act to conduct outside the United States based solely on its intended effects here.¹¹⁵ With the exception of Learned Hand’s decision in *Alcoa*, all of the cases on which Justices Souter and Scalia relied had involved at least some conduct in the United States or were dictum,¹¹⁶ and *Alcoa* was obviously not binding on the Supreme Court. Moreover, neither the Supreme Court nor Judge Hand had ever “found the presumption to be overcome with respect to our antitrust laws,” as Justice Scalia asserted.¹¹⁷ Rather, *Alcoa* and the other decisions that Souter and Scalia relied on simply ignored the presumption against extraterritoriality, as Justice Souter did in *Hartford*.

Nor would the Sherman Act have fared well under the presumption. The Act refers to “trade or commerce among the several States, or with foreign nations,”¹¹⁸ but, as Justice Scalia pointed out, this is the kind of boilerplate language the *Aramco* court found insufficient to override the presumption.¹¹⁹ There is some evidence in the legislative history of the Sherman Act that Congress was concerned about foreign conspiracies restraining trade in the United States,¹²⁰ but it seems to fall short of the “clear evidence” that the Court has recently required.¹²¹ Moreover, if one of the reasons for the presumption is “to protect against unintended clashes between our laws and those of other nations which could result in international discord,”¹²² applying the presumption to the Sherman Act would seem natural. In almost no other area has the extraterritorial application of U.S. law sparked as much protest from other nations as it has in the area of antitrust.¹²³ Although Justice Souter found that there was no conflict for the purposes of comity analysis, because foreign law did not “require[] [the

113. *Hartford*, 509 U.S. at 814 (Scalia, J., dissenting) (“Two canons of statutory construction are relevant in this inquiry. The first is the ‘longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” . . . [I]f the question were not governed by precedent, it would be worth considering whether that presumption controls the outcome here.”)

114. *Id.* (Scalia, J., dissenting).

115. Larry Kramer, *Extraterritorial Application of American Law after the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT’L L. 750, 751-52 (1995).

116. *Id.* at 751.

117. *Hartford*, 509 U.S. at 814 (Scalia, J., dissenting).

118. 15 U.S.C. § 1 (1994).

119. *Hartford*, 509 U.S. at 814 (Scalia, J., dissenting).

120. See SPENCER WEBER WALLER, JAMES ATWOOD, KINGMAN BREWSTER & SPENCER WEBER WALLER’S ANTITRUST AND AMERICAN BUSINESS ABROAD § 2.03 (3d ed. 1997) (discussing legislative history of the Sherman Act).

121. *Smith v. United States*, 507 U.S. 197, 204 (1993).

122. *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

123. See Dodge, *supra* note 111, at 164-65. To note that the extraterritorial application of antitrust law has caused conflict is not to say that it is undesirable. I have argued elsewhere that conflict with foreign law in the antitrust area has been useful because it has helped to promote negotiation and cooperation between the political branches of our government and those of other nations. See *id.* at 163-68.

defendants] to act in some fashion prohibited by law of the United States,"¹²⁴ there was certainly a conflict in the sense that British law permitted what the Sherman Act prohibited.¹²⁵ If nothing else, *Hartford* seems to mark the decline of avoiding conflict with foreign law as a reason for the presumption. While the Court applied the presumption in cases like *Smith* and *Sale* that presented no risk of conflict with foreign law, it did not apply the presumption in *Hartford* when there was such a conflict.

What, then, explains the Supreme Court's unwillingness to apply the presumption against extraterritoriality to the Sherman Act in *Hartford*? I believe it is the same thing that explains the Supreme Court's unwillingness to apply the presumption to the Lanham Act in *Steele*:¹²⁶ the fact that the defendant's extraterritorial conduct had caused harmful effects within the United States. In *Aramco*, *Smith* and *Sale*, the extraterritorial conduct at issue had not caused harmful effects within the United States; in *Steele* and *Hartford* it had. These cases strongly suggest that Justice Holmes' view of the presumption, as meaning that acts of Congress apply only to *conduct* within the United States is not the view of the current Supreme Court. The two remaining possibilities are the Bork view and the Mikva view. *Smith* and *Sale* are consistent with either view, because in each of those cases both the conduct and the effects occurred outside the United States.¹²⁷ Justice Stevens' concurring opinion in *Lujan*, on the other hand, seems to adopt Judge Bork's view that acts of Congress are presumed to be limited to conduct that causes *effects* in the United States.¹²⁸

Thus, the Supreme Court's decisions since *Aramco* offer some preliminary answers to how the presumption against extraterritoriality should be understood. They suggest that acts of Congress are presumed to apply to conduct that causes effects in the United States, as both Bork and Mikva would hold. These decisions do not, however, tell us whether acts of Congress should be presumed to apply to conduct that occurs in the United States but causes effects abroad. Judge Mikva would say yes; Judge Bork no. The Supreme Court's post-*Aramco* decisions also make clear that the presumption is not a clear statement rule and that a court should examine "all available evidence"¹²⁹ of congressional intent to determine whether the presumption has been rebutted. In the next Part of this Article, I look at how lower federal courts have in fact read the presumption since *Aramco*.

124. *Hartford*, 509 U.S. at 799.

125. See *id.* at 820 (Scalia, J., dissenting) ("In the sense in which the term 'conflic[t]' . . . is generally understood in the field of conflicts of laws, there is clearly a conflict in this litigation.")

126. See *supra* notes 74-78 and accompanying text.

127. This is also true of *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), which involved the sinking of a Liberian registered ship on the high seas.

128. See *supra* notes 82-89 and accompanying text.

129. *Sale*, 509 U.S. at 177.

II.

THE *ARAMCO* PRESUMPTION IN THE LOWER FEDERAL COURTS

Since *Aramco*, the lower federal courts have struggled with how the presumption against extraterritoriality should be applied to statutes that the Supreme Court has not yet addressed. Currently, the lower courts are divided over how to understand the presumption when interpreting other statutes. In the course of interpreting the National Environmental Policy Act ("NEPA"), Chief Judge Mikva has stated that the presumption is inapplicable when *either* conduct or effects occur within the United States.¹³⁰ The Ninth Circuit, on the other hand, has taken Justice Holmes' position when construing the Copyright Act, viewing the presumption as precluding application of acts of Congress to conduct that occurs abroad, even if there are harmful effects in the United States.¹³¹ And, in a case involving the Securities Exchange Act, the Fifth Circuit has endorsed Judge Bork's view that in applying the presumption a court should focus on where the effects are felt rather than where the conduct occurs.¹³²

While the extraterritorial scope of many statutes is important, the \$64,000 question is what *Aramco* means for the antifraud provisions of the Securities Exchange Act.¹³³ It may be useful, therefore, to look briefly at the tests that the Second Circuit had developed prior to *Aramco* for the extraterritorial application of the Act and how courts have treated those tests after *Aramco*. Prior to *Aramco*, the Second Circuit had established two basic tests for the extraterritorial application of the Securities Exchange Act. Under the "effects" test, the Act had been held to apply to foreign conduct that caused a substantial effect within the United States;¹³⁴ under the "conduct" test, the Act had been held to apply to

130. *Environmental Defense Fund v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993).

131. *Subafilms Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1097 (9th Cir. 1994) (en banc).

132. *Robinson v. TCI/US West Communications, Inc.*, 117 F.3d 900, 906 (5th Cir. 1997). In addition to the cases discussed below in Sections A, B, and C, there are several cases that have applied the presumption against extraterritoriality where the conduct at issue neither occurred in nor caused effects in the United States. *See, e.g.*, *Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535 (9th Cir. 1994) (holding that the antitying provisions of the Bank Company Holding Company Act did not apply to a transaction within the Marshall Islands); *Van Blaricom v. Burlington Northern Railroad Co.*, 17 F.3d 1224, 1226 (9th Cir. 1994) (holding that the ICC did not have jurisdiction to enforce protective conditions extraterritorially on behalf of a Canadian citizen working in Canada for an American rail carrier); *Labor Union of Pico Korea, Ltd. v. Pico Products, Inc.*, 986 F.2d 191 (2d Cir. 1992) (holding that § 301 of the Labor Management Relations Act does not apply to violation of a labor contract between a foreign union and a foreign employer). These cases are not particularly helpful in choosing among the three possible views of the presumption because their results are consistent with all three.

133. *See generally*, Michael Wallace Gordon, *United States Extraterritorial Subject Matter Jurisdiction in Securities Fraud Litigation*, 10 FLA. J. INT'L L. 487 (1996) (discussing the extraterritorial application of securities law after *Aramco* and *Hartford*).

134. *See, e.g.*, *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261-62 (2d Cir. 1989); *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968), *rev. in part on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied sub nom. Manley v. Schoenbaum*, 395 U.S. 906 (1969).

conduct in the United States that directly caused losses to foreign investors.¹³⁵ These tests had been widely adopted and even somewhat expanded by other circuits.¹³⁶

In establishing these tests, the Second Circuit had not completely ignored the presumption against extraterritoriality, but it had not given the presumption much weight. In *Schoenbaum*, the decision that first established the “effects” test, the Second Circuit concluded that “the usual presumption against extraterritorial legislation . . . [did not] show Congressional intent to preclude application of the Exchange Act.”¹³⁷ The court relied on the purpose of the Act to protect the investing public, the principle that a court is justified in punishing extraterritorial conduct based on harmful effects, and the SEC’s interpretation of the Act as applying extraterritorially.¹³⁸ It also looked at the language of Section 30(b), which exempts “any person insofar as he transacts a business in securities without the jurisdiction of the United States.”¹³⁹ “[S]ince Congress found it necessary to draft an exemptive provision for certain foreign transactions and gave the Commission power to make rules that would limit this exemption, the presumption must be that the Act was meant to apply to those foreign transactions not specifically exempted.”¹⁴⁰ In *Leasco*, the decision that established the “conduct” test, the Second Circuit dismissed the presumption as inapplicable when significant conduct occurred in the United States. Judge Friendly observed:

[W]hen, as here, there has been significant conduct within the territory, a statute cannot properly be held inapplicable simply on the ground that, absent the clearest language, Congress will not be assumed to have meant to go beyond the limits recognized by foreign relations law. Defendants’ reliance on the principle stated in *Foley Bros.* . . . that regulatory statutes will generally not be construed as applying to conduct wholly outside the United States, is thus misplaced.¹⁴¹

The Second Circuit has not reconsidered these tests in light of *Aramco*. In *Itoba Limited v. Lep Group PLC*,¹⁴² the court observed: “It is well recognized that the Securities Exchange Act is silent as to its extraterritorial application.”¹⁴³ One might have expected such an observation to have been followed by an invocation of the presumption against extraterritoriality. But the court turned instead

135. See, e.g., *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045-46 (2d Cir. 1983); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1335-37 (2d Cir. 1972); see generally *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991) (describing both tests).

136. See, e.g., *Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27, 33 (D.C. Cir. 1987) (adopting Second Circuit’s tests); *SEC v. Kasser*, 548 F.2d 109, 114 (3d Cir. 1977) (adopting conduct test but requiring less conduct in the United States); *Continental Grain (Australia) Pty. Ltd v. Pacific Oilseeds*, 592 F.2d 409, 420-21 (8th Cir. 1979) (same); *Grunenthal GmbH v. Holz*, 712 F.2d 421, 424-25 (9th Cir. 1983) (same).

137. *Schoenbaum*, 405 F.2d at 206.

138. *Id.* at 206-07.

139. 15 U.S.C. § 78dd(b) (1994).

140. *Schoenbaum*, 405 F.2d at 208.

141. *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972).

142. 54 F.3d 118 (2d Cir. 1995).

143. *Id.* at 121. Professor Sachs has argued that the legislative history of the Securities Acts shows that Congress was exclusively concerned with preventing fraud in securities transactions that occurred in the United States. See Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT’L L. 677 (1990).

to its “conduct” and “effects” tests.¹⁴⁴ While the parties in *Itoba* may not have asked the court to reconsider its precedents, the parties in other cases have done so without success. In *Sloane Overseas Fund, Ltd. v. Sapiens International Corp., N.V.*,¹⁴⁵ the district court acknowledged that “[a]pplying the reasoning in *Aramco* to this case, jurisdiction would not exist over these claims because . . . [t]here is no clear evidence that Congress intended these statutes to apply to overseas transactions.”¹⁴⁶ In spite of this, the court continued, “[i]n this Circuit . . . *Aramco* has never been applied to the 1933 Act or the 1934 Act. Instead, the Second Circuit has applied the ‘conduct’ and ‘effects’ tests”¹⁴⁷ Because the Second Circuit had not seen fit to reconsider these tests in *Itoba*, the district court refused to do so in *Sloane*.¹⁴⁸ The district court in *Leslie v. Lloyd’s of London*,¹⁴⁹ was even more direct in rejecting the defendant’s suggestion that *Aramco* be applied to limit the reach of the Securities Exchange Act:

If the [*Aramco*] Court’s election to re-emphasize the *Foley Bros.* . . . presumption against extraterritoriality did not warrant the Supreme Court’s revisiting [the] extraterritorial application of the Sherman Act in *Hartford* . . . , then this Court is not aware of any reason to view [*Aramco*] as a mechanism for revisiting the multitude of post-*Foley Bros.* cases holding that the United States securities laws can apply extraterritorially”¹⁵⁰

However, these explanations seem unsatisfying. In a case decided prior to *Itoba*, the Second Circuit observed that “[t]he Supreme Court’s recent discussions of the presumption against extraterritoriality . . . seem to require that all statutes, without exception, be construed to apply within the United States only, unless a contrary intent appears.”¹⁵¹

Whether the “conduct” and “effects” tests should survive *Aramco* depends on how one understands the presumption against extraterritoriality. Because “the Securities Exchange Act is silent as to its extraterritorial application,”¹⁵² if one takes Justice Holmes’ view that acts of Congress apply only to conduct that occurs within the United States unless a contrary intent appears, then the “conduct” test would survive but the “effects” test would not.¹⁵³ If, on the other hand, one takes Judge Bork’s view that acts of Congress apply only to conduct

144. 54 F.3d at 121-22. Not only did the *Itoba* court ignore *Aramco*, it arguably *expanded* the extraterritorial application of the Securities Exchange Act by allowing the plaintiff to combine conduct and effects in order to establish the necessary contact with the United States. *Id.* at 122 (“There is no requirement that these two tests be applied separately and distinctly from each other. Indeed, an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court.”).

145. 941 F. Supp. 1369 (S.D.N.Y. 1996).

146. *Id.* at 1373.

147. *Id.* at 1374.

148. *Id.*

149. 1995 WL 661090 (S.D. Tex. 1995), *rev. on other grounds sub nom.* Haynsworth v. The Corporation, 121 F.3d 956 (5th Cir. 1997).

150. *Id.* at *13.

151. *Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 71 (2d Cir. 1994).

152. *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 121 (2d Cir. 1995).

153. *Schoenbaum*’s argument that § 30(b) suggests by negative implication that the Securities Exchange Act applies abroad is precisely the sort of argument the *Aramco* court rejected with respect to Title VII’s alien-exemption provision.

that causes effects within the United States unless a contrary intent appears, then the “effects” test is safe but the “conduct” test should perhaps be reconsidered. And if one takes Chief Judge Mikva’s view that acts of Congress apply to conduct that occurs within or causes harmful effects within the United States, then both the “conduct” and “effects” tests may be preserved.

A. Chief Judge Mikva’s View and the Lower Courts

About a year and a half after *Aramco, Environmental Defense Fund v. Massey*¹⁵⁴ came before the D.C. Circuit. The question in *Massey* was whether NEPA required the National Science Foundation to prepare an environmental impact statement before incinerating food wastes in Antarctica. Chief Judge Mikva concluded that it did, and in the course of his opinion provided one of the more extensive discussions of the presumption against extraterritoriality.¹⁵⁵

Judge Mikva concluded that “[t]here are at least three general categories of cases for which the presumption against extraterritorial application of statutes clearly does not apply. First, as made explicit in *Aramco*, the presumption will not apply where there is an ‘affirmative intention of the Congress clearly expressed’ to extend the scope of the statute to conduct occurring within other sovereign nations.”¹⁵⁶ “Second, the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States.”¹⁵⁷ As examples, he gave the Sherman Act, the Lanham Act, and the Securities Exchange Act.¹⁵⁸ “Finally, the presumption against extraterritoriality is not applicable when the conduct regulated by the government occurs within the United States. . . . Even where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States.”¹⁵⁹

Massey, Judge Mikva concluded, fell into the third category. “NEPA is designed to control the decisionmaking process of U.S. federal agencies, not the substance of agency decisions. . . . In our view, such regulation of U.S. federal agencies and their decisionmaking processes is a legitimate exercise of Congress’ territoriality-based jurisdiction, and does not raise extraterritoriality concerns.”¹⁶⁰ Although Mikva suggested that a different result might be required if application of NEPA would conflict with foreign law¹⁶¹ or U.S. foreign policy,¹⁶² neither problem was present in the case of Antarctica.¹⁶³ Moreover,

154. 986 F.2d 528 (D.C. Cir. 1993).

155. *See id.* at 530-32.

156. *Id.* at 531 (quoting *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)). Chief Judge Mikva might more accurately have stated that an affirmative intention of Congress clearly expressed would be sufficient to *rebut* the presumption.

157. *Id.*

158. *Id.* It is worth noting that the Supreme Court had not yet decided *Hartford Fire Ins. v. California*, 509 U.S. 764 (1993), when Chief Judge Mikva wrote his opinion in *Massey*.

159. *Massey*, 986 F.2d at 531.

160. *Id.* at 532.

161. *Id.* at 534.

162. *Id.* at 534-35.

NEPA's plain language was "not limited to actions of federal agencies that have significant environmental effects within U.S. borders."¹⁶⁴

Massey's statement that "the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States"¹⁶⁵ is dictum. But Judge Mikva's reading of the presumption against extraterritoriality to mean that acts of Congress apply to conduct that occurs within the United States *or* causes effects within the United States is consistent with the *Restatement (Second) of Foreign Relations Law's* understanding of the presumption.¹⁶⁶ It also serves to explain the extraterritorial application of the Sherman, Lanham, and Securities Exchange Acts on the basis of effects in the United States.¹⁶⁷ Perhaps because of the clarity with which it stated its position, Chief Judge Mikva's opinion in *Massey* has become a focal point for other lower courts' discussions of the presumption.

B. Justice Holmes' View and the Lower Courts

Justice Holmes stated the traditional view of the presumption in *American Banana*: "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,"¹⁶⁸ or in other words, acts of Congress should be presumed to apply only to conduct that occurs within the United States unless a contrary intent appears, regardless of whether that conduct causes effects within the United States. After *Aramco*, several federal courts have adopted the Holmes view of the presumption in interpreting different statutes.

The Ninth Circuit, sitting en banc, adopted Justice Holmes' view in *Subafilms Ltd. v. MGM-Pathe Communications Co.*¹⁶⁹ while interpreting the Copyright Act of 1976. The question in *Subafilms* was whether authorization within the United States of foreign reproduction of a film violated the Act. Because the act of authorizing the reproduction occurred in the United States, one might have thought that the Act could be applied on the basis of conduct within the United States. But the Ninth Circuit concluded that authorization does not

163. Chief Judge Mikva expressly reserved the question "how NEPA might apply to actions in a case involving an actual foreign sovereign." *Id.* at 536.

164. *Id.* at 536.

165. *Id.* at 531.

166. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 38 ("Rules of the United States statutory law . . . apply only to conduct occurring within, or having effect within, the territory of the United States."); see also *Massey*, 986 F.2d at 530 (quoting *Restatement (Second)* § 38).

167. In *Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535 (9th Cir. 1994), the plaintiff argued that the antitying provisions of the Bank Company Holding Act applied extraterritorially because these provisions were closely analogous to the Sherman and Clayton Acts. *Id.* at 1543. However, the Ninth Circuit concluded that it "need not decide whether the jurisdictional reach of the Bank Holding Company Act is as broad as that of the Sherman Act" because plaintiffs had failed to allege "that the Bank's conduct resulted in any anti-competitive effects within the territory of the United States." *Id.* at 1544. Because the conduct at issue in *Gushi Bros.* neither occurred nor had effects within the United States, it is not very helpful in choosing among the three views of the presumption. See *supra* note 132.

168. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

169. 24 F.3d 1088 (9th Cir. 1994) (en banc).

give rise to liability unless the act authorized would be an infringement under the Copyright Act,¹⁷⁰ which brought the court to the question whether the Copyright Act itself applied to conduct abroad. At this point, the court observed: “The Supreme Court recently reminded us that ‘[i]t is a longstanding principle of American law “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”’”¹⁷¹ Courts had long held, the Ninth Circuit noted, that copyright laws had no application to extraterritorial infringement, and there was “no clear expression of congressional intent in either the 1976 Act or other relevant enactments to alter the preexisting extraterritoriality doctrine.”¹⁷²

The Ninth Circuit made its adoption of Justice Holmes’ view clear by explicitly rejecting Judge Mikva’s suggestion “that the presumption against extraterritorial application of U.S. laws may be ‘overcome’ when denying such application would ‘result in adverse effects within the United States.’”¹⁷³ The Ninth Circuit reasoned that the possibility of conflict with foreign law “justifies application of the *Aramco* presumption even assuming arguendo that ‘adverse effects’ within the United States ‘generally’ would require a plenary inquiry into congressional intent.”¹⁷⁴ The court found a risk of such conflict because the United States was party to the Universal Copyright Convention (“UCC”) and the Berne Convention, both of which require “national treatment” and thereby “implicate[] a rule of territoriality.”¹⁷⁵ “We think it inappropriate for the courts to act in a manner that might disrupt Congress’ efforts to secure a more stable international intellectual property regime unless Congress otherwise clearly has expressed its intent.”¹⁷⁶ In short, the Ninth Circuit held that acts of Congress should be presumed not to apply to conduct outside the United States even if that conduct causes effects in the United States (at least where the application of U.S. law would conflict with foreign law). The difficulty with this position is that it does not explain why the presumption against extraterritoriality should

170. *Id.* at 1090-95.

171. *Id.* at 1095 (quoting *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949))).

172. *Id.* at 1096.

173. *Id.* (quoting *Environmental Defense Fund v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993)). As this Article was going to press, a panel of the Ninth Circuit relied on Judge Mikva’s discussion of effects in holding that a bankruptcy court may enjoin a foreign creditor from collecting against a debtor’s estate and non-estate property abroad. *Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon)*, 153 F.3d 991, 995 (9th Cir. 1998).

174. *Id.* at 1097. The District Court for the Middle District of Tennessee has suggested that a true analysis of congressional intent would have led to a different result on the precise question posed in *Subafilms. Curb v. MCA Records, Inc.*, 898 F. Supp. 586, 595 (M.D. Tenn. 1995) (“A better view, one supported by the text, the precedents, and, ironically enough, the legislative history to which the *Subafilms* court cited, would be to hold that domestic violation of the authorization right is an infringement, sanctionable under the Copyright Act, whenever the authorizee has committed an act that would violate the copyright owner’s § 106 rights.”).

175. *Subafilms*, 24 F.3d at 1097.

176. *Id.* The Ninth Circuit’s emphasis on avoiding conflict with foreign law as a reason for applying the presumption sits strangely with the Supreme Court’s more recent decisions in *Smith, Sale*, and *Hartford*. See *supra* notes 90-125 accompanying text. For further criticism of this reason for the presumption, see *infra* notes 251-64 and accompanying text.

not be applied to the Sherman Act, the Lanham Act, or the Securities Exchange Act.

Other courts seem to have taken Justice Holmes' view of the presumption in interpreting the Bankruptcy Code. In *In re Maxwell Communications Corp.*,¹⁷⁷ creditors of Maxwell Communications Corporation, an English company that had filed for bankruptcy in both the United Kingdom and the United States, sought to avoid millions of dollars in transfers to other creditors under Section 547(b) of the Bankruptcy Code, transfers that would not have been avoidable under English law.¹⁷⁸ The bankruptcy court began its analysis by quoting Justice Holmes' statement 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'"¹⁷⁹ and noting that *Aramco* had recently reaffirmed the presumption. Application of Section 547(b) would be "extraterritorial," it concluded, because the transfer had its "center of gravity" outside the United States.¹⁸⁰ Finding no "unmistakable evidence of congressional intent"¹⁸¹ to apply Section 547 abroad, the court held that the transfers could not be avoided. The district court affirmed.¹⁸² It agreed with the bankruptcy court that the transfers occurred outside the United States,¹⁸³ and that Congress had not "'clearly expressed'" its intent to apply Section 547 extraterritorially.¹⁸⁴

Before both the bankruptcy court and the district court, the debtor and examiner relied on *Massey's* statement that the presumption against extraterritoriality does not apply when there are effects in the United States, but both courts rejected the argument. The bankruptcy court simply distinguished the situation envisioned by *Massey*, reasoning that "the alleged preferences were [not] intended to result in substantial effects within the U.S. since there was no insolvency proceeding pending at the time they were made."¹⁸⁵ The district court agreed,¹⁸⁶ but also expressed doubt that *Massey* was correct, citing *Subafilms*.¹⁸⁷ The district court concluded that it was "unclear if the domestic

177. 170 B.R. 800 (S.D.N.Y. 1994).

178. English law required the party seeking avoidance to show that transfers were made with a subjective intent to place the transferee in a better position, while § 547 did not. *See id.* at 808.

179. *Id.* at 809 (quoting *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909)).

180. *Id.*; *see also id.* at 812, 814.

181. *Id.* at 812.

182. *In re Maxwell Communication Corp.*, 186 B.R. 807 (S.D.N.Y. 1995).

183. Like the Bankruptcy Court, the District Court looked to a range of factors to determine where the transfers occurred. *See id.* at 816-17. If the only factor were where the debtor actually parted with the funds, the court pointed out, "a creditor — be it foreign or domestic — who wished to characterize a transfer as extraterritorial could simply arrange to have the transfer made overseas." *Id.* at 816.

184. *Id.* at 820 (quoting *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)).

185. 170 B.R. at 813.

186. 186 B.R. at 821 ("Given that most creditors are English and that it would have been difficult to foresee any significant domestic effects of the transfers, it is also difficult to imagine that the Banks intended the alleged preferences to result in substantial effects in the U.S."). This reasoning seems a bit odd in light of the fact that § 547 does not require proof of intent in order to avoid a transfer. *See supra* note 178 and accompanying text.

187. 186 B.R. at 821.

'effects' of foreign conduct, in the absence of Congressional direction that a statute be applied to such conduct, is sufficient to render the presumption inapplicable."¹⁸⁸ In short, both the bankruptcy court and the district court seem to have read the presumption to mean that acts of Congress apply only to conduct within the United States (Justice Holmes' position), with the district court expressing skepticism about Judge Mikva's reasoning in *Masse*.¹⁸⁹

C. Judge Bork's View and Lower Courts

Prior to *Aramco*, in *Zoelsch v. Arthur Anderson & Co.*,¹⁹⁰ Judge Bork had articulated an alternative view of the presumption that focused not on where the conduct at issue occurred but on where the effects of that conduct were felt. *Zoelsch* involved alleged conduct in the United States that contributed to losses by foreign investors. Judge Bork wrote: "We begin from the established canon of construction that 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,' which 'is based on the assumption that Congress is primarily concerned with domestic conditions.'"¹⁹¹ He read the presumption and the Securities Exchange Act itself as indicating "that Congress was concerned with extraterritorial transactions only if they were part of a plan to harm American investors or markets,"¹⁹² which is to say, only if they caused effects in the United States. Indeed, Judge Bork expressed "doubt that an American court should ever assert jurisdiction over domestic conduct that causes loss to foreign investors."¹⁹³ He reluctantly agreed to adopt the Second Circuit's "conduct" test,¹⁹⁴ but only because of "the Second Circuit's preeminence in the field of securities law and our desire to avoid a multiplicity of jurisdictional tests."¹⁹⁵ In short, Judge Bork read the presumption as meaning that acts of Congress apply not to conduct that

188. *Id.*

189. The Second Circuit affirmed but on the alternative ground of international comity, *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1054 (2d Cir. 1996), which made it unnecessary "to decide whether, setting aside considerations of comity, the 'presumption against extraterritoriality' would compel a conclusion that the Bankruptcy Code does not reach the pre-petition transfers at issue." *Id.* at 1055; *see also* 186 B.R. at 822-23 (holding in the alternative that transfers were not avoidable on comity grounds); 170 B.R. at 814-18 (same).

In a different case, *Labor Union of Pico Korea, Ltd. v. Pico Products, Inc.*, 968 F.2d 191 (2d Cir. 1992), the Second Circuit quoted Justice Holmes statement "that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done," *id.* at 195; *see American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909), in the course of holding that § 301 of the Labor Management Relations Act did not apply extraterritorially. However, because the conduct at issue in *Pico* neither occurred nor caused effects within the United States, the case is not helpful in determining whether the Second Circuit has adopted Justice Holmes' view of the presumption. *See supra* note 132.

190. 824 F.2d 27 (D.C. Cir. 1987).

191. *Id.* at 31 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

192. *Id.* at 32.

193. *Id.*

194. *Id.* at 33.

195. *Id.* at 32. In a footnote, Judge Bork tries to make the best out of being stuck with a "conduct" test by arguing that conduct may be equated with effects. "It is worth noting," he writes, "that the [conduct] test we adopt here does provide jurisdiction whenever any individual is defrauded in this country, regardless of whether the offer originates somewhere else, for the actual consumation

occurs in the United States but to conduct that causes effects in the United States.

Since *Aramco*, a few courts have adopted the Bork view. In *Robinson v. TCI/US West Communications, Inc.*,¹⁹⁶ the Fifth Circuit adopted both *Zoelsch*'s reasoning and its holding in determining the extraterritorial reach of the Securities Exchange Act.¹⁹⁷ The question in *Robinson* was the same as the question in *Zoelsch*: when should the Act's antifraud provisions apply to conduct in the United States that caused losses to foreign investors. The Fifth Circuit noted that the Second and D.C. Circuits required that the U.S. conduct "directly caused" losses to foreign investors, while the Third, Eighth and Ninth Circuits required some lesser amount of conduct.¹⁹⁸ "[W]e . . . view the debate among the circuits against the background that legislation, 'unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" ¹⁹⁹ The court continued:

What little guidance we can glean from the securities statutes indicates that they are designed to protect American investors and markets, as opposed to the victims of any fraud that somehow touches the United States. . . . To broaden our jurisdiction beyond the minimum necessary to achieve these goals seems unwarranted in the absence of an express legislative command.²⁰⁰

In short, applying the Securities Exchange Act "within the territorial jurisdiction of the United States" under the presumption meant applying the Act to conduct that has *effects* here and not to conduct that occurs here but has effects elsewhere. Needless to say, the Fifth Circuit opted for the narrower of the two conduct tests.²⁰¹

The district court in *Amlon Metals, Inc. v. FMC Corp.*²⁰² also seems to have interpreted *Aramco* in accordance with Judge Bork's view of the presumption. Plaintiffs brought suit under the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"),²⁰³ alleging that copper residue generated in the United States and shipped to England by the defendants contained a number of hazardous substances.²⁰⁴ Thus, *Amlon Metals* presented a situation in which there was conduct in the United States but effects exclusively abroad. The defendant moved to dismiss, relying on *Aramco*. The plaintiffs, in turn, relied on *Leasco* to argue that the presumption against extraterritoriality was inapplicable when there had been significant conduct within the territory.²⁰⁵ While it acknowledged that under *Leasco* "the threshold might be somewhat lower" when conduct had occurred in the United States, the court still required

of securities fraud in the United States in and of itself would constitute domestic conduct that satisfies all the elements of liability." *Id.* at 33 n.4.

196. 117 F.3d 900 (5th Cir. 1997).

197. Curiously, the opinion in *Robinson* never actually cites *Zoelsch*.

198. See *Robinson*, 117 F.3d at 905-06.

199. *Id.* at 906 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

200. *Id.*

201. *Id.* ("We adopt the Second Circuit's test . . .").

202. 775 F. Supp. 668 (S.D.N.Y. 1991).

203. 42 U.S.C. § 6972(a)(1)(B) (1994).

204. 775 F. Supp. at 672.

205. *Id.*

the plaintiffs to produce evidence of congressional intent to apply RCRA extraterritorially.²⁰⁶ After examining the legislative history, structure and language of RCRA, the court concluded that the Act had a domestic focus and that there was “little if any evidence to support plaintiffs’ contention that Congress desired RCRA to apply extraterritorially.”²⁰⁷

One can see that *Amlon Metals* adopts Judge Bork’s view of the presumption by comparing *Amlon Metals* to *Massey*. In *Massey*, Judge Mikva concluded that “[e]ven where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States.”²⁰⁸ Because NEPA regulated only the decisionmaking processes of federal agencies, the presumption against extraterritoriality did not apply.²⁰⁹ In *Amlon Metals*, by contrast, the district court required the plaintiffs to present affirmative evidence of congressional intent in order to apply RCRA to conduct in the United States that caused effects abroad.

In sum, since *Aramco* the lower courts have disagreed about what the presumption against extraterritoriality means. Chief Judge Mikva in *Massey* understood the presumption to mean that acts of Congress apply to conduct that occurs within *or* causes effects within the United States.²¹⁰ The Ninth Circuit in *Subafilms* and the bankruptcy and district courts in *Maxwell Communication*, on the other hand, have taken issue with *Massey*’s language about effects. These courts have adhered to Justice Holmes’ traditional view that under the presumption acts of Congress apply only to *conduct* within the United States despite the fact that conduct abroad may have effects in the United States. And the Fifth Circuit in *Robinson* and the district court in *Amlon Metals* have adopted the reverse of the traditional view: that acts of Congress apply only to conduct that causes *effects* in the United States, regardless of where that conduct occurs.

D. *Is the Presumption a Clear Statement Rule?*

Although the lower courts have divided over what the presumption means, they have been unanimous in concluding that the presumption against extraterritoriality is not a clear statement rule. The most extensive discussion of this question is found in *Kollias v. D & G Marine Maintenance*,²¹¹ one of the few cases to find that the presumption had been rebutted. The court explained that although “[t]he *Aramco* dissent and some commentators have interpreted the majority opinion in *Aramco* as setting forth a ‘clear statement’ rule . . . the Supreme Court has made clear since *Aramco* that reference to nontextual sources is permissible.”²¹² In *Sale*, for example, the Supreme Court had looked

206. *Id.* at 673 n.6.

207. *Id.* at 676.

208. *Environmental Defense Fund v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993).

209. *Id.* at 532.

210. *Id.* at 531.

211. 29 F.3d 67 (2d Cir. 1994).

212. *Id.* at 73.

to “all available evidence” in determining whether the Immigration and Nationality Act applied extraterritorially.²¹³

Kollias then applied this standard to determine whether the Longshore and Harbor Workers’ Compensation Act (LHWCA) applied to injuries sustained by Americans on the high seas. Looking to the structure, purpose, and administrative interpretation of the Act, the court found “a sufficiently clear indication of congressional intent to apply the statute extraterritorially.”²¹⁴ First, the court noted that the LHWCA provided for venue in the case of injuries and deaths occurring on the high seas.²¹⁵ “No plausible explanation exists for [this] reference to the high seas other than that Congress intended LHWCA coverage for injuries sustained on the high seas.”²¹⁶ The court also noted that Congress’ “overriding purpose” to provide a uniform compensation system that did not depend on the site of the worker’s injury “would be frustrated by limiting the LHWCA to territorial application.”²¹⁷ And finally, the court relied on the fact that the Director of the Office of Workers’ Compensation Programs had interpreted the LHWCA to apply extraterritorially. Although it noted that the *Aramco* Court had not deferred to the E.E.O.C.’s interpretation of Title VII, the court concluded, “we may, at a minimum, consider the Director’s interpretation in combination with indicia of congressional intent.”²¹⁸

The courts seem to be in agreement that general, boilerplate language in a statute is insufficient to rebut the presumption against extraterritoriality.²¹⁹ In addition, they agree that a court may look not just to the text of the provision at issue, but also to the text of other provisions in the statute,²²⁰ as well as to its legislative history,²²¹ to determine whether Congress clearly intended a provision to apply extraterritorially. Moreover, at least one court has held that the presumption is inapplicable when the statute deals with a distinctively interna-

213. *Id.* (quoting *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 177 (1993)).

214. *Id.*

215. 33 U.S.C. § 939(b) (1994).

216. *Kollias*, 29 F.3d at 74.

217. *Id.*

218. *Id.* at 75.

219. *See, e.g.*, *Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535, 1542 (9th Cir. 1994) (“boilerplate” insufficient to extend antitying provisions of the Bank Holding Company Act extraterritorially); *Labor Union of Pico Korea, Ltd. v. Pico Products, Inc.*, 968 F.2d 191, 194 (2d Cir. 1992) (“without regard to the citizenship of the parties” and broad definition of “commerce” insufficient to extend LMRA § 301 to violation of labor contract between foreign union and foreign employer); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 675 (S.D.N.Y. 1991) (use of “any person” in RCRA citizen suit provision not sufficient to show extraterritorial application).

220. *See, e.g.*, *Kollias*, 29 F.3d at 73-74 (venue provision of LHWCA shows Congress’ intent to apply the Act extraterritorially); *Subafilms Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1096 (9th Cir. 1994) (en banc) (express extraterritorial application of one provision of Copyright Act suggests that other provisions do not apply extraterritorially); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 15-16 (D.D.C. 1998) (arbitration requirement in amendments to Foreign Sovereign Immunities Act shows Congress’ intent to apply the amendments extraterritorially).

221. *See, e.g.*, *Kollias*, 29 F.3d at 74 (examining legislative history); *Gushi Bros.*, 28 F.3d at 1542 (looking for an “express statement of Congressional intent . . . in ‘the Act itself . . . or in its legislative history’”) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)); *Subafilms*, 24 F.3d at 1097-98 (looking to legislative history).

tional subject matter.²²² These decisions are consistent with the Supreme Court's decisions since *Aramco*, which demonstrate that the Supreme Court does not view the presumption as a clear statement rule and that it will examine "all available evidence"²²³ of congressional intent in determining whether a statute applies abroad.

III.

THE REASONS FOR THE *ARAMCO* PRESUMPTION

We have seen that there are three possible ways of understanding the presumption against extraterritoriality: (1) Justice Holmes' view that acts of Congress apply only to conduct that occurs within the United States, unless a contrary intent appears; (2) Judge Bork's view that acts of Congress apply only to conduct that causes effects within the United States, unless a contrary intent appears; and (3) Judge Mikva's view that acts of Congress apply to conduct that occurs within or causes effects within the United States, unless a contrary intent appears.²²⁴ We have also seen that the lower courts after *Aramco* are divided over which view to adopt.²²⁵ In this Part of the Article, I look to the reasons underlying the presumption against extraterritoriality for guidance. I conclude that the only legitimate reason for the presumption is "the commonsense notion that Congress generally legislates with domestic concerns in mind."²²⁶ This leads me to agree with Judge Bork that under the presumption, acts of Congress apply only to conduct that causes *effects* within the United States regardless of where that conduct occurs. I further argue that, if this is the basis for the presumption against extraterritoriality, then the presumption should not be considered a clear statement rule and that the presumption should be deemed rebutted when there is good reason to think that Congress was focused on something other than domestic conditions.

There appear to be six possible reasons for the presumption: (1) international law limitations on extraterritoriality, which Congress should be assumed to have observed;²²⁷ (2) consistency with domestic conflict-of-laws rules; (3) the need "to protect against unintended clashes between our laws and those of other nations which could result in international discord;"²²⁸ (4) "the commonsense notion that Congress generally legislates with domestic concerns in

222. See *Flatow*, 999 F. Supp. at 16 (citing *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 206-07 (1993) (Blackmun, J., dissenting)) (interpreting 1996 amendments to the Foreign Sovereign Immunities Act). Cf. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440-41 (1989) (applying the presumption to a different exception to the Foreign Sovereign Immunities Act).

223. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 177 (1993).

224. See *supra* notes 26-28 and accompanying text.

225. See *supra* notes 130-210 and accompanying text.

226. *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993); see also *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

227. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) ("an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains").

228. *Aramco*, 499 U.S. at 248.

mind;”²²⁹ (5) separation-of-powers concerns — *i.e.* “that the determination of whether and how to apply federal legislation to conduct abroad raises difficult and sensitive policy questions that tend to fall outside both the institutional competence and constitutional prerogatives of the judiciary;”²³⁰ and (6) that having some background rule about when statutes apply extraterritorially helps Congress predict the application of its law and that the presumption against extraterritoriality is as good a rule as any.²³¹

Only the notion that Congress generally legislates with domestic concerns in mind is a valid reason for the presumption today. While international law and the conflict of laws at one time suggested that a nation’s laws should be confined within its borders, neither holds true today. The conflict-with-foreign-law argument fails to reflect what Congress generally intends. Moreover, both this argument and its separation-of-powers cousin understate the ability of Congress to amend statutes that are applied too broadly overseas and overstate the problems created by conflict with foreign law. Finally, the background rule argument ignores the transaction costs inherent in the legislative process and provides no normative justification for the presumption.

A. *International Law*

The original justification for the presumption against extraterritoriality was based in international law.²³² In *The Apollon*,²³³ for example, Justice Story employed the presumption to hold that U.S. customs laws did not authorize the seizure of a vessel located in foreign waters. “The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens,” he wrote.²³⁴ “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.”²³⁵ He continued:

It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. *It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations.*²³⁶

229. *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993); *see also Aramco*, 499 U.S. at 248 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

230. *Bradley*, *supra* note 24, at 516; *see also id.* at 550-66.

231. *ESKRIDGE*, *supra* note 35, at 277.

232. *See generally Born*, *supra* note 24, at 10-16 (explaining the international law roots of the presumption).

233. 22 U.S. (9 Wheat.) 362 (1822).

234. *Id.* at 370.

235. *Id.*

236. *Id.* at 371 (emphasis added).

Couple an international law rule that the laws of a nation cannot extend beyond its own territory with a presumption that Congress does not intend to violate international law,²³⁷ and you have the presumption against extraterritoriality.

However, the international law rules concerning prescriptive jurisdiction have changed since 1822, and the presumption against extraterritoriality can no longer be justified on the basis of international law.²³⁸ The modern international law rule was articulated by the Permanent Court of International Justice as early as 1927:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principle which it regards as best and most suitable.²³⁹

Today, international law allows nations to prescribe rules not just for conduct that occurs within their territory but also for conduct that has effects within their territory, for their nationals anywhere, and in certain other cases.²⁴⁰ Thus, Justice Holmes' view of the presumption is certainly not required by international law. The Bork and Mikva views would both be consistent with international law today, but so would a complete abolition of the presumption. International law provides no basis for the presumption against extraterritoriality today.

B. Conflict of Laws

In *American Banana*, Justice Holmes based the presumption against extraterritoriality not on international law but on the prevailing theory of conflict of laws.²⁴¹ That theory was "vested rights," which was based on a strictly territorial view of sovereign power.²⁴² The authorities on which Holmes relied to support the presumption in *American Banana* were all conflicts authorities.²⁴³ In particular, Holmes relied on his own opinion in *Slater v. Mexican National R.R. Co.*,²⁴⁴ the "classic judicial formulation" of the vested rights theory,²⁴⁵ for the critical proposition "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."²⁴⁶

237. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) ("an act of congress ought never to be construed to violate the law of nations if any other possible construction remains"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114.

238. See generally Born, *supra* note 24, at 21-26 (tracing evolution of public international law rules concerning jurisdiction to prescribe).

239. *The Case of the S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 19; see also *id.* at 23 (recognizing jurisdiction based on effects).

240. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402 & 404.

241. See Dodge, *supra* note 111, at 121-23 (vested rights theory of conflicts reflected in *American Banana*); Kramer, *supra* note 8, at 184-87 (same); Born, *supra* note 24, at 16-19 (tracing influence of vested rights theory on the presumption).

242. See Elliott E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 367-68, 379-85 (1945) (discussing vested rights theory).

243. See Dodge, *supra* note 111, at 122-23; Kramer, *supra* note 8, at 186-87.

244. 194 U.S. 120, 126 (1904).

245. EUGENE R. SCOLES & PETER HAY, *CONFLICT OF LAWS* 13 n.2 (2d ed. 1992).

246. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

But conflict-of-laws rules have changed since 1909.²⁴⁷ The strict territorialism of “vested rights” was challenged by other theories, such as Judge Learned Hand’s “local law theory” and Professor Brainerd Currie’s “governmental interest analysis,” which justified the application of forum law to activities that occurred outside the forum.²⁴⁸ The *Restatement (Second) of Conflicts* abandons the idea of vested rights and looks instead to apply the law of the state with the “most significant relationship” to the parties and the transaction.²⁴⁹ Today, states have adopted such a wide variety of approaches to the conflict of laws that one cannot say there is a prevailing theory of conflicts.²⁵⁰ Thus, looking to domestic conflict-of-law theory cannot help us choose among the Holmes, Bork and Mikva views. Indeed, domestic conflicts theory does not justify any presumption against extraterritoriality at all.

C. Avoid Conflict with Foreign Law

One of the two reasons Chief Justice Rehnquist gave for the presumption against extraterritoriality in *Aramco* was that “[i]t serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”²⁵¹ This rationale tends to support Justice Holmes’ view of the presumption as meaning that acts of Congress apply only to conduct that occurs within the United States, unless a contrary intent appears. Because every nation is acknowledged to have jurisdiction to regulate activities that occur within its own borders and because it is more common for the effects of conduct to be felt in more than one nation than it is for the conduct itself to occur in more than one nation, the surest way to avoid having more than one law apply to the same activity is to assign prescriptive jurisdiction exclusively on the basis of where the conduct occurs. If “the character of an act as lawful or unlawful must

247. See Kramer, *supra* note 8, at 223 (criticizing *Aramco* for taking an outdated 19th Century choice-of-law approach).

248. See Dodge, *supra* note 111, at 113-19 (describing these “forum law” theories).

249. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) (most significant relationship test for torts); *id.* § 188 (most significant relationship test for contracts). In another Article, I have shown how each of these three basic approaches to the conflict of laws — vested rights, forum law, and most significant relationship — led to the development of three different approaches to the extraterritorial application of regulatory statutes — territorial, effects, and balancing. See Dodge, *supra* note 111, at 111-34.

250. Professor Symeonides’ 1996 survey divided the American jurisdictions into seven distinct camps for tort conflicts. The largest group, consisting of 20 states, followed the *Restatement (Second) of Conflicts*’ “most significant relationship” test, but a substantial minority of 12 states adhered to the first *Restatement*’s *lex locus delicti* rule. Of the remaining 20 jurisdictions, two states and Puerto Rico used a “significant contacts” test, two states and the District of Columbia used interest analysis, three states applied the *lex fori*, five states had adopted Professor Leflar’s “better law” approach, and six states had blended various modern approaches into their own distinctive methodologies. Symeon C. Symeonides, *Choice of Law in the American Courts in 1996: Tenth Annual Survey*, 45 AM. J. COMP. L. 447, 459 (1997). With respect to contracts conflicts, the American jurisdictions fell into five different camps, with 25 states following the *Restatement (Second)* and 10 following the first *Restatement*. *Id.* at 460. Earlier attempts by other authors to categorize the states’ approaches to conflicts have shown a similar lack of consensus. See, e.g., Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1172-74 (1987); Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 591-92 (1983).

251. *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

be determined wholly by the law of the country where the act is done,"²⁵² then generally only one nation's law will apply.²⁵³

The Supreme Court's decisions since *Aramco*, however, undercut this justification for the presumption. In *Smith* and *Sale*, the Supreme Court applied the presumption against extraterritoriality despite the fact that there was absolutely no risk of conflict with foreign law.²⁵⁴ Moreover, the Supreme Court did *not* apply the presumption in *Hartford* despite the very real possibility of a conflict with the law of other nations that could result in international discord.²⁵⁵ If avoiding conflict with foreign law is a legitimate justification for the presumption, it is difficult to make sense of the *Hartford* case.

Furthermore, avoiding conflict with foreign law does not seem to rank very high on Congress' list of priorities. Congress has *not* amended the Sherman Act to restrain courts from applying it extraterritorially.²⁵⁶ On the other hand, it *has* amended Title VII to apply extraterritorially to the employment of American citizens abroad by American and American-controlled companies.²⁵⁷ Moreover, it has recently enacted the Helms-Burton Act,²⁵⁸ which applies extraterritorially to foreign companies doing business in Cuba and makes them liable for treble damages for "trafficking in" property expropriated from American investors, provoking vehement protests from our closest trading partners.²⁵⁹ As Mr. Born has written:

[The presumption against extraterritoriality] unduly elevates Congress's presumed desire to avoid conflicts with foreign law over other important legislative goals. Much more important, in the real world, are legislators' desires to assist local constituencies, to further domestic legislative programs and interests, and to make statements of political or moral principle.²⁶⁰

Indeed, avoiding conflict with foreign law tends to conflict with the other reason for the presumption Chief Justice Rehnquist cited in *Aramco*, the notion that

252. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

253. *See* Dodge, *supra* note 111, at 123.

254. *See* *Smith v. United States*, 507 U.S. 197 (1993) (applying the presumption to the Federal Tort Claims Act in Antarctica); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (applying the presumption to the Immigration and Nationality Act on the high seas); *supra* notes 94-95, 100-02 and accompanying text.

255. *See* *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (failing to apply the presumption to shield British companies from the Sherman Act); *supra* notes 122-25 and accompanying text.

256. Instead, Congress has amended the Sherman Act to exempt anticompetitive conduct that occurs in the United States but causes effects abroad. *See* Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §§ 6a & 45(a)(3) (1994); *see generally* Dodge, *supra* note 111, at 154 (discussing the FTAIA and similar legislation).

257. *See supra* note 17 and accompanying text.

258. Pub. L. No. 104-114, 110 Stat. 785 (1996).

259. For a discussion of the Helms-Burton Act and the controversy surrounding it, see William S. Dodge, *The Helms-Burton Act and Transnational Legal Process*, 20 HASTINGS INT'L & COMP. L. REV. 713 (1997).

260. Born, *supra* note 24, at 76; *see also* David P. Currie, *Flags of Convenience, American Labor, and the Conflict of Laws*, 1963 SUP. CT. REV. 34, 66 ("Human nature being what it is, one would suspect that the presumption, if any, ought to be in favor of self-interest rather than of self-abnegation.").

Congress “is primarily concerned with domestic conditions.”²⁶¹ Domestic conditions are often vitally affected by conduct that occurs abroad.²⁶²

Finally, this rationale for the presumption — that it avoids conflict with foreign law — assumes that conflict with foreign law is always undesirable. But as I have recently argued at length, a moderate amount of conflict with foreign law can actually *promote* international negotiation and cooperation.²⁶³ This has been the case in the antitrust area, where the extraterritorial application of U.S. law has led to retaliatory legislation by other countries but has also led to international agreements providing for cooperation in antitrust matters.²⁶⁴ Thus, this justification of avoiding conflict with foreign law not only fails to describe what Congress most often actually intends, it also fails to describe what Congress ought to intend. It is an illegitimate basis for the presumption against extraterritoriality and should be discarded.

D. Congress' Concern with Domestic Conditions

The second reason Chief Justice Rehnquist gave for the presumption against extraterritoriality in *Aramco* is the assumption that Congress “is primarily concerned with domestic conditions.”²⁶⁵ As the Chief Justice later noted in *Smith*, this assumption is a matter of “commonsense,”²⁶⁶ but it is also rooted in experience. When Congress passed the Sherman Act in 1890, it was responding to attempts by the likes of Standard Oil to monopolize trade and raise prices to U.S. consumers.²⁶⁷ To the extent that Congress was concerned with foreign commerce, it seems to have been concerned with *import* commerce — that is with commerce that might affect competition and prices in the United States.²⁶⁸ Similarly, the Securities Act of 1933 and the Securities Exchange Act of 1934 were a response to the stockmarket crash that had helped plunge the United

261. *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). It is “the commonsense notion that Congress generally legislates with domestic concerns in mind” that the Court has recently chosen to emphasize rather than the need to avoid conflict with foreign law. See *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993).

262. See Born, *supra* note 24, at 74 (“‘Domestic conditions’ may be substantially affected by conduct occurring outside U.S. territory: witness the collapse of the former Soviet Empire, the OPEC oil shocks, the Third World debt crisis, and the integration of the European Community.”).

263. See Dodge, *supra* note 111, at 163-68.

264. See *id.* at 163-67.

265. *Aramco*, 499 U.S. at 248 (quoting *Foley Bros. v. Filardo*, 338 U.S. 281, 285 (1949)); see also *Smith* 507 U.S. at 204 n.5 (referring to “the commonsense notion that Congress generally legislates with domestic concerns in mind”).

266. *Smith*, 507 U.S. at 204 n.5.

267. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 492-93 (1940) (Sherman Act “was enacted in the era of ‘trusts’ and of ‘combinations’ of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.”)

268. See WALLER, *supra* note 120, at § 2.03 (discussing legislative history of the Sherman Act).

States into the Great Depression.²⁶⁹ The legislative history shows that Congress wanted to protect American investors from abusive practices.²⁷⁰ Title VII of the 1964 Civil Rights Act was a response to the civil rights movement in the United States, and its “‘central statutory purposes [were] eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.’”²⁷¹ And when Congress passed the National Environmental Policy Act of 1969, “[t]here is no question that Congress was concerned — even primarily concerned — with domestic conditions.”²⁷²

Sometimes, of course, Congress does pass laws that are primarily concerned with conditions abroad. The Foreign Corrupt Practice Act specifically prohibits U.S. companies from bribing *foreign* officials.²⁷³ The Marine Mammal Protection Act is clearly aimed at protecting dolphins in the eastern tropical Pacific Ocean.²⁷⁴ And sometimes Congress deals with foreign issues in statutes that are primarily domestic, as it now does with discrimination against American citizens by American companies abroad in Title VII.²⁷⁵ These specific examples simply serve to confirm that when Congress makes no mention of foreign concerns, it is most likely “‘primarily concerned with domestic conditions.’”²⁷⁶

But what does “domestic conditions” mean? Does it mean conduct that occurs in the United States, or effects that are felt in the United States? I believe that what Congress is primarily concerned with is preventing harmful effects in the United States. First, it seems self-evident that the reason Congress regulates anticompetitive conduct, securities fraud, employment discrimination, pollution, and the like is to prevent the harmful effects that flow from that conduct. Second, this is confirmed by congressional behavior. Frequently, there is no need to distinguish between the conduct and the effects of an activity: the domestic conduct of dumping toxic waste in a U.S. river, for example, clearly has domestic effects. But when the effects are not felt where the conduct occurs, Congress

269. See *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 849 (1975) (“The primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market.”).

270. Sachs, *supra* note 143, at 710 (citing remarks from members of Congress). Professor Sachs concludes that the antifraud provisions of the Securities Acts were intended to protect domestic traders in foreign securities but not to protect foreign traders in domestic securities. *Id.* at 721. She defines “domestic traders” as those whose trades occur inside the United States, *id.* at 681 n.17, and “foreign traders” as those whose trades occur outside the United States. *Id.* at 679 n.9.

271. *Landgraf v. USI Film Products*, 511 U.S. 244, 254 (1994) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)).

272. Jeffrey E. Gonzalez-Perez & Douglas A. Klein, *The International Reach of the Environmental Impact Statement Requirement of the National Environmental Policy Act*, 62 GEO. WASH. U. L. REV. 757, 780 (1994).

273. 15 U.S.C. §§ 78dd-1 & 78dd-2 (1994).

274. See 15 U.S.C. §§ 1361-1421 (1994). *Cf.* *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977) (holding that the criminal provisions of the Act apply on the high seas but not within the territorial waters of other nations).

275. See 42 U.S.C. §§ 2000e(f) & 2000e-1 (1994); *supra* note 17 and accompanying text. Another example is the provision of RCRA that prohibits the export of hazardous waste from the United States unless the exporter has notified EPA, which in turn notifies the receiving country, and the receiving country has consented. See 42 U.S.C. § 6938 (1994).

276. *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

has shown itself to be more concerned with effects than with conduct. In the antitrust area, for example, Congress has specifically exempted from the Sherman Act anti-competitive conduct that occurs in the United States but causes effects exclusively abroad.²⁷⁷ To say that Congress is “‘primarily concerned with domestic conditions,’”²⁷⁸ then, is really to say that Congress is primarily concerned with conduct that causes effects in the United States.

This rationale for the presumption supports Judge Bork’s view of the presumption: that acts of Congress apply only to conduct that causes *effects* within the United States, unless a contrary intent appears, regardless of where that conduct occurs. Recall that in *Zoelsch*, Judge Bork, after noting that the presumption against extraterritoriality “‘is based on the assumption that Congress is primarily concerned with domestic conditions,’”²⁷⁹ concluded that the Securities Exchange Act was “‘concerned with extraterritorial transactions only if they were part of a plan to harm American investors or markets” and “doubt[ed] that an American court should ever assert jurisdiction over domestic conduct that causes loss to foreign investors.”²⁸⁰

Justice Holmes’ view, on the other hand, is inconsistent with this rationale because it would apply U.S. law to conduct in the United States that has no effects here and fail to apply U.S. law to conduct that has effects in the United States but occurs abroad. Chief Judge Mikva’s view is also inconsistent with this rationale for the presumption. It is true that Mikva would apply U.S. law to conduct abroad that causes effects in the United States, but he would also apply U.S. law to conduct that occurred in the United States but had no effects here. Indeed, that is exactly what he did in *Massey* when he held that NEPA applied to a decision to burn waste in Antarctica because the decision was made in the United States.²⁸¹ That decision was incorrect because one should assume that NEPA, like other statutes that do not deal specifically with international or maritime subjects, was aimed at conditions in the United States in the absence of evidence to the contrary. Justice Stevens’ concurring opinion in *Lujan* reflects the better approach. He reasoned that the consultation requirement of the Endangered Species Act should be applied only to endangered or threatened species within the United States unless Congress had indicated otherwise. Finding no such indication, he concluded that the consultation requirement did not apply to endangered or threatened species abroad.²⁸²

277. See Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §§ 6a & 45(a)(3) (1994); see generally Dodge, *supra* note 111, at 154 (discussing the FTAIA and similar legislation).

278. *Aramco*, 499 U.S. at 248 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

279. *Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27, 31 (D.C. Cir. 1987) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

280. *Id.* at 32.

281. *Environmental Defense Fund v. Massey*, 986 F.2d 528, 531-32 (D.C. Cir. 1993).

282. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 585-89 (1992) (Stevens, J., concurring in the judgment); see *supra* notes 82-89 and accompanying text (discussing *Lujan*).

E. Separation of Powers

The separation of powers justification for the presumption against extraterritoriality is closely related to avoiding conflict with foreign law. Professor Bradley has argued “that the determination of whether and how to apply federal legislation to conduct abroad raises difficult and sensitive policy questions that tend to fall outside both the institutional competence and constitutional prerogatives of the judiciary.”²⁸³ Professor Bradley seems to favor Justice Holmes’ view of the presumption and characterizes decisions by courts to apply federal statutes to extraterritorial conduct without clear direction from Congress as “judicial activism.”²⁸⁴

It is true that the decision whether to apply federal legislation extraterritorially raises difficult and sensitive policy questions. One must consider to what extent the legislative aims embodied in a statute should be sacrificed in the interest of other values such as avoiding conflict with foreign law.²⁸⁵ Courts are not institutionally well-equipped to make these trade-offs.²⁸⁶ But it does not follow from these observations that courts should adopt Justice Holmes’ view of the presumption — that they should presume that acts of Congress apply only to conduct that occurs in the United States. Justice Holmes’ view strikes the balance by *always* sacrificing legislative aims in order to avoid conflict with foreign law. This is a highly questionable assumption about congressional intent. As we have seen, although courts frequently express concern about creating conflict with foreign law, Congress does not seem to care much about avoiding such conflicts.²⁸⁷ On the other hand, Congress does care about domestic conditions. Thus, a court attempting to carry out congressional intent should apply a statute extraterritorially whenever doing so would advance the domestic purposes that Congress sought to achieve with the statute. To constrain the extraterritorial application of a statute on the basis of a court’s intuition that conflict with foreign law is undesirable is — to borrow a phrase — judicial activism.²⁸⁸

Professor Bradley appears to defend the Holmes view on the ground Congress can always amend a statute to apply to conduct abroad if Congress so desires. He points to the *Aramco* case as a nice illustration of the way the process ought to work.²⁸⁹ Congress quickly amended Title VII to apply to extrater-

283. Bradley, *supra* note 24, at 516.

284. *Id.* at 552. Professor Bradley and his sometimes co-author Professor Goldsmith have relied on similar separation-of-powers arguments to argue that the role of federal courts in interpreting and enforcing customary international law and foreign relations law should be quite limited. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 861 (1997); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1680-98 (1997).

285. See Dodge, *supra* note 111, at 145.

286. See *id.* at 159-63.

287. See *supra* notes 256-60 and accompanying text.

288. This is precisely the sort of “unguided intuitive judgment about the ‘foreign relations’ quotient of a particular case” that Professor Goldsmith has criticized in a different context. See Goldsmith, *supra* note 284, at 1690-93. However, Professor Goldsmith seems to join Professor Bradley in supporting the Holmes view of the presumption. See *id.* at 1701.

289. See Bradley, *supra* note 24, at 552-53.

ritorially to American citizens employed by American companies and by American-controlled foreign companies.²⁹⁰ It also clarified that Title VII does not apply to foreign companies that are not American-controlled, and it does not apply if the employment discrimination is compelled by foreign law.²⁹¹ However, Congress could just as easily have tailored Title VII if the Supreme Court had construed it too expansively — for example, to cover American citizens employed by foreign companies.²⁹² The fact that Congress can override a court's erroneous interpretation of a statute does not justify Justice Holmes' view of the presumption.

Professor Bradley observes: "There is no reason to think that Congress would have addressed these issues, at least this quickly, had it not been for the Court's application of the presumption in *Aramco*."²⁹³ But, if this is true, it is only because the Court reached a result so clearly at odds with what Congress intended. Thus, Professor Bradley comes very close to defending Justice Holmes' view as a sort of "penalty default," designed to force Congress to reveal its preferences by adopting a rule that Congress would not want.²⁹⁴ However, this justification for the presumption is strongly countermajoritarian, and is hardly consistent with traditional notions of the separation of powers.

Finally, Professor Bradley suggests that Justice Holmes' view may be justified not on the ground that it keeps courts from intruding on Congress' domain, but on the ground that it prevents interference "with the foreign affairs activities and prerogatives of the Executive."²⁹⁵ Specifically, he suggests that "[e]xtraterritorial application may offend foreign governments and thus interfere with the negotiation of international agreements."²⁹⁶ However, this has simply not been true in the area where the extraterritorial application of American law

290. 42 U.S.C. § 2000e(f) (1994).

291. *Id.* § 2000e-1.

292. In fact, the Supreme Court was not faced with a choice of interpreting Title VII either too broadly or too narrowly. It could easily have interpreted Title VII to apply only to American employers. See *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 274 (Marshall, J., dissenting). The Court could also have protected American employers who were compelled to discriminate by foreign law under the doctrine of foreign state compulsion. See *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 441 (discussing defense of foreign state compulsion); see also *Hartford Fire Ins. v. California*, 509 U.S. 764, 799 (1993) (suggesting that defendants might be excused from compliance with the Sherman Act in the case of foreign state compulsion). In short, the Supreme Court could have calibrated Title VII in precisely the same way that Congress later did.

293. Bradley, *supra* note 24, at 553.

294. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 91 (1989) ("penalty defaults are purposefully set at what the parties would not want—in order to encourage the parties to reveal information to each other or to third parties"); see also Goldsmith, *supra* note 284, at 1703 n.353 (discussing the information-forcing possibilities of presumptions about extraterritoriality).

295. See Bradley, *supra* note 24, at 552 (comparing presumption against extraterritoriality with the act of state doctrine).

296. *Id.* at 562. Justice Stevens' opinion for the court in *Sale v. Haitian Centers Council, Inc.* invoked a somewhat different separation-of-power argument for the presumption, arguing that the "presumption has special force when we are construing a treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility." 509 U.S. 155, 188 (1993). Justice Stevens was not worried about conflicts with other nations interfering with diplomacy but about whether the President had a free hand in foreign affairs unfettered by congressional restraints. As Justice Blackmun pointed out in dissent, Justice Stevens got this separation-of-

has provoked the loudest and most consistent foreign protests — antitrust. Although the extraterritorial application of U.S. antitrust law has caused friction in the short run, it has led in the longer run to a series of agreements between the United States and other countries providing for cooperation in antitrust matters.²⁹⁷ Far from interfering with the negotiation of these agreements, “[c]onflict appears to have put the issue on the diplomatic agenda and to have given the parties an incentive to negotiate.”²⁹⁸ Moreover, if courts were to moderate such conflicts by applying the presumption against extraterritoriality, they might in fact hurt the negotiating position of the United States: “Our bargaining chips will have been given away before the political branches could use them.”²⁹⁹

The Holmes view of the presumption — that acts of Congress apply only to conduct that occurs within the United States — cannot be justified on separation-of-powers grounds. Rather, this view gives preference to the *judiciary’s* interest in avoiding conflict with foreign law over both Congress’ interests in achieving its legislative aims and the Executive’s interest in getting the most out of international negotiations.

F. Background Rules

One more possible justification for the presumption against extraterritoriality is that it provides a background rule that helps Congress to predict the application of its statutes. Professor Eskridge analogizes to the convention of “driving a car on the right-hand side of the road. It is not so important to choose the best convention as it is to choose one convention and stick to it.”³⁰⁰ To justify the presumption against extraterritoriality on this basis, however, Eskridge notes that three conditions must be met: (1) Congress must be “institutionally capable of knowing and working from an interpretive regime that the Court is institutionally capable of devising and transmitting in coherent form;” (2) the application of the interpretive regime must be “transparent” to Congress; and (3) the interpretive regime should not change.³⁰¹ He concludes that while *Aramco* may satisfy the first of these conditions, it fails the second and third.³⁰² He points out that a reasonable congressional observer in 1964, the year Title VII was passed, would have thought that the presumption against extraterritoriality was not good law and certainly would not have predicted *Aramco’s* shift from presumption to clear statement rule.³⁰³

powers issue backwards, since immigration is an area committed by the Constitution to Congress. *See id.* at 207 (Blackmun, J., dissenting).

297. *See* Dodge, *supra* note 111, at 163-68.

298. *Id.* at 166.

299. Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a “Choice-of-Law” Approach*, 70 TEX. L. REV. 1799, 1817 (1992).

300. ESKRIDGE, *supra* note 35, at 277.

301. *Id.* at 278.

302. *Id.*

303. *Id.* at 281-85. As I have noted above, the Supreme Court’s decisions since *Aramco* make clear that the presumption against extraterritoriality is not, in fact, a clear statement rule. *See supra* notes 91-104 and accompanying text.

Professor Eskridge also points out that substantive canons of construction, like the presumption against extraterritoriality, have “allocational effects.”³⁰⁴ “The canon against extraterritorial application of United States law systematically advantages transnational companies, for example. Because the default rule is that there is not extraterritorial application, the burden of inertia is on those who want the statute to apply extraterritorially.”³⁰⁵ These allocational consequences “require normative justification.”³⁰⁶ In short, the presumption against extraterritoriality is not just a background rule like driving on the right-hand side of the road. The content of the presumption matters, and one must offer some justification not just for having a presumption against extraterritoriality but for adopting the Holmes, Bork, or Mikva view of that presumption. As I have suggested above, the Bork view can be justified on the ground that Congress is generally concerned with domestic conditions and therefore the presumption helps to effectuate congressional intent.³⁰⁷ Neither of the other views can.

G. Rebutting the Presumption

Having concluded that the only legitimate justification for the presumption against extraterritoriality is the notion that Congress is primarily concerned with domestic conditions and that this justification supports Judge Bork’s view, one question remains: what evidence should be sufficient to rebut the presumption? It seems clear that general, inclusive language that, read literally, might extend a statute to conduct that causes effects abroad should not be sufficient. If one assumes that Congress was focused on a primarily domestic problem, such broad language does not indicate any congressional intent to apply a statute extraterritorially. However, since the ultimate purpose of the presumption is to aid in determining congressional intent, all other evidence of that intent should be considered, including the statute’s language, purpose, and legislative history. Administrative agencies’ interpretations of a statute should be given the same deference in this context that they are in any other.³⁰⁸ In fact, since *Aramco*, both the Supreme Court and the lower courts have looked to “all available evidence”³⁰⁹ in determining whether the presumption has been rebutted.³¹⁰

But the presumption against extraterritoriality should also be rebutted when it is clear from the subject of the statute that Congress was not primarily concerned with domestic conditions. An example is the Refugee Act of 1980, which amended the Immigration and Nationality Act and was at issue in *Sale*. As Justice Blackmun noted in his dissent:

304. ESKRIDGE, *supra* note 35, at 279.

305. *Id.*; see also Kramer, *supra* note 8, at 183 (“Legislation is not enacted in a Coasean universe of no transaction costs. . . . For these reasons, the content of a presumption matters — more so as the presumption is made stronger.”).

306. ESKRIDGE, *supra* note 35, at 279.

307. See *supra* notes 265-82 and accompanying text.

308. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

309. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 177 (1993).

310. See *supra* notes 90-93, 98-99, 211-23 and accompanying text.

There is no danger that the Congress that enacted the Refugee Act was blind to the fact that the laws it was crafting had implications beyond this Nation's borders. The "commonsense notion" that Congress was looking inwards — perfectly valid in a case involving the Federal Tort Claims Act, such as *Smith* — cannot be reasonably applied to the Refugee Act of 1980.³¹¹

Thus, when a statute deals with a distinctly international or maritime subject matter, the presumption against extraterritoriality should be deemed rebutted on that basis alone.

IV. CONCLUSION

It is indeed "a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,'"³¹² and, properly understood, this principle makes a good deal of sense. It serves, as canons of construction should, as an aid in determining congressional intent. The presumption is legitimately based on "the commonsense notion that Congress generally legislates with domestic concerns in mind."³¹³

However, Congress' focus on domestic conditions does not mean that its legislation should be applied only to conduct that occurs within the United States. Rather it should be applied to conduct that affects those conditions, regardless of where that conduct occurs. This is the position that Judge Bork took in *Zoelsch*.³¹⁴ It is a reversal of the traditional understanding of the presumption expressed by Justice Holmes in *American Banana*,³¹⁵ but it is the understanding of the presumption that best fits its modern rationale. Moreover, it makes sense of the fact that statutes like the Sherman Act, the Lanham Act, and the Securities Exchange Act have been applied extraterritorially on the basis of effects.

On the other hand, this understanding of the presumption calls into question the application of congressional legislation simply on the basis of conduct in the United States when no effects are felt here. Thus, it suggests that *Massey*³¹⁶ was wrongly decided, but perhaps more significantly that the "conduct" test for the extraterritorial application of the Securities Exchange Act developed by the Sec-

311. *Sale*, 509 U.S. at 206 (Blackmun, J., dissenting). See also *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 16 (D.D.C. 1998) (holding the presumption inapplicable to interpretation of the Foreign Sovereign Immunities Act).

312. *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

313. *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993).

314. *Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27, 31-32 (D.C. Cir. 1987); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 585-89 (1992) (Stevens, J., concurring in the judgment); *Robinson v. TCI/US West Communications, Inc.*, 117 F.3d 900, 906 (5th Cir. 1997); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 672-73 (S.D.N.Y. 1991).

315. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) ("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").

316. *Environmental Defense Fund v. Massey*, 986 F.2d 528 (D.C. Cir. 1993) (applying NEPA to decision to burn waste in Antarctica).

ond Circuit in *Leasco*³¹⁷ and adopted in one form or another by the Third, Fifth, Eighth, Ninth, and D.C. Circuits³¹⁸ is subject to question.

Of course a presumption is just a presumption. Courts do, and should, look to “all available evidence”³¹⁹ in determining whether the presumption has been rebutted. Moreover, the presumption should be deemed rebutted when a statute deals with a distinctly international or maritime subject matter.

After a long hiatus, the presumption against extraterritoriality is back. But this need not be cause for dismay, for properly understood, the presumption against extraterritoriality is indeed “a valid approach whereby unexpressed congressional intent may be ascertained.”³²⁰

317. *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972).

318. *See supra* notes 135-36 and accompanying text.

319. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 177 (1993).

320. *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).